Choice of Law to Determine the Validity and Effect of Contracts a Comparison of English and American Approaches to the Conflict of Laws

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CHOICE OF LAW TO DETERMINE THE VALIDITY AND EFFECT OF CONTRACTS: A COMPARISON OF ENGLISH AND AMERICAN APPROACHES TO THE CONFLICT OF LAWS

PART I*

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On September 8, 1972, a writ bearing number A398/72 was issued out of the Wellington Registry of the Supreme Court of New Zealand on behalf of the Shimato Construction Company of Tokyo, Japan. In the annexed statement of claim, the plaintiff prayed damages of one million yen ($NZ 262,000) against Her Majesty's Attorney-General for New Zealand, sued in respect of the Ministry of Foreign Affairs.

The issuance of the writ was the latest step in a continuing saga. Negotiations, ultimately successful, for the purchase of the New Zealand Embassy in Tokyo were alleged to have commenced in late 1968.
The plaintiff alleged that the purchase price of one million yen had been paid and that all conditions of the contract had been fulfilled, but that the defendant refused to hand over the property. The defendant, said the plaintiff, was guilty of either breach of contract or, alternatively, negligence in clothing its agents with ostensible authority to contract for the sale of the Embassy.

Not quite on a par with selling the Eiffel Tower to gullible touring scrap metal dealers, the sale of the New Zealand Embassy in Tokyo is nevertheless one of the more audacious of recent frauds. But the criminal aspects of the transaction do not furnish its only interest. The facts raise several questions of both public and private international law.

Assuming the Shimato Construction Company can overcome the obstacles presented by the doctrines of sovereign and diplomatic immunity, should it sue the New Zealand Government in New Zealand or Japan? Should the court ultimately faced with the problem apply Japanese or New Zealand law? Should, or does, the answer to this question depend upon whether the plaintiff chooses to bring its action in New Zealand or in Japan? These questions raise problems in that discipline known as the conflict of laws or, more specifically, in that part of the conflict of laws which relates to the choice of law. Problems in choice of law are rarely found against quite such a bizarre background as the alleged fraudulent sale of a diplomatic mission in Tokyo. Nevertheless, these problems furnish in their own right one of the more fascinating studies in the whole of the law.

I

HISTORICAL INTRODUCTION

A. Scope of the Article

The purpose of this paper is to examine and compare the choice of law rules utilized in American and English courts to resolve conflicts of law on issues involving the effect and validity, primarily the essential validity, of commercial contracts. Although the focus is on essential validity and effect of commercial contracts, other issues will be discussed, particularly those of form and capacity (which go to validity) when such discussion will illuminate the main concern of the article. Likewise, cases involving other than commercial contracts and some questions of tort law are mentioned when the applicable choice of law rules are perhaps better illustrated in these cases, or when there have not been found any reported commercial contract cases on a particular issue.
currently divided on the correct approach to the choice of law process. The minority follows essentially the theories of the first Restatement of Conflict of Laws,² whereas the majority has adopted one form or another of the many modern, and compared to the first Restatement, radical conflicts doctrines.³

This article attempts an exposition and comparison of the rules that English and American courts apply or might be persuaded to apply to choice of law problems in contract cases. Additionally, where the rules in the two countries are found to differ, or where (particularly in the United States) there are several competing rules in one area, an assessment of the relative merits of the different rules will be made. However, comparative evaluation of different rules and of different theories on the choice of law process will generally be found only where it is relevant to the main objective, rather than as an end in itself.

B. Historical Introduction to the Conflict of Laws

The modern law of conflicts in both England and the United States finds its roots in the eighteenth-century common law.⁴ The choice of law rule during that period in contract law conflicts cases was largely governed by the maxim locus regit actum. Broadly speaking, English judicial decisions have fallen away from this norm; in America, the history of the conflict of laws has seen a somewhat wavering adherence to the rule.⁵

Nevertheless, English and American conflicts laws have traditionally been regarded as very similar.⁶ Justice Story's Commentaries on the Conflict of Laws,⁷ the first general treatise on the subject in the

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² Restatement of Conflict of Laws (1934).
³ See notes 30-56 and accompanying text infra.
⁴ As with most branches of the law, it is possible to trace the conflict of laws back to classical antiquity. See, e.g., Yntema, Contract and Conflict of Laws: "Autonomy" in Choice of Law in the United States, 1 N.Y.L.F. 46, 46 (1955), where the influence of the laws of Ancient Greece is considered.
⁶ This is in contrast to English and most Commonwealth conflicts laws, which are not only regarded as similar, but are in fact the same. It is therefore more acceptable to cite Commonwealth authority in English conflict of laws cases, and vice versa, than in other fields of law. See, e.g., Broken Hill Proprietary Co. v. Latham, [1933] I Ch. 373, 388 (C.A. 1932) (Maugham, J.); id. at 399 (Lawrence, L.J., concurring); National Bank of Australasia Ltd. v. Scottish Union & Nat'l Ins. Co., 84 Commw. L.R. 177, 209 (Austl. 1951) (Latham, C.J.). According to Graveson, this Commonwealth uniformity is chiefly due to the work of the Judicial Committee of the Privy Council. Graveson, The Judicial Unification of Private International Law, in De Conflcctu Legum 154 (Neth. Int'l L. Rev. ed. 1962).
⁷ J. Story, Commentaries on the Conflict of Laws (1834).
English language, treated English and American law as the same. One hundred years later, Professor Joseph Beale's treatise was "devoted to a careful study of the positive common law of England and America."8 This tradition continues down to the present time. Professor Willis Reese, Reporter of the Restatement (Second) of Conflict of Laws has written:

In preparing the Tentative Drafts [of the Restatement (Second)], nearly as much consideration was given to English as to American cases. The drafts should, in general, be consistent with English law, since it is believed that there are few basic differences between the choice of law rules prevailing in England and in the United States.9

Although it might seem more common for Americans to claim that their conflicts rules are similar to the English norms than vice versa, the process is not wholly one-sided. In particular, A. V. Dicey's Conflict of Laws, the leading English text, attempted in its first edition to cover the laws of both countries.10

The casual observer may consider it odd that English and American conflicts laws should be thought to be so similar. First, most American conflict of laws cases are interstate, whereas most English cases are international. Second, the conflicts rules of the American States are subject to the requirements of the United States Constitution. In England, apart from a few statutes of limited application, conflicts rules are simply part of the common law. Surprisingly, while these two factors appear to have had considerable influence on the divergent development of rules of jurisdiction and the recognition of foreign judgments in the two countries, neither has caused any very significant differences between English and American choice of law rules.11

There is, however, a third factor which is of more decisive significance. The modern choice of law rules of England and America are built upon entirely different theoretical bases. Briefly, English

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10 See generally A. Dicey, A Digest of the Law of England with Reference to the Conflict of Laws (1896). This endeavor was not repeated in later editions, since Dicey found that English lawyers were not particularly interested in American authority, and he was unable within the confines of his Digest to accomplish a treatment of American law sufficiently comprehensive to be of value to American lawyers. See id. at v-vi (2d ed. 1908).
courts follow a classificatory and jurisdiction-selecting method when faced with a choice of law problem, whereas the majority of American courts adopt what is known as the principles of interest analysis. Under the latter approach, a choice of law is made after an evaluation of the specific conflicting rules (not the conflicting jurisdictions) and of the relative interests of the different legal systems that have some connection with the case at bar.\textsuperscript{12}

These different theoretical bases of the conflict of laws in turn result in rather different choice of law rules, or, at least, in rules that appear to be different. It is a reasonable generalization to say that rules developed from a jurisdiction-selecting approach tend to be somewhat rigid, whereas the principles of interest analysis permit more case-by-case flexibility. Nevertheless, ironically in view of the immense amount of theorizing that takes place on the western side of the Atlantic, the results reached by English and American courts in the field of contracts will usually be found to be the same. This close identity of results is in part a consequence of the somewhat untypical nature of the English choice of law rule for contract cases as compared with the bulk of English rules. This rule, called the “proper law” approach, is much more flexible than the usual mechanical, jurisdiction-selecting rules adopted by English courts for most choice of law problems.

C. Historical Introduction to Choice of Law Rules in Contract Cases

It was not until relatively modern times that the concept of the legally enforceable bargain entered the common law in anything like its present form. As Hessel Yntema has stated, eventually the “principle . . . \textit{pacta sunt servanda} [came to furnish] a conventional basis for civil government, international treaty, and private right.”\textsuperscript{13} Once this doctrine was established, the issue of choice of law in cases of contracts with foreign connections could be faced squarely. The most obvious choice of law rule, and the one most often adopted when early judges thought in conflicts terms, was \textit{locus regit actum}. But the mechanical nature of this rule was soon apparent, for

\begin{quote}
[\textit{t}he immediate corollary of the principle that contract is a source of obligation is that, absent more imperious considerations, the obligations created by agreement should correspond to the terms of agreement. In cases of conflict of laws, it is thus a natural inference from the principle of contract that the law contemplated by
\end{quote}

\textsuperscript{12} This somewhat obscure terminology does not admit of a concise yet precise definition. The question of the theoretical bases of Anglo-American conflicts law is the subject of section II infra.

\textsuperscript{13} Yntema, \textit{supra} note 4, at 47.
the parties should apply in situations where their rights are to be measured by their agreement.\textsuperscript{14}

As early as 1703, a certain Ayloffe, counsel for the plaintiff in the case of Foubert v. Turst,\textsuperscript{15} which involved a marriage settlement containing a clause stipulating that it should be governed by the custom of Paris, argued: "[A] ll lawful contracts, as well of marriage, as relative to any thing else, ought to be fully performed between the parties and their representatives, according to the apparent intent of such contracts . . . ."\textsuperscript{16} Nevertheless, it was not until 1760, in Lord Mansfield’s celebrated dictum in Robinson v. Bland,\textsuperscript{17} that the modern rule emerged: "The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed."\textsuperscript{18} In the United States, Lord Mansfield was echoed by Chief Justice Marshall in Wayman v. Southard,\textsuperscript{19} holding on behalf of a unanimous Supreme Court that "universal law [recognizes] the principle that, in every forum, a contract is governed by the law with a view to which it was made."\textsuperscript{20}

The next stage of the development of choice of law rules demonstrated that common law lawyers, as well as the civilians,\textsuperscript{21} could prove the truth of Professor Herma Kay’s aphorism that "conflict of laws is a field, not of laws, but of men."\textsuperscript{22} Few areas of law have been so directly affected by jurisprudential theorizing.

Despite the opinions of Lord Mansfield and Chief Justice Marshall, scholars soon discerned an inconsistency between nineteenth-century Austinian positivism\textsuperscript{23} and allowing parties a free rein concerning the law by which their contracts were to be governed. An unimaginative and inflexible adherence to Austin’s theories of territorial sover-

\begin{footnotes}
\footnote{14}Id.
\footnote{15}1 Eng. Rep. 464 (H.L. 1703).
\footnote{16}Id. at 465.
\footnote{17}97 Eng. Rep. 717 (K.B. 1760).
\footnote{18}Id. at 718.
\footnote{19}23 U.S. (10 Wheat.) 1 (1825). Justice Story was a member of the Court at that time.
\footnote{20}Id. at 48.
\footnote{22}Kay, Ehrenzweig’s Proper Law and Proper Forum, 18 OKLA. L. REV. 223, 223 (1965).
\footnote{23}Another species of laws not made by the supreme legislature, are laws (if such they can be called) which are established by private persons, and to which the supreme legislature lends its sanction. These (in truth) are nothing but obligations imposed by virtue of rights which the legislature has conferred. . . . [A] private person cannot be the author of law . . . .
\end{footnotes}
eignty created certain choice of law problems. How can foreign law have any effect within the forum without impinging upon the latter's territorial sovereignty? If laws are a sovereign's command, how can parties contract with a view, express or implied, that any particular law governs their contract? Surely, if that contract is legally binding, it is so because of a sovereign's command, and not because of the will of the parties. How can individuals be competent to choose which sovereign shall govern their acts?

It has long since been accepted that these questions are based on erroneous beliefs and quite miss the real issues of the conflict of laws, just as Austinian positivism itself is now no longer accepted as the sole explanation of the phenomenon of law. But the questions posed during the vogue of the territorial theories of law demanded, and received, an answer, which took the form of the vested rights doctrine. Conflict of laws was seen as a system whereby the forum, by its own laws, protected and enforced rights acquired by litigants in other sovereign jurisdictions. It was thus necessary to examine each legal relationship to discover under what law it had come into being. This was interpreted to mean the law of the place where the last act occurred to create a legal right and corresponding obligation. The right would then be enforced in the forum as created by this original law; for contracts, this meant the law of the place of making the contract. For most of the history of the conflict of laws in America, the doctrine of vested rights and rules derived from it have furnished the orthodox approach to the choice of law process.

Although Dicey adopted essentially a vested rights stance on choice of law questions, the doctrine never took hold in English courts. Although probably more susceptible to academic influence in the area of conflict of laws than in other branches of the law, English judges have generally shown themselves less willing to follow the lead of learned writers than have those in America. Consequently, what may be called the traditional choice of law rules for contract cases differed considerably between the two countries.

24 See, e.g., W. Cook, The Logical and Legal Bases of the Conflict of Laws passim (1942); Arminjon, La Notion des Droits Acquis en Droit International Privé, 44 Recueil des Cours 1, 105 (1933).
26 See R. Leflar, American Conflicts Law 205-09 (2d ed. 1968) [hereinafter cited as Leflar].
29 That is, those rules prevailing from about 1920 to 1950.
D. The Traditional Choice of Law Rules in England and America, Contrasted with a Brief Description of the Theories of Interest Analysis

The orthodox, vested rights rule contained in the first Restatement is that the validity and effect of a contract are governed by the law of the place of making of that contract. This was the central rule for contracts in the Restatement; an exception was made for matters of performance, which were to be regulated by the law of the place of performance.

This bifurcated rule was never fully accepted by American courts. There is authority in favor of both branches of the rule, but the view of the Restatement faced two problems which proved to be insuperable. First, in a hard case the rule is almost unworkable, for it is often difficult to decide whether an issue is a matter of validity and effect or of performance. Furthermore, because the possibility exists that the place of making of any particular contract will be fortuitous, the rule could easily result in a contract being governed by a law with which it has a very tenuous connection. In order to avoid unacceptable results, the courts came to use certain modes of reasoning, sometimes collectively called “escape devices,” which enabled them to avoid applying the law indicated by the vested rights choice of law rule. These include the familiar techniques of renvoi, of characterization of an issue as belonging to a different legal category (a tort case as contract, for example), and of characterization of an issue as procedural rather than as substantive, and therefore to be governed by the law of the forum.

Second, it is doubtful whether the Restatement’s choice of law rule for contract cases was ever accepted by even a majority of states. On

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30 Restatement of Conflict of Laws § 332 (1934).
31 Id. § 358.
32 See, e.g., cases collected in Leflar 355-59.
35 See, e.g., Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1955).
36 A precise head-count of all the states with a view toward determining the majority rule at the time of the first Restatement is not feasible. As Leflar observed concerning the rules of place of making, place of performance, and place intended by the parties: “It is impossible to say that, of these three possible rules, some jurisdictions followed one, some another, and some the third. The typical situation was one of confusion, combined acceptance of all three rules.” Leflar 358. In support of this contention, Leflar cites the following Supreme Court cases: Hall v. Cordell, 142 U.S. 116 (1891) (place of performance); Scudder v. Union Nat'l Bank, 91 U.S. 406 (1875) (place of making); Andrews v. Pond, 38 U.S. (13 Pet.) 65 (1839) (parties may choose the governing law). See also the analysis of Arkansas cases in Leflar 369-64.
the contrary, the rival rule that a contract should be governed by the law intended by the parties—expressed, inferred, or imputed—was at least as popular. Even Beale, the champion of the vested rights theory and Reporter of the first Restatement, was forced to admit in 1935 that “on the whole . . . the prevailing tendency of the American cases is to regard the intention of the parties as controlling; and this intention is often conclusively found to be in favor of the law of the place of performance.”

English cases present a contrast to this confusion. Central to the English choice of law rule is the concept of the “proper law” of a contract. “Every contract has a proper law” which governs most issues that may arise in relation to that contract. How to find the proper law, and, in particular, the degree to which parties should be permitted to choose or be presumed to have chosen that law, are matters that have exercised the British courts and scholars to no little degree.

Subject to a number of exceptions, the proper law of a contract governs all questions of its formation, validity, effect, interpretation, and discharge. This rule continues in force in English law. Its details have from time to time been modified, but English courts have for at least the last century decided choice of law issues in contract in essentially the same way. Consequently, in comparing American and English law, the chief focus so far as the law of England is concerned will be upon the determination and application of the proper law.

The situation is quite different regarding conflicts law in the

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37 2 J. Beale, supra note 8, at 1100.
39 See section IV infra; Prebble, Part II, section V. At this stage, the following definition by Lord Wright is offered:

The proper law of the contract means that law which the English or other Court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary, criteria such as lex loci contractus or lex loci solutionis, and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts.

Mount Albert Borough Council v. Australasian Temperance & Gen. Mut. Life Assurance Soc'y, Ltd., [1938] A.C. 224, 240, [1937] 4 All E.R. 203, 214 (N.Z. 1937). This definition is now slightly outdated in that when the parties' intention is not expressed or inferable, an English court will consider the “surrounding facts,” not to find some presumed intention of the parties, but rather to discover with which system of law the contract is most closely connected. See Prebble, Part II, notes 504-22 and accompanying text.

40 A. Dicey & J. Morris, THE CONFLICT OF LAWS 691-785 (J. Morris ed. 8th ed. 1967) [hereinafter cited as Dicey & Morris]. Examples of exceptions include contractual capacity of parties (see Prebble, Part II, notes 652-69 and accompanying text) and formal requirements of contract law. See id. at notes 670-80 and accompanying text.
United States. The past twenty years have seen a radical change in the choice of law rules applied by the courts. Traditional rules for contract cases outlined above have been replaced in most states by new rules reflecting a philosophy quite at variance with the old vested rights reasoning. The current majority rule in America is generally as follows: Contracts are governed as to all issues by the law chosen by the parties, if any. If there is no chosen law, then an issue arising in a contract case is to be determined by the law which, with respect to that issue, has the most significant relationship to the transaction and the parties. It should be noted that in America, as in England, prime importance is accorded to the express intention of the parties. This is known as the principle of autonomy.\textsuperscript{41} If there has been no autonomous choice of law, what is known as the "significant contacts" test is employed. This term will also be used, where appropriate in context, to refer to the corresponding English rule.

This sharp change in America from vested rights thinking to the new choice of law rules is not unique to the area of contract law. The new reasoning pervades every area of choice of law, although its influence is perhaps most noticeable in contract and tort cases. The new theories may collectively be called "interest analysis." Choice of law by interest analysis holds that "a court should apply the law of the state which has the greatest concern [i.e., interest] in the determination of the particular issue"\textsuperscript{42} before it. To discover the state with the greatest interest in that issue, it is necessary to examine not only the physical contacts between the issue and the different states with which it is in some way connected, but also the actual rules which those states would apply to that issue, for it is by rules of law that a state declares its position regarding specific cases. Thus, interest analysis requires that a court select from among different competing rules of law; it is insufficient merely for a court to select one of two or more conflicting jurisdictions and to apply the rule of that jurisdiction on the disputed question, whatever that rule may be.

It was not until the 1950's that courts began expressly to adopt the new reasoning.\textsuperscript{43} The 1953 Supreme Court case of \textit{Lauritzen v.}  

\textsuperscript{41}See section IV infra.  
Larsen was influential in this process. Although the Court's opinion did not follow interest analysis reasoning, it specifically rejected the vested rights rule that the validity of a contract is governed by the lex loci contractus in favor of the doctrine of autonomy. After Lauritzen, the New York Court of Appeals led the way with judgments in the areas of contract and tort, adopting something of an amalgam of the views of Cavers, Cook, and Currie. California soon followed suit with respect to the Statute of Frauds. The pressures for other jurisdictions to follow the lead of New York and California were not inconsiderable. The academic world, although not entirely unanimous as to the definition of "interest analysis," has long been in agreement that the doctrine of vested rights furnishes an entirely incorrect approach to the choice of law problem.

The Uniform Commercial Code has adopted a version of interest analysis to govern those choice of law questions related to the contracts to which it applies. The Restatement (Second) of Conflict of Laws is framed in terms of interest analysis. Because of the time spent in its preparation and the publication of many preliminary drafts, its influence predates its final publication in 1971 by eighteen years.

In the United States federal system, different jurisdictions tend to face the same problems and to solve them in a similar manner, even when these problems involve only a question of local law. When an issue of the conflict of laws arises whereby a court is automatically forced to look to the laws of another state, this tendency is, of course, strengthened. As Professor Rudolf B. Schlesinger has observed:

Theoretically, the various courts of last resort . . . have the power to disagree with each other and to develop the most discordant notions of choice-of-law. It must be kept in mind, however, that the courts do not operate in isolation from each other . . . Thus, although the details of the newly developed, post-Bealean choice-of-law rules may not always be the same in New York and in California, there is still hope that at least among the more forward-

44 345 U.S. 571 (1953).
48 The choice of law provision of the Uniform Commercial Code and its influence on the development of case law in areas to which it does not directly apply are considered in notes 461-77 and accompanying text infra.
49 Restatement (Second) of Conflict of Laws (1971) [hereinafter cited as Restatement (Second)]. Since the Restatement (Second) is a consensus, it is considerably less radical in its treatment of choice of law rules than are the most progressive academics. Thus, it already may have something of an air of conservative respectability in the eyes of judges distrustful of too rapid change. Cf. Leflar, Ehrenzweig and the Courts, 18 Okla. L. Rev. 366, 372 (1965).
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looking American courts of last resort a common core of shared principles and solutions will emerge.\footnote{Schlesinger, Book Review, 16 AM. J. COMP. L. 608, 614 (1968). There is, however, one federal rule which inhibits the modernization of choice of law. Since Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), federal courts sitting in diversity have been bound to follow the choice of law rules of the state in which they sit. This has the effect of preventing a progressive federal court from exerting any modernizing influence. Which are those forward-looking courts that have embraced interest analysis as the means of making their choice of law decisions in contract cases? This question is not easily answered. Conflicts is a relatively small field of law in terms of the number of cases reported, and of these only a small proportion involve contracts. It is therefore not unlikely that in any particular state the court of last resort has not had occasion to rule on a contract choice of law case since the judicial change to interest analysis began. Even in the field of torts, where automobile accidents make litigation with multi-state contacts much more commonplace, some jurisdictions have yet to declare their position.}

Because of the influence of the Uniform Commercial Code, the warm reception that has been accorded the Restatement (Second),\footnote{Cases collected in the Restatement (Second)'s appendix cite early drafts with approval.} and the nearly unanimous academic disapproval of vested rights reasoning, it seems fair to assume that most states that have not yet expressly rejected the interest approach will ultimately adopt it.\footnote{This also seems to be the opinion of Professors Reese and Weintraub. In 1960, Reese maintained that the significant contacts test for contract cases "bids fair soon to become, if it is not so already, the majority rule in [America]." Reese, Power of Parties To Choose Law Governing Their Contract, 1960 PROC. AM. SOC'Y INT'L L. 49, 50. Eight years later, Weintraub recognized two rules which now seem to have emerged from the welter of contending rules as kings of the hill. These two rules are, first, that the parties may, in the contract, choose the governing law, and second, that in the absence of such a choice by the parties, the applicable law is that of the state which "has the most significant relationship to the transaction and the parties." Weintraub, Choice of Law in Contract, 54 IOWA L. REV. 399, 399-400 (1968) [hereinafter cited as Weintraub].} Although certain states have rejected interest analysis, preferring to maintain the old rules which they believe offer greater hope of certainty and predictability of result, the cases in which this has happened have almost invariably involved torts.\footnote{See McGinty v. Ballentine Produce, Inc., 241 Ark. 533, 408 S.W.2d 891 (1966); Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966); Friday v. Smoot, 211 A.2d 594 (Del. 1965); Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743 (Fla. 1967) (dictum); McDaniel v. Sinn, 194 Kan. 625, 400 P.2d 1018 (1965); Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 226 So. 2d 216 (1970); White v. King, 244 Md. 448, 233 A.2d 768 (1967); Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969); Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963); Oshiek v. Oshiek, 244 S.C. 249, 139 S.E.2d 303 (1964). In Kennedy v. Dixon, supra, the Supreme Court of Missouri claimed that lex loci delicti was still the majority choice of law rule in that state for tort cases. The court cited no authority for this proposition. Texas tort law appears to be in the vested rights camp. Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968), follows the lex loci for torts. Two earlier cases, not of the Texas court of last resort, adopted modern reasoning. Seguros Tepeyac, S.A., Compania}
would not have the same objection to abandoning vested rights reasoning in the case of contracts, for three reasons.\textsuperscript{54}

First, the \textit{locus regit actum} rule has traditionally been more firmly entrenched in tort cases than in contract. The existence of an "intention of the parties" test side by side with the dual "place of making/place of performance" rule has already been noted.\textsuperscript{55}

Second, whereas a contract's relationship with different jurisdictions may be either entirely fortuitous or carefully engineered, at least there is a fair chance that the state where a tort occurs will have some interest in the subsequent litigation.

Third, and most important, the principles of interest analysis yield a choice of law rule for tort cases that will be something akin to the following, regardless of one's school: "The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties . . . ."\textsuperscript{56} Torts, unlike contracts, are seldom planned. The parties are far less likely to have had any previous dealings with one another. The policies behind tort law—compensation, punishment, protection of persons and property—are far more numerous and varied than the single most important policy behind the law of contract: the protection of persons' justified expectations that others will keep their bargains. These factors combine to make it far more difficult, in general, for a court to decide with which jurisdiction an issue in tort is most significantly connected than is the case with contract issues.


\textsuperscript{55} See notes 35-37 and accompanying text \textit{supra}.

\textsuperscript{56} \textit{Restatement (Second)} \S 145(1).
A COMPARISON OF THE MODERN APPROACHES TO CHOICE OF LAW IN ENGLAND AND AMERICA

A. Outline of Interest Analysis

The term "interest analysis" has come to include a wide variety of scholarly and judicial opinion concerning the proper functioning of the choice of law process.

The new [American] approach [to choice of law] recognizes that the problem confronting the court is a choice between two particular rules of law to govern the issue before the court; it is not a problem of choosing between two legal systems in their entirety and accepting in advance whatever might, on inspection, prove to be the relevant rules in these two systems. Only if the court is choosing between particular rules can it identify the respective policies embodied in those rules and decide whether they present a true conflict, and, if so, which law appears to have the better claim to application in the light of the facts of the case, including the expectations of the parties. This means that a few simple rules of wide sweep are not likely to be developed; instead, it offers the hope that decisions based on discriminating assessments of policies and expectations will gradually build up a body of differentiated rules to which courts can adhere and which they can steadily develop.57

For courts that have adopted the techniques of interest analysis, choice of law in the conflict of laws is not simply an ancillary discipline which merely points the court towards the rules of substantive law that decide the case. On the contrary, interest analysis involves an assessment of the conflicting rules themselves and, by the choice of law that is made, a final disposition of the case as part of the choice of law process. Adherents of interest analysis believe that giving choice of law this larger, unblinking role leads to more rational results than are possible when choice of law is effected merely by the selection of a jurisdiction, with the ultimate disposition of the case left to a later stage of the legal reasoning process.

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These remarks should be contrasted with the following passage from Cheshire's leading English work: "It must be observed that the function of private international law is complete when it has chosen the appropriate system of law. Its rules do not furnish a direct solution of the dispute . . . ." CHESHIRE & NORTH 9.
What are the standards that determine whether a choice of law decision most accurately reflects the aims of the conflict of laws? First, the word "interest" comes from the theory that in every conflicts case each state that is connected with the transaction may be in some way interested in the result. This interest is manifested by certain state policies, which are to be deduced from the laws that particular state has seen fit to enact, or which its courts have developed, to resolve purely local disputes of the type exemplified by the case at bar. After the respective interests of the different states have been discovered, it is the duty of the court to apply to the case at bar the law of the state which is seen to be most concerned with the determination of the particular issue in that case.

This theory is easier to state than to put into practice. Many judge-made rules have evolved from no recognizable policies; even statutes are often enacted without any clear articulation of their purposes. Nevertheless, a court must attempt to discern these policies, and then, through comparing the policies with the degree and kinds of contacts between the states concerned with the issue before it, to determine and compare the relative interests of these states in the case.5

Second, since the writings of Cook,59 there has been little scholarly disagreement that the choice of law process should proceed on an issue-by-issue basis. That is, rules should not be formulated to cover all contracts, all torts, all questions of succession, and the like. Rather, the crucial issue in any particular case should be isolated and choice of law rules formulated in terms that take account of the particular facts, if not of each case, then of much smaller groupings of cases than are comprehended under such umbrellas as "contract" and "tort."

A further area of considerable agreement concerns what is known as the phenomenon of the "false conflict." A false conflict occurs when, upon a judicial study of the rules possibly applicable to the case at bar, it is found that the end result of applying each of the rules would be the same. There is then no need for the court to choose between the different rules.

Some scholars contend that other situations should also be considered false conflicts. They would include cases in which the interest of one state in the case clearly overwhelms that of any other jurisdiction and cases in which choice of law rules developed by one state in

58 On the difficulty of ascertaining these state policies, see Reese, supra note 42, at 316-18.
59 See, e.g., W. Cook, supra note 24.
previous cases indicate that, were the present case before its courts, it would not apply its own local law rule to that case.\textsuperscript{60}

Beyond these points of concurrence, there is disagreement. Once the exact issue is isolated and a true conflict of laws is discovered, according to what principles should the appropriate choice of law rule be formulated? Conflicts scholars have differing views on this issue. The Restatement (Second) contains its list;\textsuperscript{61} Professor Robert A. Leflar formulates general "choice-influencing considerations,"\textsuperscript{62} Professor David F. Cavers, more particularized "principles of preference."\textsuperscript{63} Although their order may be open to argument, or should perhaps change according to the facts of each case, a court should bear in mind the following considerations:\textsuperscript{64} (1) predictability of results, which comprehends the protection of the justified expectations of the parties, (2) maintenance of international and interstate order, (3) the relevant policies of the forum and of other interested jurisdictions, and (4) simplification of the judicial task. This list, however, is not of much assistance in difficult cases. In such cases, the decision maker must simply come down in favor of one choice of law principle or another.

Traditionally, choice of law was regarded as an even-handed process; the forum did not regard its law or any law as superior to any other. This approach harmonized well with jurisdiction-selecting choice of law rules; if the choice of law process is merely a preliminary step towards a final decision, then there should not be any value judgments made between the conflicting rules as to which rule will result in the better decision. This even-handed approach does not carry over easily to interest analysis, for it offers no assistance to a court confronted with a difficult case in which choice of law principles favoring opposite rules seem to be evenly balanced.

Early in the development of interest analysis, it was argued that when the forum was discovered to have significant interest in a case, the court was bound by the policies behind its own laws (that is, the policies which indicated its interest) to apply the forum's law. The first duty of a court, it was said, is to apply the laws of the jurisdiction within which it sits. This reasoning results in a distinct orientation of the choice of law process towards the law of the forum. The proponents

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\textsuperscript{60} See notes 140-58 and accompanying text infra.

\textsuperscript{61} Restatement (Second) § 6. Section 6 is set forth at p. 455 infra.

\textsuperscript{62} Leflar 245.

\textsuperscript{63} D. Cavers, supra note 27, passim.

\textsuperscript{64} This list combines the positions of Leflar and of the Restatement (Second). See Leflar 245; Restatement (Second) § 6.
of forum orientation modified their views as time went on, conceding
that a forum might not find in every case an interest sufficient to com-
pel application of its own rules. Nevertheless, even this more enlight-
ened view cannot be said to have a major following at the present time.

More recently, the principle of result orientation has grown vig-
orously. Here, the court is urged to seek the "better rule" of law, re-
jecting, for instance, anachronistic or discriminatory rules in favor of
their modern, liberal counterparts.

These three different approaches—even-handedness, forum orien-
tation, and result orientation—though evincing distinct differences in
emphasis, are not mutually exclusive either in theory or in practice.
For example, where two conflicting laws are equally anachronistic or
modern, result orientation is of no assistance. A court might then simply
decide to favor the forum rule. In practice, it may be difficult to deter-
mine the approach of a particular state. There are few American juris-
dictions, particularly in the area of contract law, that have been using
interest analysis long enough to enable discovery of whether they favor
one or another of these different approaches. Furthermore, a state
may decide that it will follow one principle in some cases and another
in others.

There remains one rather important area of dispute as to the
correct method of coming to choice of law decisions by means of the
modern reasoning. According to Professor Reese,

The principal question in choice of law today is whether we
should have rules or an approach. By "rule" is meant a phenom-
enon found in most areas of the law, namely a formula which once
applied will lead a court to a conclusion. . . .

By "approach" is meant a system which does no more than
state what factor or factors should be considered in arriving at a
conclusion. . . .

. . . [T]here can be an approach, as opposed to a rule, in a
situation where consideration is limited to a single factor. This is
true, for example, of the principle so frequently voiced today by
courts and writers that a court should apply the law of the state

65 Some states do seem to have made a definite decision. New Hampshire, for example,
at least in interspousal immunity cases, has opted for the result-oriented "better rule of
law" approach. See Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); compare Heath v.
Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

66 New York, for example, has, since Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99
(1954), generally adopted an even-handed approach to choice of law, although in the usury
case of Chrisafulli v. Childs, 33 App. Div. 2d 293, 307 N.Y.S.2d 701 (4th Dep't 1970), the
reasoning of the court was result-oriented. See Prebble, Part II, notes 691-95 and accom-
ppanying text.
which has the greatest concern in the determination of the particular issue.67

In terms of Professor Reese's definition, techniques of interest analysis, taken as a whole, are thus an approach rather than a rule. Professor Reese's opinion is that courts can and should progressively refine the principles of interest analysis so that specific rules may emerge.

To be successful, such rules must satisfactorily implement the multistate and local law policies involved. It is unlikely that rules of wide application can attain this objective in torts and contract and in many other areas of choice of law. This is so, among other reasons, because most areas of the law contain a multitude of local law rules embodying different policies, because the grouping of relevant contacts may vary widely from case to case, and because in many areas the state of greatest concern is likely to vary with the particular issue. More hope for success should be afforded by a relatively large number of narrow rules, each of which would be concerned with a particular issue or a group of closely related issues.68

B. Rule Selection and Jurisdiction Selection

An English court does not choose between two or more competing rules of law, but between two legal systems. Theoretically, therefore, the court may decide a choice of law issue without knowing what effect this will have on the final outcome of the case. In practice, for one reason or another, the court usually seems to be informed of the actual content of the competing rules, but examples of reported cases where judgment is delivered without any reference to the real issue are not rare.69 In fact, The Assunzione,70 which, as reported on a preliminary point of law, is one of the leading modern decisions in this field, makes no mention at all of why the parties presented conflict of laws arguments to the court. The case involved a sale and shipment of wheat by French sellers to Italian purchasers. The plaintiff-seller argued that French law, rather than Italian, should apply to disputes

67 Reese, supra note 42, at 315-16.
68 Id. at 325. Regarding torts, Professor Reese's arguments are quite compelling. But in the case of contracts there seems little merit in attempting to subdivide the fundamental rules of the autonomy doctrine, supplemented by the significant contacts test, for cases in which there is no express choice of law.
69 E.g., Chatenay v. Brazilian Submarine Tel. Co., [1891] 1 Q.B. 79 (1890). This case involved a power of attorney and whether it should be governed by English or Brazilian law. The official report entirely ignores the actual terms of the power, although they are reproduced at 7 T.L.R. 1 (1891).
which had arisen under the contract. But there is no mention in the case why the plaintiff preferred French law, or why the defendants wanted Italian. As it transpired, the parties themselves must also have been somewhat hazy on this point, for by the time the case finally came to trial on the merits, they had agreed that the English Carriage of Goods by Sea Act, 1924, should apply.\footnote{1956} 2 Lloyd's List L.R. 468, 469 (Adm. 1957). Any interest analysis approach should prevent such a situation from arising.

Whereas English courts are relatively consistent in applying their jurisdiction-selecting rules, the transition in American courts from Bealean reasoning to interest analysis and rule selection has not been without falter. Professor Weintraub argues with some force that even \textit{Auten v. Auten},\footnote{308 N.Y. 155, 124 N.E.2d 99 (1954).} probably the leading modern case on choice of law in contract, was decided by reasoning defective according to the criteria of interest analysis.\footnote{Weintraub 415.}

\textit{In Auten}, a wife was attempting to enforce a separation agreement against her husband in New York. The husband's defense was that the wife had repudiated the agreement by previously commencing litigation in England. The case proceeded on the basis that the defense would succeed if the agreement were governed by New York law, but perhaps would not if English law were to be applied.\footnote{"Perhaps" is used because the actual English rule was not positively proved, since the appeal was from a dismissal on motion for summary judgment of the wife's case and therefore only affidavits of the wife's attorneys furnished evidence of the relevant English law. See 308 N.Y. at 163-64, 124 N.E.2d at 103. Moreover, the court was not at all sure that the relevant New York law was as the husband contended. \textit{Id.} at 159, 124 N.E.2d at 101.}

Not knowing exactly what the content of either of the rules said to be in conflict was, how could the court apply the rule-selecting principles of interest analysis? How could it be justified in holding that "the law of England must be applied"\footnote{\textit{Id.} at 163, 124 N.E.2d at 103.} and in remanding the case to the trial court to determine what that law was? In fact, the case was so much more closely connected with England (the matrimonial domicile and home of the wife and children) than with New York, that whatever the English rule, it is difficult to conceive of any other decision once the court adopted the modern approach. But the court did not adopt this reasoning, and the case is to that extent defective, at least insofar as one accepts the proposition that interest analysis requires a court to choose between rules rather than jurisdictions.\footnote{\textit{Auten} was an early case, but American courts still upon occasion...}
distort the principles of interest analysis and select jurisdictions rather than rules. A good example is *Baffin Land Corp. v. Monticello Motor Inn, Inc.* In that case, which involved a supposed conflict between the laws of New York and Washington, the Supreme Court of Washington decided it would "no longer adhere to the rule of lex loci contractus" but would adopt the approach of the *Restatement (Second).* The court was careful: "Application of the new rule we adopt may at first present some difficulties. The approach is not to count contacts, but rather to consider which contacts are most significant and to determine where those contacts are found." The court then carefully examined the circumstances of the case and decided that Washington law applied, but cast some doubt on its grasp of the essentials of interest analysis as understood by most scholars by adding: "We come now to the question of what the applicable Washington law is." As American courts grow increasingly sophisticated in applying modern conflicts doctrines, it may be expected that the incidence of such distortions of the interest analysis approach will diminish. Certainly, reasoning such as that in *Baffin Land* may be guarded against by competent counsel, for if a court decides to adopt the new choice of law rules, it will probably be willing to apply the basic condition of rule selection rather than jurisdiction selection.

C. *In England, Characterization; in America, Choice of Law Principles Plus the Issue-by-Issue Approach*

Dean Falconbridge has constructed a neat model of the typical English choice of law rule:

The Court should, in the first place, characterize . . . or define the juridical nature of . . . the subject or question upon which its adjudication is required . . . .

The Court should, in the second place, select the proper law,

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76 70 Wash. 2d 893, 425 P.2d 623 (1967). Weintraub also identifies this example. Weintraub 414.

77 One commentator, however, argues that there was in fact no true conflict in this case. See Weintraub 414.

78 70 Wash. 2d at 899, 425 P.2d at 627.

79 *Restatement (Second)* § 332 (Tent. Draft No. 6, 1960).

80 70 Wash. 2d at 900, 425 P.2d at 628 (emphasis in original).

81 Id. at 903, 425 P.2d at 629. To be fair to the court, the *Restatement (Second)* as then formulated was cast more in terms of jurisdiction-selection than it is now. Weintraub, who criticizes *Baffin Land* (Weintraub 415-17) must have been additionally exasperated by the court's reliance upon a version of § 332(b) which he had previously critically discussed. Weintraub, *The Contracts Proposals of the Second Restatement of the Conflict of Laws—A Critique,* 46 Iowa L. Rev. 713 (1961). The court referred with apparent approval to Weintraub's discussion. 70 Wash. 2d at 901, 425 P.2d at 628.
that is, the law . . . indicated by its appropriate rule of conflict of
laws as being the law which ought to govern the decision upon the
subject or question already characterized.82

Thus, an English court will characterize problems as, for example,
"succession to movables," or as "formal validity of marriage," to be
governed by the laws of, respectively, the last domicile of the deceased83
and the locus celebrationis84 (ignoring exceptional cases).

Generally speaking, little argument is generated by the character-
ization process, despite its importance. The various areas of law are
fairly well marked off from one another. Court and counsel will almost
universally realize that the facts of a particular case raise an issue of
contract, tort, succession, etc. Nevertheless, some cases may arguably
be characterized in more than one way. In particular, there is a grey
area between contract and tort which contains, inter alia, such cases as
negligent injury caused by a defendant to a plaintiff with whom he is
in a contractual relationship, e.g., master and servant, carrier and
passenger. Here, characterization of the case one way or the other may
well be a real issue.

The English conflict of laws contains no pervasive philosophical
background from which different choice of law rules were developed.85
English choice of law rules are thus essentially mutually independent.
Each has been developed by the courts to meet the needs of the par-
ticular broad legal category to which it applies. The rule applied and
the results obtained may thus vary depending on how the court char-
acterizes the facts of a particular case.86

In America, on the other hand, there is a long tradition of at-

83 See id. at 256-58.
84 See Ogden v. Ogden, [1908] P. 46 (1907).

The separation of the main problem of conflicts into characterization first and
choice of law later, or vice versa, is . . . analytically objectionable since it is
bound to lead to theoretical and practical difficulties. . . . [Characterization is a
relic] of the jurisprudence of conceptions, the theory that jural conceptions have
autonomous existence and that from them are deduced the legal consequences
governing the case.

See also Ehrenzweig, Characterization in the Conflict of Laws: An Unwelcome Addition to
American Doctrine, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 395, 399 (K. Nadel-
mann, A. von Mehren & J. Hazard eds. 1961): "Delimitation of torts and contracts . . . is
not the result of 'legal ideas' but of the whims of history, and allocation of a question to
any such category for conflicts purposes must vary with the interpretation of the rules
invoked."
tempting to rationalize the choice of law process in terms of some a priori principle. The prime example is the first *Restatement of Conflict of Laws*, which, in its endeavor to construct a system of choice of law rules on the foundation of the vested rights doctrine, became the Edsel of the American Law Institute's publishing activities.

The *Restatement (Second)* has maintained the effort towards a rational system of choice of law grounded in a particular philosophy, although it has of course radically altered that philosophy. Its basic choice of law principle is that each disputed issue should be governed by the rule of local law with the most significant relationship to that issue. Although this principle would probably be accepted by most modern scholars and courts, there is considerable disagreement on what matters are relevant to determine significance of relationship. For the *Restatement (Second)* these matters are contained in section 6, which reads as follows:

Choice-of-Law Principles
(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
   (a) the needs of the interstate and international systems,
   (b) the relevant policies of the forum,
   (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
   (d) the protection of justified expectations,
   (e) the basic policies underlying the particular field of law,
   (f) certainty, predictability and uniformity of result, and
   (g) ease in the determination and application of the law to be applied.

Although the *Restatement (Second)* observes a single, unifying philosophy as far as choice of law is concerned, it does not follow that there should necessarily be only one general choice of law rule to cover all types of cases. Certain scholars, notably Professor Brainerd Currie, have advocated the adoption of a choice of law method, or approach, to deal with litigation on a case-by-case basis. Other authorities, including the *Restatement (Second)*, believe that although it is a mistake to have a few rules of broad application, as in the English system, narrower rules can and should be developed to cover more closely defined areas of the law. As Professor Walter Cook explained with regard to contract cases:

[I]t is of little value to attempt to lay down a single broad rule for
determining the "validity" of "contracts" of all kinds. What is
needed is a grouping of problems so that each of the various types
of social, economic, and business situations dealt with in the law of
"contracts" can receive adequate consideration in terms of the
needs and interests of the community.\textsuperscript{88}

The \textit{Restatement (Second)} puts Cook's ideas into practice with
respect to contracts and torts by formulating a basic rule for each of
the two areas of law. The basic rule found in section 6 is refined into a
series of specific tests for dealing with either individual types of con-
tract\textsuperscript{89} or tort,\textsuperscript{90} or of issues that may arise in contract or tort cases.
Because these rules of the \textit{Restatement (Second)} are deduced from a
single accepted principle, it is found that the basic rules for contract
and tort are the same:

The rights and [liabilities] [duties] with respect to an issue in [tort]
[contract] are determined by the local law of the state which, with
respect to that issue, has the most significant relationship to the
[occurrence] [transaction] and the parties under the principles
stated in § 6.\textsuperscript{91}

It is evident that when a court that has adopted the rules of the
\textit{Restatement (Second)} is faced with a problem on the borderline be-
tween contract and tort, it will be unimportant for the result which
way the issue is characterized. Either way, the same rule or one of the
sub-rules derived from this basic rule will be applied.\textsuperscript{92} The same
remarks apply to a court that has adopted interest analysis as its choice
of law tool, but that, unlike the \textit{Restatement (Second)}, prefers simply
to approach disputes on a case-by-case basis rather than to attempt to

\textsuperscript{88} W. Cook, \textit{supra} note 24, at 417.
\textsuperscript{89} \textit{Restatement (Second)} §§ 189-207.
\textsuperscript{90} \textit{Id.} §§ 146-74.
\textsuperscript{91} \textit{Id.} §§ 145(1), 188(1). Reference to the autonomy doctrine is omitted here. Although
it is the choice of law rule to which the courts should look first in contract cases, it is
somewhat untypical of choice of law rules as a whole, owing to its emphasis upon the
intent of the parties to the near exclusion of all other factors which might influence the
choice of law process.

\textsuperscript{92} Although the fundamental rule is the same for contract and tort cases, the \textit{Restate-
ment (Second)} makes it clear in §§ 145 and 188 that the contacts to be taken into account
in determining which local law has the most significant relationship to the issue at bar
will vary from case to case and, in particular, between contract and tort cases. But in a
"tort" case in which the parties had a pre-existing contractual relationship, that factor
would assume great significance. That is, in those cases that blur the distinctions between
contract and tort, the contacts that should be taken into account will tend to be the same
whether the case is called one thing or the other. Under the \textit{Restatement (Second)}, there-
fore, mere nomenclature of a case will not of itself be a reason for a court to choose
certain contacts as more significant for the choice of law process than others.
formulate particular rules. In these situations, a question of characterization of the type an English court would have to face is meaningless.

Either version of the issue-by-issue approach as an essential ingredient of interest analysis (i.e., the Restatement (Second)'s grouping of like issues, or the more radical case-by-case approach) produces a result in difficult choice of law cases superior to rules that necessitate characterization prior to decision of the choice of law issue by one of two dissimilar rules. This superiority may be demonstrated by reference to the celebrated New York case of Babcock v. Jackson. In Babcock, an automobile driver defended a negligence suit brought by his guest passenger in a New York court, arising out of an accident in Ontario, by relying on an Ontario guest statute granting the driver immunity from such suits. In the Appellate Division, the case was characterized as tortious. The lex loci delicti was therefore applied, and the defense succeeded. Justice Halpern, dissenting, made a heroic but speciously reasoned attempt to apply the New York common law rule (requiring only proof of ordinary negligence) as the lex loci contractus, the parties having agreed to set out upon their trip while in New York:

[T]he implied promise by the defendant to drive the automobile with care, even though gratuitous in origin, would become an enforceable one, once the plaintiff had become a passenger in the defendant's automobile in reliance upon the defendant's promise. The defendant would then be liable for any injury suffered by the plaintiff by reason of the defendant's breach of his voluntary promise . . . .

The New York Court of Appeals solved Justice Halpern's problem by the express adoption of an interest approach. A year later, the Pennsylvania Supreme Court in Griffith v. United Air Lines, Inc. faced a somewhat similar attempt to characterize a basically tortious suit as contractual, holding:

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95 17 App. Div. 2d at 700, 230 N.Y.S.2d at 123 (dissenting opinion). The passage quoted here does not form the core of Justice Halpern's opinion. The bulk of the opinion is a well-reasoned exercise in interest analysis that appears to have been influential at the level of the Court of Appeals. Justice Halpern was thus one of the first judges to adopt a true interest approach in a tort case. See Lenhoff, Justice Halpern's Contribution to Conflict of Laws, 13 Buffalo L. Rev. 317 (1964).
96 12 N.Y.2d at 481-82, 191 N.E.2d at 284, 240 N.Y.S.2d at 749.
The essentials of this case remain the same regardless of its label. Mere technicalities of pleading should not blind us to the true nature of the action. The choice of law will be the same whether the action is labeled trespass or assumpsit.98

In this evaluation of the relative merits of the American choice of law process and of the English system of characterization, there is a final, somewhat ironic, twist. Theoretically speaking, English courts might be expected to find cases in which contract and tort issues are mixed together to be rather difficult, and to resort to shaky characterization to avoid undesirable results. In fact, this does not happen. The reason lies in the peculiar nature of the English choice of law rule for tort cases. To make out his cause of action in England, a plaintiff must show that the defendant's allegedly tortious conduct was both actionable in England and "not justifiable" by the lex loci delicti.99 The exact effect of this double test is unclear,100 even though it was established over one hundred years ago. However, it may be said with some confidence that

the substantive law of England plays the dominant role, determining the cause of action, whereas the law of the place in which the act was committed plays a subordinate role, in that it may provide a justification for the act and so defeat the cause of action but it does not in itself determine the cause of action.101

Generally speaking, such a "justification" must relate to the whole conduct of the defendant. Thus, if the defendant's act is tortious by the lex loci, but that law sets a limit to his liability, or grants him some special immunity under the particular circumstances, such limitation or immunity will not avail him. Until recently, even if the act were not tortious at all by the lex loci, although subject thereunder to criminal


99 Phillips v. Eyre, L.R. 6 Q.B. 1, 28 (1870). This statement of the rule, while sufficient for present purposes, glosses over one of the most controversial debates in English private international law. See, e.g., CHESHIRE & NORTH 261-80.


sanctions, the defendant would have no defense to a tort case brought in England.\footnote{102} English law, the law of the forum, determines liability.\footnote{103}

Theoretically, the situation could also arise in which the English court desired to avoid applying English law by characterizing a tort case as contractual and most closely related to some other jurisdiction. Here, of course, the twist mentioned above would not occur, and the full and unfortunate effects of a characterization approach to choice of law would be apparent. However, the prospect of an English court resorting to spurious characterization to avoid the application of an English rule of law appears improbable.

D. "Policy" in Interest Analysis and "Public Policy"

Ernst Rabel wrote in 1951:

In the field of contracts, there is no reason in the world why a court, considering a case governed by a foreign law, should inject into a case a public policy of its own statutes, except its public law, that is, constitutional, administrative, fiscal, [and] penal . . . laws, and the basic conceptions of morality. . . . At least, contracts must be freed from the ubiquitous threat of unknown and incompetent statutes, which happen to be in force at the forum, and for the forum.\footnote{104}

English courts adhere fairly closely to these principles. But in America, the interest analysis approach creates complications. Far from regarding the intrusion of forum public policy into the choice of law process as exceptional, interest analysis has as part of its raison d'être the task of ensuring that a particular policy's requirements are considered, and if necessary met, in cases before forum courts.\footnote{105} It has even been


\footnote{103} To take Babcock as an example: if England were substituted for New York, and Scotland (with an Ontario-like guest statute) for Ontario, English law would apply, for the defendant's act would be both actionable in England and "not justifiable" in Scotland. There would thus be no temptation for the English court to characterize the case as involving a contract centered in England. Cf. Collins, supra note 98, at 142. But see Assad v. Latendresse, Q.R. 79 S.C. 286 (1941) (Quebec), not followed in McLean v. Pettigrew, [1945] 2 D.L.R. 65 (1944).


\footnote{105} Two points should be noted. First, modern American conflicts scholars would certainly cavil at the assertion that their concern with state policy can be compared with the old American and current English exception to otherwise applicable choice of law rules where those rules would result in a decision contrary to forum public policy. Nevertheless, in the eyes of this British writer, the ultimate effect of allowing state policy con-
suggested that, because of interest analysis, the choice of law process takes on some of the characteristics of the public law field, thus cutting across the neat division drawn by Rabel. Furthermore, whether one favors a global choice of law method or the eventual development of specific, though narrow, choice of law rules, at present choice of law "rules" rarely exist in some areas, having been replaced by broad policies to be applied on a case-by-case basis. It is therefore not surprising that some American courts give an import to public policy that in England would be quite improper.

The most recent pronouncement of the Supreme Court on this issue has put the matter into new perspective. In *M/S Bremen v. Zapata Off-Shore Co.*, a contract was made to tow an oil rig from an area off the Gulf Coast of the United States to the Mediterranean Sea. The towing company, Unterweser Reederei GmbH, was German. A Delaware company, Zapata, with its main office and operation in Texas,
owned the rig. The contract required that "[a]ny dispute arising must be treated before the London Court of Justice." 109 Also, the contract contained a clause exempting Unterweser and its servants from liability for negligence in navigation. Shortly after the voyage commenced, there was an accident which damaged the rig. Each party blamed the other. Zapata persuaded Unterweser to put in to Tampa, Florida, for repairs, where it promptly instituted a damage claim in a Florida federal district court against the German company. 110

Unterweser commenced proceedings in London pursuant to the contract provision, but to preserve its rights in America it was compelled by time limits imposed by federal law also to commence separate proceedings for exoneration from or limitation of liability in the United States district court. Unterweser then moved to stay this limitation action, pleading forum non conveniens, on the grounds of the contractual forum-selecting clause. The motion was denied. Moreover, Unterweser was enjoined from continuing with its London action in the same matter. 111 The Court of Appeals for the Fifth Circuit dismissed Unterweser's appeal from this decision. 112

109 407 U.S. at 2. Unterweser generally inserted a stipulation for a German forum into its towage contracts, but in dealing with an American company it compromised on England. Id. at 14 n.15.

110 Id. at 3-4.

111 Id. at 5-6.

112 In re Unterweser Reederei GmbH, 428 F.2d 888 (5th Cir. 1970). The court gave several reasons, but most significant for present purposes was the following passage from its opinion:

The only other nation having significant contacts with, or interest in, the controversy is Germany. England's only relationship is the designation of her courts in the forum clause.

Zapata, the only claimant in the limitation action, is a United States citizen. The discretion of the district court to remand the case to a foreign forum was consequently limited. This is especially true since, as the Court noted, there are indications that Zapata's substantive rights will be materially affected if the dispute is litigated in an English Court. The towage contract contained . . . exculpatory provisions . . . apparently contrary to public policy and unenforceable in American Courts. However, according to the affidavit of . . . Zapata's English maritime law expert, these clauses would be held prima facie valid and enforceable by an English Court. The district court was entitled to consider that remanding Zapata to a foreign forum, with no practical contact with the controversy, could raise a bar to recovery by a United States citizen which its own convenient courts would not countenance.

Id. at 894-95 (footnotes omitted). Cf. Gaillard v. Field, 381 F.2d 25 (10th Cir. 1967), cert. denied, 389 U.S. 1044 (1968) (interstate case). For a more enlightened view, see Castilleja v. Camero, 414 S.W.2d 424 (Tex. 1967). Cases in which illegal usury is pleaded as a defense to an action for debt present an interesting study in the attitude of American courts toward public policy. Until recently, the trend was to uphold these contracts if at all possible, since the policy of holding parties to their contracts generally outweighed the policy against usurious interest. Modern, socially conscious courts may be retreating from
The Supreme Court reversed, holding that "far too little weight and effect were given to the forum clause in resolving this controversy." Rather than exhibiting "narrow nationalism," as the Court of Appeals had been accused of doing, the Supreme Court recognized the burgeoning of international commerce, with its concomitant forum bargaining, and required that absent fraud, undue influence, or the recalcitrant party's being deprived of his day in court, the forum clause would be upheld. This was done even though the exculpatory clauses in the contract were thereby made prima facie valid and enforceable under English law, a result declared by the Supreme Court to be contrary to public policy in the United States.

Although it could be argued that the result of Bremen should be confined to its particular setting in admiralty, the probable effect of the case will be a movement away from overriding concern with American public policy in all commercial transactions towards a view allowing the parties greater contractual freedom.

English courts provide a contrast to the American approach as exemplified in Bremen, taking, indeed, a somewhat ostrich-like position on the whole matter of public policy. Lord Atkin has said: "[T]he [public policy] doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds." Although this remark is of general applicability, in the area of private international law English judges have proved willing to be somewhat more adventurous in their forays into the field of forum policy. The probable explanation is that matters which offend English ideas of public policy are more likely to occur in cases with foreign connections than in those of purely local concern. But even in conflicts cases, English courts show much greater reluctance than American ones to allow public policy to intervene. Public policy is regarded as a matter for the legislature rather than the courts. Since the constitu-

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tional struggles of the seventeenth century, English judges have shown a marked disinclination to override the common law by considerations of public policy, a disinclination that has been carried over to the choice of law process.

In the recent English case of Sayers v. International Drilling Co. N.V., the plaintiff was an Englishman who had signed a contract in England to work on the defendant's oil rig off the coast of Nigeria. The defendant was a Dutch company with its head office in the Netherlands and no establishment in England. The contract excluded the defendant's liability for personal injury to the employee, a provision valid in the Netherlands but void under English law. The court, applying Dutch law, rejected the plaintiff's claim for damages for personal injuries suffered in the course of his employment. In so doing, the court was being almost as internationalist as is demanded by Rabel, allowing foreign law to prevail over its own labor law, which is, after all, almost a public law field.

A similar effort to keep forum public policy within narrow limits is found in Addison v. Brown, an action by a woman to enforce a maintenance agreement against her ex-husband. The agreement had been made preparatory to divorce proceedings in California. It provided that no application should be made "to any court in such proceeding" for maintenance, although the agreement might be incorporated in "such judgment or decree" of the California court, which was in fact done. Although valid in California, this agreement might be void in England as a purported ouster of the jurisdiction of the court. However, Mr. Justice Streatfeild held that the public policy

120 Rabel, supra note 104.
121 It is certainly arguable that in Sayers the Court of Appeal went unnecessarily far in sacrificing English public policy. L. J. Kovats criticizes the case strongly:

To seek the greatest efficacy of a contract of employment when performance itself is not in issue is illusory in practical terms. It may be convenient [as the Court of Appeal held], financially or administratively, for a company employing an international labour force to limit or exclude its own liability to a workman for injuries suffered in the course of his employment, but there is little justice in allowing the employee to be deprived of compensation which his own laws may give him.


123 See id. at 780, [1954] 2 All E.R. at 214.
against such ouster applied only to English, and not to foreign courts. The wife was therefore able to maintain her action.

Finally, whereas an American court might try to find the policy behind a forum statute and apply the spirit of the act more broadly than the letter, English courts are disposed to follow the presumption that all statutes are in derogation of the common law and should be as closely confined in their effect as possible. This tendency is graphically illustrated by the case of Santos v. Illidge. In that case, an English court entertained an action for breach of contract for the sale of slaves in Brazil. Professor Kahn-Freund has written:

No one can read a decision like Santos v. Illidge without being struck by the phenomenon that more than half a century after the beginning of the suppression of the slave trade by law and more than a quarter of a century after the trade had been condemned in emphatic terms in the consolidating statute of 1824, and slavery had been abolished in the Empire in 1833, Baron Bramwell and Blackburn, J., regarded the matter entirely as one of verbal interpretation of the statutes.

The English statutes were, of course, interpreted narrowly, and were held not to prevent the enforcement of the contract in an English court. Santos is an extreme case, and it is difficult to envision an English court coming to the same conclusion today. Nonetheless, the case is illustrative of a judicial attitude that still at least in part persists.

A more contemporary example is Vita Food Products, Inc. v. Unus Shipping Co., Ltd., on appeal from the Supreme Court of Nova Scotia to the Privy Council. This case involved the issue of whether

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125 [1954] 1 W.L.R. at 784, [1954] 2 All E.R. at 217. Cheshire and North believe that the agreement expressly ousted the jurisdiction of "any court," not just the California courts. CHESHIRE & NORTH 146. This interpretation ignores the words "any court in such proceeding," "such proceeding" referring to a California divorce. However, the agreement did go on to provide that its terms should prevail over anything that "any judgment of any court shall otherwise provide." [1954] 1 W.L.R. at 780, [1954] 2 All E.R. at 214.

127 46 Geo. 3, c. 52 (1806).
128 5 Geo. 4, c. 113 (1824). (Further references omitted.)
129 3 & 4 Will. 4, c. 78 (1833).
130 Pollock, C.B., and Wightman, J., dissented. The majority consisted of Bramwell, B., Hill, J., Channell, B., and Blackburn, J.

131 Kahn-Freund, supra note 107, at 66 (footnotes renumbered and conformed). But see Boissevain v. Weil, [1950] A.C. 327, [1950] 1 All E.R. 728, discussed id. at 59-64. Of course, some modern American scholars are likely to contend that this sort of issue is just a matter of interpretation of the statutes of the forum. But these scholars mean quite the opposite of the narrow interpretation techniques adopted by nineteenth-century English judges. See, e.g., Currie, supra note 98, at 47-48; Symposium, supra note 105, at 239 (remarks of Chief Justice R. Traynor); cf. Lauritzen v. Larsen, 345 U.S. 571, 573-79 (1953).

the Hague Rules, as embodied in the Newfoundland Carriage of Goods by Sea Act, 1932, applied to a certain shipment of goods from Newfoundland. The Privy Council could not have been unaware of the history of the Hague Rules and the strong policy of Newfoundland, England, and indeed of the international community, that the rules should apply to all bills of lading in order to obtain a certain uniformity in the world's laws relating to the sea carriage of goods. Yet the parties were able to avoid the application of the Hague Rules merely by stipulating in their contract that the law of England (whose version of the Hague Rules does not apply to imports into England) should apply.

Against this background, it is not surprising that there are only a few cases in which English public policy will invalidate a claim based on foreign law. These may be briefly categorized as follows: (1) where the fundamental conceptions of English justice are disregarded, (2) where the English conceptions of morality are infringed, (3) where a transaction prejudices the interests of the United Kingdom or its good relations with foreign powers, and (4) where a foreign law or status offends the English conceptions of liberty and freedom of action.

These categories are not exhaustive. Nor is it necessarily the case that a foreign rule which appears to fit into one will be automatically overruled in an English court. Rather, a technique Kahn-Freund calls the doctrine of relativity of public policy is applied. That is, the foreign law sought to be applied will be examined in the context of the case at bar to determine whether it will produce an unacceptable result in that particular case. If so, it will not be applied. The foreign law will not simply be rejected as unacceptable. The doctrine of relativity...
tivity of public policy is, of course, a clear exception to the usual rule of jurisdiction- (rather than rule-) selection observed by English courts.

E. True and False Conflicts

Analyzing a case to discover whether it presents a "true" conflict of laws is a hallmark of the interest approach. If only a "false" conflict is found, then the choice of law problem is solved.140

There are at least two schools of thought as to what constitutes a false conflict.141 The first holds that when, as between two different states whose rules are in conflict, one state clearly has a much greater interest in the outcome than the other, a false conflict exists. Because the second state has relatively little interest in the issue, the claims of that state may be summarily dismissed. This view is somewhat misleading; it is more correct to regard such cases as merely involving a fairly easy choice of law decision between two laws which are truly in conflict.142

A false conflict is more properly said to occur in cases where, under the domestic law of each of the two competing states, the results would be the same even though this concurrence may be the result of the operation of entirely different rules of domestic law.143 For instance, had it been found in Auten v. Auten144 that under English law the wife could not have enforced the maintenance agreement because of, for example, subsequent adultery on her part, then New York and English law would both find in favor of the husband, and a false conflict would exist. The court should simply hold for the husband in that case, since it would not be necessary to choose between English and New York law.

Although the false conflict approach is still largely confined to the realm of scholarly writing, it has occasionally been used by the courts. In two tort cases, Williams v. Rawlings Truck Line, Inc.,145 and Gaither v. Myers,146 the Court of Appeals for the District of Columbia Circuit

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140 The resolution of the conflict may possibly come about through the forum's examination of both the conflicting rule of the foreign jurisdiction and its relevant choice of law rule, and the discovery thereby that, on the facts, the foreign state would decline to apply its substantive law rule.

141 Comment, False Conflicts, 55 CALIF. L. REV. 74 (1968), identifies at least six different meanings that have been ascribed to the term "false conflict."

142 See Leflar 238.

143 See W. REESE & M. ROSENBERG, supra note 100, at 524:
When rules of two or more states are phrased in terms that literally construed would lead to opposed results, they pose a gratuitous conflict if, on according them their intended scope, the rules would produce the same decision on the issue presented.

144 208 N.Y. 155, 124 N.E.2d 99 (1954); see notes 72-75 and accompanying text supra.

145 357 F.2d 581 (D.C. Cir. 1965).

146 404 F.2d 216 (D.C. Cir. 1968).
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utilized false conflict reasoning to reach its decisions. But in only one case, Lester v. Aetna Life Insurance Co., has a court decided a dispute on a contract by finding the existence of a false conflict.

In 1952, Lester, then a resident of Wisconsin, purchased a life insurance policy from Aetna. The transaction took place in Wisconsin, although Aetna's head office is in Connecticut. Lester paid his premiums from Wisconsin until 1957, when he moved to Louisiana, and continued his premiums until 1962, when he missed a payment. Aetna declared the policy forfeited. This declaration was effective under Wisconsin law, but not under the law of Louisiana. Louisiana required an insurer first to give notice to its insured that his premium was due.

Lester died, and his son, named as beneficiary in the policy, filed suit against Aetna in a Louisiana court. The case was removed to federal district court on the basis of the diversity of citizenship of the parties involved. The district court, in deciding what law to apply, was bound by Klaxon Co. v. Stentor Electrical Manufacturing Co. to follow Louisiana choice of law rules. The court concluded that Louisiana would apply the modern, significant contacts test, and, determining that Louisiana was the center of gravity of the contract, applied Louisiana law in finding for the son.

It soon became evident that the federal district court was in error in deciding that Louisiana would apply the modern rule. In Johnson v. St. Paul Mercury Insurance Co., the Supreme Court of Louisiana held that it would retain the Bealean lex loci delicti rule in tort cases —explicitly rejecting the significant contacts approach.

When Lester was taken on appeal to the United States Court of Appeals for the Fifth Circuit, that court had no doubt that the Johnson

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147 In Williams, where the issue was ownership of an automobile for the purpose of establishing vicarious liability, adoption of the New York doctrine of estoppel was held to further the interests of New York while not interfering with any of the articulated policies of the District of Columbia. Application of the District of Columbia proof of sale rule, on the other hand, would have impinged on New York interests without furthering any District of Columbia policies. Hence, the New York law was applied. 357 F.2d at 586.

148 In Gaither, the District of Columbia rule that leaving keys in an automobile constitutes negligence that may be the proximate cause of injury, in spite of intervening theft, conflicted with the Maryland rule that intervening theft would negative proximate cause. The court found a false conflict insofar as the District's interest in promoting safety and financial responsibility did not conflict with Maryland's interest in preventing theft and limiting liability of car owners. 433 F.2d at 891.

149 LA. REV. STAT. ANN. § 22:177 (1959). Aetna had given notice, but it was defective under Louisiana law. 433 F.2d at 891.

150 313 U.S. 487 (1941).


152 256 La. 289, 236 So. 2d 216 (1970).
reasoning was intended to apply equally to contract cases and that it was therefore bound to apply the *lex loci contractus* rule in any choice of law decision that it might make. However, the court resolved this problem by deciding that there was not a true conflict of laws at all, since Louisiana was the only state with any real interest in the dispute. Consequently, the court held that Louisiana law should apply.

In the case at bar, the laws of Louisiana and of Wisconsin as to notice differ materially, but only Louisiana has even the remotest interest in having its law applied.

Louisiana . . . provides that no insurer shall declare lapsed any policy for non-payment of premium . . . unless a written notice . . . is mailed to the insured . . . prior to the date when payable. Louisiana’s interest in enacting this statute was to protect the Louisiana insured against “losing his policy, through mere neglect to pay the premium, and also to give him a fair chance to meet the payments when due.” . . .

Wisconsin has no such notice statute and . . . has no interest in relieving appellant, a non-domiciliary insurance company, of the burden of giving notice in Louisiana to a Louisiana citizen that his premium to be paid in Louisiana is due. Wisconsin’s only contact with this case occurred and ended long ago in the single, fortuitous event of delivery of the insurance policy in that state. Wisconsin’s policy—assuming it has such a policy—of protecting its own domiciliary insurers against mandatory notice requirements would be neither furthered nor impinged upon by application of Louisiana law in this case.

. . . We conclude that only if appellant had been a domiciliary of Wisconsin would a “true” conflict of interest exist. We find no conflict of laws. Appellant is bound by the Louisiana notice statute.\(^{154}\)

It will be observed that the court analyzed this case as presenting a false conflict not by determining that the case would be disposed of similarly under the laws of both Louisiana and Wisconsin, but by holding that the Wisconsin interest was so minimal that it should be ignored.\(^{155}\) It will be recollected that of the two most common usages

\(^{153}\) 433 F.2d at 888-89.

\(^{154}\) Id. at 890-91 (citations omitted).

\(^{155}\) This conclusion is debatable. It is a reasonable assumption that the majority of life insurance business written in Wisconsin is with nondomiciliary companies, and, certainly, by bringing their business to Wisconsin these companies contribute to the welfare of that state. Consequently, out-of-state insurance companies might also be thought worthy of the protection of Wisconsin’s laws. See Comment, *Lester v. Aetna Life Insurance Company: Two Cents and the False Conflict Mystique*, 7 CAL. W.L. REV. 402, 417-18 (1971). In addition to an excellent discussion of the *Lester* case, this Comment contains a perceptive survey of most of the literature on false conflict reasoning that has appeared to date.
of "false conflict" referred to above, the one adopted in *Lester* was termed "misleading." The case bears out this criticism. To repeat, where one state has a substantially greater interest in the facts than another state whose law is connected with those facts, a court following the interest analysis approach is presented with a case in which it is easy to decide where the most significant contacts lie, rather than with a false conflict. But in *Lester*, the court of appeals was of course precluded by *Johnson v. St. Paul Mercury Insurance Co.* from simply deciding that the case was most significantly connected with Louisiana and applying Louisiana law on that basis. In effect, however, this is exactly what the court did, using the same reasoning, but giving it a different name.

It would appear that in *Lester* the court of appeals disregarded the strictures of *Johnson* in two respects. First, the *Lester* court's false conflict reasoning was an unabashed exercise in choice of law by interest analysis, not authorized of a federal court sitting in diversity in Louisiana. *Klaxon* requires obedience to all state choice of law rules; there is no exception for "false conflicts." Second, even had the *Johnson* court not expressly rejected interest analysis, but confined itself to preferring the *lex loci* rule over the significant contacts test without going into the theoretical background of either, it is submitted that *Lester* would still be in violation of the *Klaxon* rule. As stated above, the version of false conflict reasoning used by the court is merely the significant contacts test applied under another name.158

156 See text accompanying notes 141-42 supra.
157 256 La. 289, 236 So. 2d 216 (1970). In *Johnson*, the Louisiana Supreme Court rejected not only the significant contacts test for contract and tort actions, but modern interest analysis as a whole:

> What this theory will lead to in its application is a dogma that states can and do have a logical, rational and legitimate interest only in their own residents. A provincialism repugnant to our federalism would be sure to follow in this field of law under Currie's rules. A state whose conflict of laws rule always serves its own citizens can hardly expect its citizens in the courts of another state to receive any treatment which is inimical to the citizens of that state.

*Id.* at 302-03, 236 So. 2d at 221.

158 There is probably no way in which the court in *Lester* could have applied Louisiana law without transgressing the Louisiana choice of law rule set out in *Johnson*. However, one variation on its method of reasoning would have avoided the latter of the two criticisms made above.

Instead of asking "What interest does Wisconsin have in this case?" the court could have asked, "How would a Wisconsin court decide this case?" Quite possibly, the *Lester* court might have found that Wisconsin would apply Louisiana law, either by following the significant contacts test *simpliciter* (which was recognized in Wisconsin in *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 177 N.W.2d 328 (1970)) or by applying the Louisiana notice rules as a "better rule of law" than the Wisconsin provision. See notes 181-200 and accompanying text infra. The court would thus have found that under the domestic laws
Properly applied, a true/false conflict analysis may be capable of solving apparently difficult cases, for different jurisdictions frequently will give the same answer to the same question, though by means of different reasoning.

English courts are unable to avail themselves of this subtle technique, because they are committed to jurisdiction selection. They may disregard the proscription against scrutinizing the contents of individual rules of domestic law from time to time, but such exceptions seem unlikely to extend to cover the detailed analysis of competing rules necessary to discover whether a supposed conflict is in fact false.

F. Favoring the Law of the Forum

English judges hearing private international law cases are generally quite conscious of their responsibility to international society, a responsibility interpreted as requiring that courts approach cases in an even-handed manner, with no bias either for or against a particular rule. Where, therefore, forum law is one of the laws in conflict, it starts with no particular advantage over a competing foreign law. The reasoning behind this even-handed approach is well stated by A. E. Anton, the Scottish jurist, whose words apply equally well to English law:

In a free society the court's duty is not wholly or even primarily to give effect to state interests but rather to balance those interests with such private interests as seek recognition. Its duty is conceived to be no different in the conflict of laws: here such interest as the state may have in giving effect to its legislative policies must be weighed against the need to give effect to the reasonable expectations of the parties. Hitherto our system of private international law has had no great difficulty in achieving this balance because it has assumed that its own rules of private law are designed less to effectuate state policies than to provide a workable framework of rules within which the interests of private persons may be adjusted.

There is one important exception to this even-handed policy. This ex-
ception stems from the rule, observed in both England and America, that matters of procedure are governed by the law of the forum. Un-
exceptionable in itself, this rule may be the subject of abuse if a court characterizes rules that are in reality substantive as procedural, in that they are apt to have a material effect upon the outcome of the case.\textsuperscript{161} English courts thus characterize Statute of Frauds problems as procedural,\textsuperscript{162} for example. There have even been suggestions that the issue of measure of damages is similarly a matter for forum law.\textsuperscript{163} But historically, American courts have probably been greater offenders in this regard than their English counterparts.

In vested rights jurisdictions, procedural characterization has been one of the traditional escape devices utilized by the courts to avoid the otherwise undesirable results of applying strict Bealean choice of law rules. Thus, issues involving statutes of limitation, the parol evidence rule, presumptions of law and evidence, and burdens of proof, have often been characterized as procedural in American courts.\textsuperscript{164}

In England, there is a growing appreciation of the speciousness that is involved in simply applying forum law to a case with strong foreign connections only because some important issue has been characterized as procedural. This trend was recently evident when the majority of the House of Lords in Boys v. Chaplin\textsuperscript{165} held the measure of damages to be a substantive question. Thus, the quotation from Anton increasingly reflects not only the philosophy of English choice of law, but also how courts actually resolve the issue.

In American jurisdictions that have adopted the principles of interest analysis, the problem of instances of colorable characterization adopted in order that the court may apply forum law should cease to be a matter for concern, for it is fundamental to the interest approach that courts be quite candid in stating their reasons for the choice of

\textsuperscript{161} Of course, in certain cases, any rule, no matter how procedural, may affect the outcome. But a distinction should be drawn between mechanical rules which relate to the way a court is run and "outcome-affecting extrastate rules, phrased procedurally, that a court can apply about as easily as it can apply its own rules." \textit{Leelar} 289. The reason why a court should, on the other hand, apply its own rules which relate simply to the machinery of litigation is that "it would be utterly impractical and unrealistic to expect judges, lawyers, juries, bailiffs, court clerks, reporters, and other judicial functionaries to master and apply an entire new system of judicial procedure for each out-of-state case that comes to trial in their courts." \textit{Id. }at 288.

\textsuperscript{162} See Prebble, Part II, notes 670-73 and accompanying text.


\textsuperscript{164} These matters are discussed, and examples given, in \textit{Leelar} 290-315, where other outcome-affecting issues that are sometimes characterized as procedural are also considered.

But this does not mean that forum favoring effected by procedural characterization is a thing of the past. On the contrary, quite unabashed selection of forum law qua forum law is strongly advocated by certain proponents of interest analysis. Clearly enough, an even-handed, "justice is blind" attitude toward the choice of law process is quite at variance with reasoning by interest analysis. Some supporters of interest analysis are not at all unwilling to weight the balance in any choice of law decision in favor of the forum law. This bias is defended by two different arguments, associated chiefly with Professors Brainerd Currie and Albert Ehrenzweig.

Currie's thesis was that any true conflict of laws between the forum and another state necessarily involves a conflict of policy between the two states. The judiciary, Currie explained, is not competent to put the policy of a foreign state above its own. Consequently, the forum must apply its own law. Currie summarized his technique shortly before his death:

1. When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws . . . .
2. . . . .
3. If the court finds an apparent conflict between the interests of the two states, it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.
4. If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.\textsuperscript{166}

Ehrenzweig reached a similar conclusion by a different route.\textsuperscript{167} First he observed that reference to choice of law rules and to foreign law should be considered essentially abnormal; the usual task of a court is to apply the law of the forum. Nevertheless, he recognized the existence of certain areas in which well-established choice of law rules, routinely followed by the courts, point to foreign law. Where these rules are not so established, he felt that there must be reference to public policy. This policy could only be that of the forum, said Ehrenzweig, for it is the choice of law rules of the forum which that policy

\textsuperscript{166} E. CHEATHAM, E. GRISWOLD, W. REESE & M. ROSENBERG, CASES ON CONFLICT OF LAWS 477-78 (5th ed. 1964). Currie views with a certain degree of equanimity the inevitable result that the outcome of a case may depend upon where it is filed. See id. at 478. This is in marked contrast to the long-standing English belief that choice of law rules, if at all possible, should be the same in all fora. See, e.g., Udny v. Udny, L.R. 1 Sc. & Div. App. 441, 452 (1869) (Lord Hatherley, L.C.).

\textsuperscript{167} A useful summary of Ehrenzweig's views may be found in Schlesinger, Book Review, 16 AM. J. COMP. L. 608, 610-12 (1968).
is fashioning. Some super-law, which all states were bound to obey, could furnish the necessary policy guidelines, but no such law exists. Reference to forum policy will naturally result in the application of forum law in most cases, although there will be cases in which the policy of the forum clearly indicates that some other law should apply. Ehrenzweig recognized that his thesis would, if followed in practice, create severe problems of forum shopping. But he contended that this problem should be solved by tightening the rules of jurisdiction.

The forum-favoring theories have not had the same acceptance in the courts that they enjoy in scholarly writing, and it does not seem likely that they will be adopted wholesale by the courts in the foreseeable future. For Ehrenzweig's and Currie's ideas to work efficiently, wholesale legislative revision of the American rules of jurisdiction would be necessary. There is no sign that such a revision is at all probable, and in fact the current tendency is the other way—to a broadening of the bases of jurisdiction.

Nevertheless, forum-favoring theories continue to have an effect in American cases. Probably the most notorious example is Lilienthal v. Kaufman. This was an action in Oregon on two promissory notes signed in California. Unknown to the plaintiff, a Californian, the defendant promisor, an Oregon domiciliary, had previously been declared a "spend-thrift" in Oregon, and placed under the supervision of a guardian. The guardian had declared the notes void, as he was able to do under Oregon law, although California law contained no such provision. The court held:

We have, then, two jurisdictions, each with several close connections with the transaction, and each with a substantial interest, which will be served or thwarted, depending on which law is applied. The interests of neither jurisdiction are clearly more important than those of the other. We are of the opinion that in such a case the public policy of Oregon should prevail and the law of Oregon should be applied; we should apply that choice-of-law rule which will "advance the policies or interests of" Oregon.

169 Id.
170 Examples of scholarly support for theories the same as or similar to those of Currie and Ehrenzweig include: A. SHAPIRA, THE INTEREST APPROACH TO CHOICE OF LAW passim (1970); CHEATHAM & REESE, Choice of the Applicable Law, 52 COLUM. L. REV. 959, 964 (1952); Rheinstein, Ehrenzweig on the Conflict of Laws, 18 OKLA. L. REV. 238, 239-40 (1965).
171 And, indeed, in American statutes. See the discussion of UNIFORM COMMERCIAL CODE § 1-105, notes 461-77 and accompanying text infra.
173 Id., at 16, 395 P.2d at 549 (citation omitted).
Lilienthal is a rather extreme case, but it illustrates the willingness of some American courts to be influenced by an express bias towards forum law.

In England, there is no such express bias, by the nature of the English choice of law rules. Claims that the natural predilection of judges for their own law brings about results as if such a bias existed are made from time to time, particularly with respect to choice of law in contract. Admittedly, the rules for finding the proper law are somewhat amorphous, and there is certainly scope here, if anywhere, for judicial rationalization of an unexpressed prejudice in favor of the lex fori.

However, the formlessness of the English contractual choice of law rules, although offering potential for concealed forum favoring, at the same time makes it difficult to prove or disprove that any such hidden process does exist. Simply to say that in a majority of conflicts-contract cases English courts do choose English law is insufficient, although probably correct. But there are many possible explanations for this statistic. The most likely is that English commercial and maritime law are probably more important in international trade than any other. It is consequently both easy and reasonable in many cases to infer from the words and conduct of contracting parties an intention to choose English law or to find that a case is closely connected with that law. Another conceivable explanation is that a significant portion of plaintiffs before English courts choose those courts simply because England has the most substantial relationship with the claim; it is wrong to assume that every plaintiff is a hard-eyed forum-shopper.

See, e.g., Kahn-Freund, supra note 107, at 45; Love, Choice of Law Clauses in International Contracts: A Practical Approach, 12 HARV. INT'L L.J. 1, 6-10 (1971).

See section IV infra; Prebble, Part II, section V.

See Kahn-Freund, supra note 107, at 45.
In the balance may be weighed the fact that in the last three reported contract cases before the English courts which have raised a choice of law question, the judges have held that non-forum law applied to the issue at bar. In two of these cases, the court would have been justified by precedent in applying English law. In the third, Sayers v. International Drilling Co. N.V., the court rejected an appealing claim that was valid under English law but not under the conflicting Dutch law applied in the case. These cases can be read to imply that when English courts claim to view conflicting laws of the forum and of a foreign jurisdiction on an equal basis, they mean what they say.

G. Result Orientation and the Better Rule of Law

Courts are, of course, concerned with the application of rules of law, and they tend to be somewhat unsympathetic towards suggestions that individual cases should be considered on their merits and a "fair" or "merciful" decision be reached. However, where there is a lacuna in the law or when the law on a particular subject is unclear or still developing (descriptions which apply to many of the areas of conflict of laws), there is every reason for a court to try to discern the fairer of two alternatives.

In making such an attempt, the court may consider what result on the facts of the case would appear to be better, or, alternatively, which of two possibly applicable laws appears to be better. Regarding the first alternative, in contract cases a common line of reasoning is that it is preferable, if possible, to enforce a contract, since the fundamental policy of contract law (upholding properly concluded bargains) is thus furthered. This reasoning is known as application of the rule of validation. The present discussion is chiefly concerned with the second alternative, selection of the "better rule of law."

A number of American writers have urged, in one way or another,


180 Contra, 10 L.Q. Rev. 102 (1894). The author claimed to descry "a leaning, possibly not an unreasonable leaning, towards the assumption that English law is the proper law of any contract connected with England." Id. Compare In re Missouri S.S. Co., 42 Ch. D. 321 (C.A. 1889), with Liverpool & Great W. Steam Co. v. Phenix Ins. Co., 129 U.S. 397 (1889).

181 See Prebble, Part II, notes 681-95 and accompanying text, where the rule of validation is discussed in relation to contracts against which the defense of usury is raised.
that in choosing between two conflicting rules, a court should consider, *inter alia*, which rule is "better." Cheatham and Reese bade courts to consider justice in the individual case, although this was the last and least important of nine different policy considerations they identified for choice of law decision making. Weintraub asserted that a rule reflecting current social trends should be preferred to one that is anachronistic. But it is with the name of Professor Robert Leflar that application of the better rule of law is most closely associated. The better rule is one of several "choice-influencing considerations" which Leflar elaborates, similar in content to the principles in *Restatement (Second)* section 6.

In contract cases, the better rule will generally be that which protects the justified expectations of the parties by upholding their transaction. To an extent, therefore, the better rule of law and the rule of validation overlap. There is some evidence that American courts have long been influenced by an unexpressed better rule policy, which has been effected sub silentio by means of the traditional escape devices of vested rights reasoning. In recent years, the courts of several states have adopted Leflar's argument in tort cases. The choice of law section of the Uniform Commercial Code, section 1-105, adopts better rule of law reasoning. Section 1-105 justifies this forum-favoring aspect of the UCC on the basis that the Code is probably superior to any law with which its provisions are in conflict.

These developments of and support for the better rule of law approach have been viewed with some skepticism. Cavers, for example, has "recognized the influence of the better law in choice-of-law decisions not as a desiratum but as an inevitable psychological reaction in

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182 See Cheatham & Reese, *supra* note 170, at 980.

183 *Id.*

184 Weintraub 423.

185 *E.g.*, *LEFLAR* 244-64.

186 *P. 455 supra*.

187 *LEFLAR* 255-56.

188 *See* cases cited and discussed *id.* at 258.

189 *See*, *e.g.*, Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Woodward v. Stewart, 104 R.I. 290, 249 A.2d 917, *cert. dismissed*, 399 U.S. 957 (1969); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968); Zelinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 156 N.W.2d 466 (1968); Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

190 *See* notes 461-64 and accompanying text *infra*.

191 *UNIFORM COMMERCIAL CODE* § 1-105, Comment 3. Now that all states but Louisiana have enacted the UCC this argument is not as strong as it might once have been. Where states have made their own variations in the Code, it is not possible to say, without more, that variations made by the forum are superior to those made by the jurisdiction whose law contains the conflicting rule. See Weintraub 418.
marginal cases, a tendency not to be encouraged, but to be taken into account in explaining decisions.”\textsuperscript{192}

The great temptation would seem to be for judges to apply forum rather than foreign law on the pretext (or indeed in the sincere belief) that the former is “better.” Such a tendency is of course antipathetic to the central idea, if not the reason for, the existence of conflict of law rules: to show when a court should apply foreign law. With each jurisdiction choosing the rules it believes best, hopes of reaching similar results in similar cases before different forums would certainly dim. Furthermore, it is somewhat presumptuous for a court to decline to apply foreign law to a case with strong foreign connections on the grounds that the forum has selected an allegedly better rule.\textsuperscript{193} Nevertheless, in view of legislative and judicial developments favoring the better rule approach,\textsuperscript{194} it may be expected that American courts deciding contract cases will increasingly use reasoning choosing the better rule in appropriate cases.

In England, where choice of law rules are at least theoretically jurisdiction-selecting, the better rule issue should not arise. But English courts, although utilizing choice of law rules which appear somewhat archaic in present American opinion, have never allowed theory to dictate entirely the rules of private international law. In two House of Lords cases there may be found statements which indicate strongly some support for the choice of the better rule, or at least support for a result-oriented choice of law rule. In \textit{National Bank of Greece & Athens, S.A. v. Metliss},\textsuperscript{195} Viscount Simonds said: “But, my Lords, in the end and in the absence of authority binding this House, the question is simply: What does justice demand in such a case as this?”\textsuperscript{196} In \textit{Starkowski v. Attorney General},\textsuperscript{197} Lord Reid observed:

\begin{quote}
To my mind the best way of approaching this question is to consider the consequences of a decision in either sense. The circumstances are such that no decision can avoid creating some possible hard cases, but if a decision in one sense will on the whole lead to much more just and reasonable results, that appears to me to be a strong argument in its favour.\textsuperscript{198}
\end{quote}

\textsuperscript{192} Cavers, \textit{The Value of Principled Preferences}, 49 \textit{Texas L. Rev.} 211, 215 (1971).

\textsuperscript{193} \textit{Cf.} Rabel, \textit{supra} note 104, at 135.

\textsuperscript{194} \textit{See} notes 181-91 and accompanying text \textit{supra}.


\textsuperscript{196} Id. at 525, [1957] 3 All E.R. at 612. Viscount Simonds was, it should be noted, choosing between two rules of law. He did not go so far as to say that the House of Lords should simply impose a just solution, without regard to the law.


\textsuperscript{198} Id. at 170, [1953] 2 All E.R. at 1274. This was not a contract case, but Lord Reid's remarks may reasonably be regarded as of general application,
Too much should not be read into these quotations. Graveson, for instance, has taken pains to show that Metliss and Starkowski indicate that some principle of judicial justice forms the foundation of the English conflict of laws.\(^{199}\) Certainly, one hopes that English courts try to be both judicial and just, in conflicts cases as well as in others. But it is misleading to believe that they will override established choice of law rules in favor of some judge-made justice that seems to fit the case at bar.

Viscount Simonds made it clear that he was speaking in the absence of binding authority; Starkowski, too, involved a novel point of law.\(^{200}\) Of course, if "judicial justice" is a source of law or policy referred to by courts when they find no established rule to govern a particular case, it may in a real sense be called a basis or foundation of the conflict of laws. But such cases are rare. In English courts, justice in the individual case may be a consideration, but it does not have the widespread applicability that appears to be becoming characteristic of Leflar's better rule approach in America.

H. The Significance for Choice of Law of Post-Transaction Events

The subject of judicial treatment of post-transaction events in the choice of law process does not attract much more than a passing reference in American scholarly literature. No particular doctrine has developed comparable to, say, the better rule approach or the theories of true and false conflicts. Compared with English practice, however, it is found that interest analysis takes a completely opposite approach to the question of post-transaction events. The matter is therefore of some importance.

The issue of whether actions of contracting parties subsequent to the making of their contract may be considered by a court seeking to choose the law to govern that contract recently came squarely before the House of Lords in *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.*\(^{201}\) Lord Reid considered the question exhaustively, stating:

> As I understood him, counsel sought to use [the actions of the parties subsequent to the contract] to show that there was an agree-


\(^{200}\) This was: What is the effect upon a formally invalid marriage of subsequent legislation at the *locus celebrationis* purporting retrospectively to validate the marriage, when the parties are no longer domiciliaries of the *locus celebrationis*? See [1954] A.C. at 170, [1953] 2 All E.R. at 1274.

ment when the original contract was made that the proper law of that contract was to be the law of England. I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.202

Lord Reid's conclusion appears so axiomatic that it seems unlikely that the American rule could possibly be any different. But this viewpoint ignores the all-pervasive American concern with governmental interest. To an English court, choice of law in a contract case is basically a private law matter. It is not the role of the state to intervene. But in America, choice of law takes on almost public law overtones. When the state may be affected in one way or another, this governmental interest is at least considered by an American court in coming to a choice of law decision. Consequently, according to this view, a change of position by either or both of the parties after the formation of their contract, insofar as it affects their relationship with a state or states, should be considered by a court.203

In the field of contracts, insurance litigation probably provides the chief example of cases where post-transaction events may affect choice of law. This is a comparatively recent development. In the time of vested rights reasoning, the Supreme Court certainly would have held it a denial of due process for a court to decide a contractual dis-

202 Id. at 603, [1970] 1 All E.R. at 797. To the same effect, see id. at 606, [1970] 1 All E.R. at 800 (Lord Hodson); id. at 611, [1970] 1 All E.R. at 804 (Viscount Dilhorne); and id. at 615, [1970] 1 All E.R. at 807 (Lord Wilberforce). Lord Guest, the fifth member of the House, did not advert to this question.

203 This process is easier to illustrate by reference to post-accident events in tort cases than by considering contract litigation. For example, had the plaintiff in Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), between the accident and the trial changed her domicile from New York to Ontario, the balance of the interests between the two jurisdictions would certainly have been tilted towards Ontario, perhaps decisively. See notes 93-96 and accompanying text supra.

Judges are divided on the weight that should be given to post-accident events, but the trend seems to be towards considering these events in choice of law decisions, at least within limits sufficiently narrow to prevent events from being engineered for the purpose of forum shopping. See Doiron v. Doiron, 109 N.H. 1, 241 A.2d 372 (1968) (court assumed that post-accident change of domicile by parties was relevant to choice of law problem, although on facts it was outweighed by other considerations); Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968) (court considered post-accident change of domicile by defendants in deciding choice of law question, since change had nothing to do with desire to achieve more favorable legal climate). Contra, Reich v. Purcell, 67 Cal. 2d 551, 492 P.2d 727, 63 Cal. Rptr. 31 (1967) (post-accident change of domicile did not affect choice of law).
pute by reference to a law different from that which would have been held to govern at the time of contracting. In a long line of insurance cases where the constitutionality of different choice of law techniques was examined, the high water mark of the vested rights approach seems to have been passed by about 1935. Subsequent cases permitted the application to insurance contracts of the law of, for instance, the domicile of the insured, even though he took up this domicile well after the execution of the contract.

For a court to allow a post-transaction event to weigh in its decision-making process, even where this may be justifiable by the principles of interest analysis, may tend to go against the judicial grain. Consequently, American courts are disposed to hold not that post-transaction events have influenced their decision on choice of law, but that these events indicate the formation of a fresh contract, governed by a different law. Such an approach may involve a certain amount of fitting facts to arguments. Although parties are always free to vary their agreements or to make new ones, to decide that there was a new contract in the case of Confederation Life Association v. Vega y Arminan involved strained reasoning, to say the least.

In Vega y Arminan, a Canadian company doing business in Cuba issued a life insurance policy to a Cuban, in Cuba. All payments were to be made there in United States dollars. When issued, therefore, the policy was clearly governed by Cuban law. The insured later

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205 See Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960); John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936). For an analysis of these cases and of later cases on the same issue, see Note, Post Transaction or Occurrence Events in the Conflict of Laws, 69 Colum. L. Rev. 843, 852-53 (1969). This Note is a good study of the law on post-transaction events. It concludes that not only is it quite constitutional for courts to take account of these events, but that they must do so to apply the interest approach correctly. Id. at 865. Although many of the jurisdictions that have adopted interest analysis would probably accept this reasoning, the matter is still disputed. In particular, the influential opinion of Chief Justice Traynor in Reich v. Purcell, 67 Cal. 2d 551, 555-56, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34-35 (1967), is authority against the stand taken by the Note writer.


207 This provision was common in Cuba, where for a long time American dollars were legal tender.

208 The question of the effect of the Cuban regulations if Cuban law did not govern the contract did not arise, for by the time of the action Cuba had withdrawn from the Bretton Woods Agreement, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, which established the International Monetary Fund and imposed regulations affecting choice of law. For a case with similar facts, but occurring while Cuba was still a member of the International Monetary Fund, see Confederation Life Ass'n v. Ugalde, 164 So. 2d 1 (Fla.), cert. denied, 379 U.S. 915 (1964).
sued in a federal district court in Florida for the cash surrender value of the policy in dollars. To pay, the insurer would have had to breach Cuban exchange control regulations, which of course governed if the contract were subject to Cuban law. The court rejected this defense, however, advancing the questionable argument that the insured's demand for the cash surrender value of the policy created a new contract by being the acceptance of a continuing offer made by the insurer. The fresh contract was governed by the law of Florida, the place of making.

It will naturally be comparatively rare that post-transaction events are sufficiently significant to influence the choice of law in a contract case. But the possibility must be borne in mind, particularly because of the completely different rule in England.

III

THE FEDERAL CONSTITUTION

A. Some Issues of Constitutional Law

English law in all fields, including the conflict of laws, is distinguished from that of the United States by the presence of pervasive issues of constitutional law in the American legal system. Another potential difference between the conflicts rules of the two countries is that in England most conflicts cases are international in character; in America the cases are mainly interstate. These two matters are related, because many of the differences or at least reasons for potential differences between American rules relating to interstate and international conflicts law are found in rules of constitutional law. Three significant questions are thus presented: Does United States constitutional law cause important differences between American and English choice of law rules in contract cases? Does constitutional law cause significant differences in America between rules for cases involving international

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209 207 So. 2d at 36-37.
210 There is some doubt as to whether Vega y Arminan would be followed today. Its antiquated reasoning but "modern" conclusion certainly furnish a strange contrast, although it is unlikely that a court genuinely following an interest approach would have come to the same conclusion, for Florida's main connection with the case was merely that of being the locus contractus of the alleged second contract. Vega y Arminan is discussed in the perspective of other cases in 9 VA. J. INT'L L. 478 (1969).
and interstate conflicts? If the answer to this second question is "yes," does this factor distinguish American from English choice of law rules?

There seems little doubt that it is constitutionally open to the federal authorities, through either congressional enactment or Supreme Court ruling, or a combination thereof, to make uniform the whole field of American conflict of laws as part of the federal law.212 The source of this power lies mainly in the full faith and credit clause of the Constitution.213 Within the field of commercial contracts, all doubt is dispelled by the commerce clause, under which Congress has power "[t]o regulate commerce with foreign Nations, and among the several States . . . ."214 To an extent, the possibility of federalizing conflicts law has become an actuality in the field of jurisdiction, but for historical reasons,215 and more recently because of the vast volume and complexity of the litigation that would be involved, the Supreme Court has made little effort to take choice of law out of the hands of the states.216 It may be that this inaction is contrary to the plans of the eighteenth-century Congresses; they probably intended to reserve choice of law to the federal jurisdiction.217 Arguably, federal laissez-faire in choice of law is an abdication of responsibility which has contributed to the confused state of American conflicts law.218 America has, said Justice Jackson, "so far as I can ascertain the most localized and conflicting system of any country which presents the external appearance of nationhood."219 The Federal Constitution could be a strong instrument for the unification of the choice of law rules of American states. Unified rules would at least mitigate the regrettable fragmentation identified by Justice Jackson. However, the potential of the Constitution in

212 See, e.g., id. passim. But see notes 220-30 and accompanying text infra.
213 U.S. CONST. art. IV, § 1.
214 Id. art. I, § 8, cl. 3.
[T]o the extent that choice of law will vary depending upon the forum in which the matter is litigated, choice-of-law considerations are necessarily implicated in decisions respecting jurisdiction and recognition. . . . [O]ne reflecting upon the rules developed by the court for these areas under the Due Process and Full Faith and Credit Clauses should keep this analytical deficiency in mind.
217 See Baxter, supra note 215, at 33-42. Interestingly, one of the few areas in which the Supreme Court has in fact federalized the rules of choice of law is in the contracts area, albeit only in the peculiar and relatively unimportant field of contracts of insurance between fraternal benefit societies and their members. See, e.g., Sovereign Camp v. Bolin, 305 U.S. 66 (1938). See also LEFLAR 128-30.
219 Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 COLUM. L. REV. 1, 18 (1945).
this direction is largely unrealized, and there seems little likelihood that the Supreme Court will change its attitude in the near future.

During the 1920's and 1930's the Supreme Court, in a series of decisions that chiefly involved insurance contracts, did in fact appear to be about to take control of all choice of law rules.\textsuperscript{220} This trend has now completely been reversed, and the Court today "embraces a 'states' rights' theory"\textsuperscript{221} in choice of law. According to the Court in \textit{Richards v. United States:}\textsuperscript{222}

Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.\textsuperscript{223}

The words "sufficiently substantial" indicate that although great freedom is accorded to the states, a choice of law will be struck down on constitutional grounds if it is arbitrary or discriminatory, as was the case, for example, in \textit{Home Insurance Co. v. Dick}.\textsuperscript{224} There the Court held that the choice of forum law by the trial court was so unrelated to the contract under litigation as to amount to a denial of due process. Theoretically, the \textit{Dick} case exemplifies a marked difference between English and American law, because there is of course no overriding prohibition on arbitrariness applicable to English choice of law rules. In practice, however, English judges in their selection and application of the proper law of a contract under litigation have always reached decisions that in America would be found to be well within constitutional requirements.

The analysis above is premised upon the belief that it is constitutionally open to the Supreme Court further to federalize choice of law rules and that, despite practical difficulties that would be involved,
this step might, on balance, be advantageous. This opinion is by no means unanimously held. Currie appeared to believe, for instance, that it is beyond the powers of the Court to lay down specific rules in most of the area of choice of law, although presumably Congress, as the legislative branch of the government, could formulate such rules. Currie's view is based upon an interest analysis argument that finds some support in language such as that quoted in the passage from Richards v. United States above. Currie argued:

The unimplemented clause requires deference to the law of a sister state only when that state has an interest in the application of its policy and the forum state has no such interest; in cases of conflicting interest, such as Kilberg, the Constitution does not choose between them. Congress has not exercised its power to determine the choice, and the Court cannot make the choice without assuming a legislative function of a high political order.

From a theoretical point of view, if Currie is right, the Supreme Court not only refrains from exercising a general supervisory power over choice of law in the several states (except to the extent that it strikes down wholly unreasonable or arbitrary rules); it does not have the power to exercise it. Consequently, there would be, in this respect, no potential difference between English law and the law applied by courts in the United States, since neither would be subject to supervision on points of constitutional law by a superior court above and outside the hierarchy of the courts of the state.

For present purposes, it is of little concern whether Currie's opinion is correct. It is exceedingly rare to find instances of American courts

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225 Currie, supra note 98, at 24.
227 Currie is referring to the constitutional power of Congress to pass legislation implementing the provisions of the full faith and credit clause. This power has remained unexercised, with the exception of a 1790 Act whereby states' "records and judicial proceedings... shall have... such faith and credit given to them in every court within the United States" (Act of May 26, 1790, ch. 11, 1 Stat. 122), amended in 1948 to read "Acts, records and judicial proceedings," etc. (Act of June 25, 1948, ch. 646, 62 Stat. 947), and now codified in 28 U.S.C. § 1738 (1970).
230 See Home Ins. Co. v. Dick, 281 U.S. 397 (1930). In Hughes v. Fetter, 341 U.S. 609 (1951), it was shown that Wisconsin courts, which routinely entertained actions for wrongful death caused within the state, refused to entertain a suit arising from a death in Illinois and based upon the Illinois wrongful death statute. The Supreme Court held that under the full faith and credit clause "Wisconsin cannot escape [the] constitutional obligation to enforce the rights and duties validly created under the laws of other states." Id. at 611.
applying choice of law rules which are wholly unreasonable or discriminatory, and no cases are known where this has happened in England. For this reason, whether the Supreme Court has the power further to federalize choice of law rules is of no practical concern. The likelihood of Supreme Court action to reverse the choice of law decision of a state court is as slim as the possibility that that decision will be wholly arbitrary or discriminatory.

B. Interstate and International Conflicts of Law

There is a long-standing dispute in the United States as to whether there is or should be any difference in the choice of law rules where the conflict is between two states of the Union and rules where a state and a foreign jurisdiction are involved. Ehrenzweig, chief protagonist of the group that would give a positive answer to this question, emphasizes his views by treating interstate and international conflicts as separate subjects. If Ehrenzweig is correct, then the task of this study is at least doubled, because it becomes necessary to compare English law with two branches of American conflicts law—interstate and international. The words “at least” are used because if there is this distinction in America, perhaps there is a similar contrast to be found in English law resulting from a possible dissimilarity in treatment of cases having connections with jurisdictions within the United Kingdom or within the British Commonwealth, or cases which are wholly foreign.

Ehrenzweig identifies certain hunches, policies, and influences which, in his opinion, would lead an American court to distinguish between international and interstate conflicts. Some of the more explicit examples include: (I) A court that would hesitate, for fear of seeming provincial, to invalidate a contract valid under the law of a

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233 He has gone so far as to write separate texts on each. A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW (1967); A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS (1962).
234 The daunting prospect of distinguishing three different systems of private international law in force in England is, however, illusory. The question is not even a live issue.

[For the purpose of private international law and so far as English courts are concerned, the law of Scotland, of the Channel Isles, of Northern Ireland, or of one of the member countries of the British Commonwealth is just as much a foreign law as the law of Italy or Portugal.

CHESIRE & NORTH 9. The few exceptions to this rule are not relevant here. The most important ones involve the enforcement of foreign judgments (see DICEY & MORRIS 965-1042) and the proof of foreign law. Id. at 1110-19.]
sister-state may be less unwilling to strike down the bargain were it valid merely under the law of a foreign jurisdiction. A court may be more solicitous toward the public policies of a foreign sovereign country, which will possibly face difficulties entirely different from those confronting any American government, than toward the policies of a sister-state when these differ from its own. A court's explicit forum orientation in international conflicts cases may be more tolerable than in interstate cases, since the former are characterized by the absence of unconditional judgment-recognition in foreign courts, which allows re-examination of the merits of a case, whereas the latter are subject to the requirements of full faith and credit.

In contrast to Ehrenzweig, the orthodox American view, embodied in section 10 of the Restatement (Second), is that there is no necessity for a difference between the techniques or rules applied to choice of law in international cases and those applied in interstate cases. Nevertheless, it remains true that certain factors peculiar to international conflicts law may compel a court to come to a different conclusion on a choice of law issue than would have been the case had the conflict been purely interstate, even though that court is applying the same rules for determining that law as it would in any other conflicts case.

There does not appear to be any quality inherent in the examples taken from Ehrenzweig that would suggest that he has discovered any issues which demand the adoption of different choice of law rules to accommodate them properly. He has simply identified facts, albeit important facts, which must be considered along with other relevant matters when a court is making a choice of law decision.

But the case for segregating international and interstate conflicts law does not rest wholly or even mainly upon such essentially non-legalistic and even discretionary considerations as those just given as

236 A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 21 (1967). It may be noted that the contradictory forces of factors 1 and 2 do not add to the strength of Ehrenzweig's argument.
237 Id. at 22.
238 As von Mehren and Trautman say: "[I]n our judgment the process of analysis remains the same; differences in result . . . merely reflect the degree to which experience has developed a sense of community and an understanding of the sister state's institutions and rules." A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON THE CONFLICT OF LAWS 4 (1965). This article is, of course, concerned with contracts between private individuals and thus with private law. In the area of public law conflicts such as enforcement of judgments, tax claims, and expropriation, the differences may be more significant. See Scoles, Interstate and International Distinctions in Conflict of Laws in the United States, 54 CALIF. L. REV. 1599, 1605-10 (1966).
examples. Formal legal rules of American constitutional and federal law exist which might perhaps be expected to cause relevant differences between the two types of cases. Foremost among these rules is that the full faith and credit clause has application only in interstate cases. However, the previous discussion\textsuperscript{239} has demonstrated by comparing American and English law that the presence of the constitutional requirement of full faith and credit is not in fact a cause of significant differences between the choice of law rules of the two countries. Likewise, one does not find any great difference in American choice of law rules between international and interstate cases arising from the operation of the full faith and credit clause. However, other aspects of federal law are pertinent in the international sphere. The federal government has certain powers to regulate international transactions by law and treaty. Reference has been made to the commerce clause of the Constitution,\textsuperscript{240} though with one important exception,\textsuperscript{241} the congressional power derived from this clause remains largely unexercised in any respects relevant to the conflicts problems raised by international contracts.

In contrast to the unexercised powers contained in the commerce clause is the field of maritime law, which is a wholly federal concern by constitutional reservation without the need for specific legislation.\textsuperscript{242} There is thus no question of "difference" from state rules here. However, federal law remains as yet incompletely developed in the maritime area. It is thus occasionally necessary for a federal court to adopt rules of state law in order to fill the gaps that would otherwise exist.\textsuperscript{243}

\textsuperscript{239} See notes 213, 215-19 and accompanying text supra; text following note 224 supra.

\textsuperscript{240} See text accompanying note 214 supra.

\textsuperscript{241} This exception is the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1970), which provides in part:

A written provision in any maritime transaction or a contract evidencing a transaction involving [international or interstate] commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

\textsuperscript{242} Id. § 2. In Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 406 (2d Cir. 1959), cert. dismissed, 364 U.S. 801 (1960), the court held: "It is reasonably clear that Congress intended by the Arbitration Act to create a new body of federal substantive law affecting the validity and interpretation of arbitration agreements." That is, state courts cannot avoid the Act by characterizing the issue of arbitration as procedural and applying forum law. Nevertheless, this position is not entirely certain. See Note, The Federal Arbitration Act in State Courts: Converse Erie Problems, 55 Cornell L. Rev. 923 (1970).

More complicated are the largely unanswered questions raised by *Banco Nacional de Cuba v. Sabbatino*, 244 which exemplifies the ill-defined principle that federal rather than state law controls any issue in United States litigation, including private suits, with regard to which American foreign affairs may be involved.245 Leflar states:

This is true whether there is relevant enacted law or not. If no enacted law exists, the governing law is developed by the federal courts and constitutes [an] area of federal common law. Difficult questions can arise as to what matters fall within the foreign affairs category for this purpose, since the interests and policies of nations differ, and often change with the years. They will have to be recognized as they exist at any given time, with respect to any particular nation.246

Speculation as to what types of international contracts might be affected by this rule is profitless. But clearly, a party to a contract who is apprehensive about the possible results of applying state choice of law rules to the disputed issues might find considerable room for argument that the litigation involves United States foreign affairs and that federal rules, which might produce a different result, should apply.

Although a general study of American foreign relations is of course inappropriate here, there is one aspect of United States foreign policy that should be mentioned for its potential to affect markedly the choice of law rules normally applicable to international contracts—the American habit of conducting economic warfare in times of peace against nations of whose governments the United States strongly disapproves. In relevant cases, this practice can cause a result entirely different from that which would obtain in interstate, or indeed English, cases presenting otherwise similar facts. For example, in 1963 the Department of State announced Treasury restrictions that would "contribute further to the economic isolation of Cuba"247 whereby, *inter alia*, payments by life insurers to Cuban nationals were authorized only if made by deposits in blocked accounts in American banks in the name of the national who was the ultimate beneficiary of the policy.248 Thus, the contractual provisions for payment in a private insurance policy were subjected to a countervailing set of rules by the intervention of American foreign policy makers.

This sort of regulation does not, of course, illustrate any basic dif-

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244 376 U.S. 398 (1964); see Leflar 138, 157, 174-75.
245 See Leflar 156-57.
246 Id.
ference between the legal systems of the United States and the United Kingdom. The British government certainly could take such steps as those taken against Cuba by the United States. The significant difference is, however, that Britain does not in practice promulgate peacetime economic regulations aimed at particular countries, thereby distorting the normal rules of the conflict of laws as applied to international contracts.

A related question arises from the treaty-making power conferred on the President and Senate by the Constitution. This power has been little used in a manner that would affect private contracts. Some doubt exists concerning how far the federal government may by treaty derogate from the rights of states to make their own laws. Nevertheless, it appears to be increasingly accepted that it is a proper function of the Presidency to make treaties regulating the field of international trade, as exemplified, for instance, by the recent enthusiastic participation of the United States in the Hague Conferences on Private International Law and the United Nations Commission on International Trade Law.

Concerning these issues of constitutional and federal law, the same question should be asked that was relevant to the factors identified by Ehrenzweig. Do they, or should they, compel American courts to adopt different rules and approaches to the choice of law problem in international and interstate cases? The answer must be "no." American foreign policy, a treaty, or some requirement of federal law are surely no more than factors or choice-influencing considerations which must be borne in mind when considering certain issues. Granted, these factors may occasionally have such decisive importance as to override all others. This is, however, a property shared by many choice-influencing considerations. It is difficult, for instance, to conceive of any circumstances that would justify a court's holding unenforceable for informality a contract for the sale of land that complied with the form requirements of the lex situs.

250 U.S. Const. art. II, § 2, cl. 2.
253 See text accompanying notes 233-37 supra.
Where a state has adopted the flexible, pragmatic approach of the Restatement (Second) to govern its choice of law rules in contract cases, the American distinction between interstate and international conflicts should prove to be no more than a complicating factor, and certainly no reason for adopting different sets of rules in the two types of cases. The Restatement (Second) is correct to say:

The rules in the Restatement of this Subject apply to cases with elements in one or more States of the United States and are generally applicable to cases with elements in one or more foreign nations. There may, however, be factors in a particular international case which call for a result different from that which would be reached in an interstate case.254

For an Englishman, perhaps the most significant factor to be borne in mind when studying the American situation is that the law of international trade has been to some extent federalized in the United States with respect to both substantive and choice of law rules. To a lesser extent, there is a certain federalizing of choice of law rules relating to purely interstate contracts. Finally, some provisions of the American Constitution apply to interstate but not international contracts, and vice-versa. Therefore, to discover the law relevant to a particular case, it is insufficient merely to ascertain the law of the jurisdiction in which suit is brought, for there may be pertinent overriding federal or constitutional rules.

However, although some areas of contract law are governed by federal rules and others by state rules, it does not necessarily follow that as applied to a particular case these rules will necessarily be differ-

254 Restatement (Second) § 10. There are several other matters which for completeness ought to be mentioned in an examination of the differences between interstate and international conflicts law in the United States but which are not developed fully here. (1) Proof of foreign law in American courts is now largely regulated by statute; the methods of proof and the consequences of failure to plead and prove foreign law will almost certainly vary according to whether or not the law concerned is or is not that of a sister state. See R. Schlesinger, supra note 107, at 38-187. (2) The effect upon international contract litigation of Uniform Commercial Code § 1-105(1) is as yet uncertain. This section, the UCC's general choice of law provision, contains an essentially forum-favoring element. Scoles argues that the section can be construed to minimize the effect of this element in cases with significant international contacts. Scoles, supra note 236, at 1622. But see Weintraub 418. (3) It is occasionally argued that the conflict of laws really has little business meddling with international trade at all, and that a new lex mercatoria, separate from most or all of the requirements of any particular municipal legal system is developing. See notes 394-98 and accompanying text infra. (4) It is claimed that forum-shopping is not significant in international cases. See Darby, The Conflict of Laws and International Trade, 4 San Diego L. Rev. 45, 52-53 (1967). If there is any substance at all to this claim, at most the difference from interstate cases must be only a matter of degree.
ent. They simply have different sources. Therefore, to take up an example given above, even assuming that a contracting party convinces a court that his case concerns United States foreign affairs and that consequently federal choice of law rules must apply, these rules will not necessarily be different from the corresponding state rules. Generally speaking, the greatest difference will probably occur where the state concerned has not adopted the principles of interest analysis, since federal courts, particularly after being given the lead by the Supreme Court in *Lauritzen v. Larsen*, show a marked tendency towards modern reasoning.

IV

CONTRACTS CONTAINING AN EXPRESS CHOICE OF LAW CLAUSE: PARTY AUTONOMY

A. Express Choice Where the Issue Relates to Facultative Rules of Law

Most rules of contract law in both England and America perform essentially a gap-filling function. Where contracting parties have not considered certain matters, the law completes the construction of their contract for them. In these gap-filling cases, it would have been open to the parties initially to have decided the issues in their own way—and not necessarily as the law prescribes in the absence of any decision by the parties. The law neither demands nor prohibits parties' own solutions but simply imposes its own where they have not done so.

If the parties would have been at liberty to determine these issues of facultative law directly at the time of making their contract, there is no reason why they should not be able to do the same thing indirectly by expressly stipulating that such questions should be dealt with according to the law of a particular state or nation. This is in fact the rule in both England and America. It is expressed in *Restatement (Second)* section 187(1) as follows:

The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is

255 See notes 244-48 and accompanying text supra.
256 345 U.S. 571 (1953).
257 See *Restatement (Second)* § 187, comment c at 563.
258 This is not to say that courts will always accept the terms of a contract as the parties may dictate them, as, for example, in the case of unconscionability.
259 On the English rule, see CHISHIRE & NORTH 210 and authorities cited there.
one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

This section is in effect "a rule providing for incorporation by reference and is not a rule of choice of law," but

the point deserves emphasis . . . because most rules of contract law are designed to fill gaps in a contract which the parties could themselves have filled with express provisions. This is generally true, for example, of rules relating to construction, to conditions precedent and subsequent, to sufficiency of performance and to excuse for nonperformance, including questions of frustration and impossibility. As to all such matters, the forum will apply the provisions of the chosen law. But

B. Express Choice Where the Issue Relates to Nonfacultative Rules of Law

1. Statement of the Autonomy Principle

The Restatement (Second) in section 187(2) adopts almost without compromise the autonomy principle:

The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Whether the rule expressed by section 187(2) is correct is one of the perennial arguments among conflicts scholars. The dispute completely overshadows the unanimous agreement on section 187(1), a rule which in effect covers most of the contracts area of conflicts law, for, as noted above, most of the rules of contract law are facultative. Comparatively few cases concern issues "which the parties could not have resolved by an explicit provision in their agreement," but these are the hard cases.

260 Restatement (Second) § 187, comment c at 563.
261 Id.
2. Rationale of the Autonomy Principle

Professor J.-P. Niboyet raises two objections to allowing parties the freedom to specify the law to govern their contracts:

In internal law in the area of obligations, . . . the agreements of the parties are limited by a whole field: that of imperative laws. Thus, in French law, the formation of a contract requires a valid consent, a "cause," and a lawful object. By their own will, the parties cannot decide not to respect the rules of law. Any agreement to the contrary would be absolutely void. No difference is possible in this regard between one imperative law and another, whether it is the law of obligations, of persons, of goods, or of estates; the sanction is invariably the same.

But this is not so in international law! Imperative laws, in the transition from internal law to international law, become simply facultative; they are degraded by the transition. Why . . . ? It is a historical phenomenon. We must recognize this. . . . [I]t exists without any other justification.203

Essentially, Niboyet contends that where autonomy does not exist in domestic law, it should have no place in the private international law of contracts. Niboyet argues, as he is entitled, by analogy. But all analogical disputation has a weakness: it fails when there may be shown relevant differences between opposite sides of the analogy. It is submitted that different considerations relating to contracts with multi-state contacts not only justify but demand a treatment at variance with that accorded to purely domestic bargains.

Beale's objections to autonomy were more closely reasoned than Niboyet's. Fitting his argument into the scheme of the vested rights doctrine, Beale argued as follows: any cause of action is created by the law of the jurisdiction where the last act necessary to consummate that cause of action occurred.204 If that law is to be changed, it is a matter for the legislature of that state. But the principle of party autonomy purports to permit parties to choose at will a law to govern their contracts, thus possibly creating a cause of action by the law of some other state, or nullifying a cause of action that might exist under the law of the state of the last act. According to Beale, this amounts to giving the parties the power to change the laws of sovereign states—power, in effect, to legislate.205

203 Niboyet, La Théorie de l'Autonomie de la Volonté, 16 Recueil des Cours 5, 7 (1927) (translation) (emphasis in original).
204 See notes 23-27 and accompanying text supra.
205 The fundamental objection to [the autonomy principle] in point of theory is that it involves permission to the parties to do a legislative act. . . . The adoption of a rule to determine which of several systems of law shall govern a given transaction is in itself an act of the law. . . . Now, if it is to be said that this is to be left
There are two possible answers to Beale. Cook, conceding that party autonomy permits parties to do a legislative act, went on to argue that this is not a valid objection to the doctrine. He contended that there are many areas of law within which individuals are permitted to legislate. They may, for example, draw up their wills as they please, within wide limitations. They may contract out of many otherwise binding provisions of such laws as the Uniform Commercial Code. However, Cook’s argument involves giving the word “legislation” such an extended meaning as to deprive it of significance. For example, the act of a father in drafting his will so as to omit a son who has disappointed him is basically different from the kind of act that is contemplated by the rule that the legislative power of Congress may not be delegated to individuals. And if one concedes that the autonomy doctrine permits “legislation” by individuals, there is more than a suspicion that one is in fact according to individuals the kind of power that should be reserved for legislatures.

The better answer to Beale is contained in the comments to section 187 of the Restatement (Second):

There is nothing to prevent the forum from employing a choice-of-law rule which provides that, subject to stated exceptions, the law of the state chosen by the parties shall be applied to determine the validity of a contract and the rights created thereby.

The action of the parties in choosing a certain law to govern their contract is thus seen to be, and is treated as, the creation of a factual situation by private act and not of a law by legislative act. The parties are to the will of the parties to determine, that gives to the parties what is in truth the power of legislation so far as their agreement is concerned. The meaning of the suggestion, in short, is that since the parties can adopt any foreign law at their pleasure to govern their act, that at their will they can free themselves from the power of the law which would otherwise apply to their acts.


W. Cook, supra note 24, at 392-98.

Uniform Commercial Code § 1-102(3).


Restatement (Second) § 187, comment e at 565. The Restatement (Second)’s explanation may be compared with F. M. & D.L., Foreign Trade Monopoly: Private International Law 101 (1967). Mädl contends that parties are not really permitted to make up their own law and that there is not an abeyance of otherwise applicable rules, since they have only a mere right of choice, i.e., the right to select the one of the legal systems containing provisions for the very transaction, to which they then submit themselves. There is no question of a submission to nil, there is no legal vacuum. Id. This begs Beale’s question; it would surely be no less “legislation” for parties to substitute law applicable under some foreign system than to invent their own system or rules. Whether the forum will permit one course and forbid another is, of course, a different question.
given power to arrange the factual content of their contracts, but the legal consequences remain to be decided according to the law. Jurisdictions adopting the autonomy doctrine simply predicate certain legal consequences (the application of the chosen law) upon the factual conduct of the parties (the making of the choice).

A jurisdiction can therefore adopt the autonomy principle without unduly straining the traditional canons of positivist jurisprudence. Whether it should do so, however, involves practical rather than theoretical considerations, which were summed up neatly by the United States Court of Appeals for the Second Circuit in Siegelman v. Cunard White Star Ltd.: 270

Instead of viewing the parties as usurping the legislative function, it seems more realistic to regard them as relieving the courts of the problem of resolving a question of conflict of laws. Their course might be expected to reduce litigation, and is to be commended as much as good draftsmanship which relieves courts of problems of resolving ambiguities. . . . A tendency toward certainty in commercial transactions should be encouraged by the courts. 271

Since the Siegelman decision in 1955, increasing court congestion in the United States has lent added urgency to the need for a reduction in litigation. Conflicts law, as a field, though admittedly comprising relatively few cases, 272 has if anything exacerbated the problems faced by the courts. The Babcock case "illustriates that as the law improves, it is likely to grow more complex; whether for good or for ill, here is a change in law that adds just a little bit more to the burdens on courts and judges." 273

The complexity of the Babcock rule for torts is reflected in the recent changes that have occurred in the area of contracts. Certainly there are now more "decision points" 274 for a court's consideration than

270 221 F.2d 189 (2d Cir. 1955).
271 Id. at 195; accord, RESTATEMENT (SECOND) § 187, comment e at 565; cf. Bernkran t v. Fowler, 55 Cal. 2d 588, 596, 360 P.2d 906, 910, 12 Cal. Rptr. 266, 270 (1961): "Unless they could rely on their own law, they would have to look to the laws of all of the jurisdictions to which [the promisor] might move regardless of where he was domiciled when the contract was made." But see Weintraub 408. Discussing the "commercial certainty" argument, Weintraub notes, with some justification, that "[c]ommercial convenience and avoidance of the frustration of the parties' plans is served by validating the contract whenever it is reasonable to do so." Id. (footnote omitted). For an argument that because of its promotion of business convenience the autonomy rule may be justified by the commerce clause of the Constitution, see Horowitz, The Commerce Clause as a Limitation on State Choice of Law Doctrine, 84 HArv. L. Rev. 806, 822 (1971).
272 Compared to, for example, automobile negligence cases or family law cases.
274 Id., at 85-110.
under the mechanical place of making/place of performance rules. Autonomy in choice of law can limit these problems significantly.\textsuperscript{275}

Such are the chief arguments in favor of allowing parties to stipulate the law to govern their contracts. As a counter-argument, if it were the case that as a general rule parties could select a law that would not only free them from the rules of an otherwise applicable law, but free them in such a manner that they could engage in conduct clearly contrary to the policies of that other law, then this factor could outweigh the advantages of certainty gained from recognizing their autonomous choice. But this is not the general rule. Rabel has emphasized that

\begin{quote}
[c]onflicts rules delimiting the application of private law rules exist because the substantive rules of the various civilized jurisdictions are supposed to be exchangeable. This relationship should not be jeopardized at the forum by a pretended superiority of its own policies or legal techniques.\textsuperscript{276}
\end{quote}

It is not claimed that permitting autonomous choice of law will never result in serious conflicts of policy between the chosen law and otherwise applicable law.\textsuperscript{277} But such cases will be a minority, and as befits a minority, should be dealt with as exceptions.\textsuperscript{278} They constitute the occasion for certain limitations on parties' freedom of choice, but they do not outweigh the value of recognizing the autonomy principle as a general rule.

\section*{3. Judicial and Scholarly Views on the Autonomy Principle}

There has been little serious doubt for the last century that English courts subscribe to the autonomy principle. Lord Atkin's classic formulation in \textit{Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft}\textsuperscript{279} reads:

\begin{quote}
The legal principles which are to guide an English Court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract[,] if any, which will be conclusive.\textsuperscript{280}
\end{quote}

\textsuperscript{275} \textit{See id.} at 103-04. Frank discusses the increasing complexity of choice of law rules for contract cases and mentions the question of autonomy without recognizing that, in following the parties' express choice of law, a court can avoid much of this complexity.
\textsuperscript{276} \textit{2 E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY} 582 (2d ed. 1960).
\textsuperscript{277} \textit{See notes} 355-81 and accompanying text \textit{infra}.
\textsuperscript{278} \textit{See notes} 313-434 and accompanying text \textit{infra}.
\textsuperscript{279} \textit{[1937]} A.C. 500, \textit{[1937]} 2 All E.R. 164.
\textsuperscript{280} \textit{Id.} at 529, \textit{[1937]} 2 All E.R. at 166; \textit{see} authorities collected in \textit{DICEY & MORRIS} 691 n.2.
This rule has yet to survive in any reported case the acid test of being used to validate a contract void by the law most significantly connected with it. But too much should not be made of this. Lord Atkin’s statement is clear, and two years later in another leading case, in which the governing law was held to be that of England, Lord Wright observed: “It might be said that the transaction . . . contains nothing to connect it in any way with English law, and therefore that choice could not be seriously taken. . . . Connection with English law is not as a matter of principle essential.”

In the United States, it is more an act of faith than a deduction of legal reasoning that leads one to assert that section 187(2) of the Restatement (Second) embodies the American rule, or even the majority rule among American jurisdictions. Clear support for autonomy may be found at the level of the Supreme Court. But in the state of New York, for example, a case denying the autonomy principle preceded the Second Circuit’s decision in Siegelman v. Cunard White.

281 By a selective and objective study of English cases it is possible to make some sort of an argument for the following proposition: “It remains an open question whether English courts would honor a stipulation of foreign law which did not coincide with English conflicts rules if the contacts between the contract and the foreign law were as minimal as in the cases where the stipulated English law was honored.” Lowe, Choice of Law Clauses in International Contracts: A Practical Approach, 12 HARv. INT’L J. 1, 9 (1971). But such an analysis ignores both the English respect for not only what the courts do but also what they say. That courts should “honor a stipulation of foreign law” is itself an “English conflicts rule.”


283 Id. at 290, [1939] 1 All E.R. at 521 (Lord Wright). Certain doubt was thrown upon the uncompromisingly expansive nature of their Lordships’ remarks by Lord Denning, who said in Boissevain v. Weil, [1949] 1 K.B. 482, 491 (C.A. 1948): “I do not believe that parties are free to stipulate by what law the validity of their contract is to be determined. Their intention is only one of the factors to be taken into account.” See also In re Helbert Wagg & Co., [1956] 1 Ch. 323, 341, [1956] 1 All E.R. 129, 136 (1955).

Such a statement in America, with its rapid change in choice of law rules, might have cast serious doubt upon pre-World War II authority, even from levels comparable to those of the House of Lords and Privy Council. But Lords Atkin and Wright have been vindicated by two recent cases in which the House was not tempted by Lord Denning’s heresy, and maintained its adherence to the autonomy principle. Compagnie Tunisienne de Navigation S.A. v. Compagnie d’Armement Maritime S.A., [1971] A.C. 572, [1970] 3 All E.R. 71 (1970); Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd., [1970] A.C. 583, [1970] 1 All E.R. 796.

284 P. 492 supra.

285 See Lauritzen v. Larsen, 345 U.S. 571, 588-89 (1953). The Supreme Court has recently stated that autonomy will be respected absent a showing of overreaching, duress, fraud, or the unavailability of a day in court for the complaining party. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); see notes 108-16 and accompanying text supra.
by only six years, and in the very year that *Siegelman* was decided, a federal district court in New York held that an express choice of law is only one of several factors to be considered in determining which forum has the most significant connection with the dispute. When the issue was before it in *Haag v. Barnes*, the New York Court of Appeals recognized the autonomy principle as the "traditional view" and the significant contacts approach as the "more modern view." The court concluded that under either view its decision would be the same, but that under the modern view an express stipulation for a particular law is an important factor to be considered by a court in making its choice of law.

If *Haag* is authority that the New York courts do not follow the autonomy rule in general contract cases, an interesting situation is presented, since New York has enacted the Uniform Commercial Code, which specifically provides for autonomous choice of law in contracts to which it applies. The result is that New York may currently have two choice of law rules for contracts, depending on whether or not the transactions are governed by the UCC.

New York courts, however, will probably uphold party autonomy when the issue is squarely presented. First, *Haag* is, by the standards of the rapidly changing field of the conflict of laws, a relatively early case. Second, for the reasons outlined above, the case cannot be regarded as incontrovertibly denying that the doctrine is part of New York law. Third, the adoption of the autonomy principle by the New York legislature for contracts under the Uniform Commercial Code in 1962 and the publication of the *Restatement (Second)* in 1971 will probably influence the courts to some extent in cases not falling under the Code. Finally, *Restatement (Second)* section 187 has already been cited with approval by a federal district court sitting in diversity in New York.

Among recent academic studies, there is a fairly strong measure of agreement. Although most are in favor of autonomy in principle, it is generally felt that, despite the view of the *Restatement (Second)*, the
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doctrine does not form part of the law and is unlikely to do so in the near future. However, many academics seem overly influenced by the old cases decided under the vested rights theory, which have yet to be overruled in many jurisdictions. In those states that have adopted interest analysis, it seems that these vested rights cases must surely fall before the first attack of skilled and diligent counsel, for they are founded on reasoning which is now quite discredited.

In the 1940's, it was often contended that parties were not allowed to choose the law to govern their contracts at all, for in doing so they would be exercising a legislative function. In the 1950's, opinion did not change greatly, but was based on the more respectable reasoning that American cases were by and large unfavorable to autonomy. Morris Levin formulated a new "proposed rule" that party stipulations should be honored where the chosen law had a "substantial connection with the transaction and its enforcement would not be contrary to the public policy of the forum," which he apparently thought was a rather radical suggestion. Dean Henri Batiffol, referring to American as well as to foreign law, considered that "an express clause in the contract choosing the law is only an indication to the judge of the most real connection as the parties see it." Another foreign observer, Professor R. H. Graveson, concluded as late as 1960 that Siegelman was untypical, and that American law was better represented by the celebrated vested rights judgment of Chief Judge Learned Hand in E. Gerli & Co. v. Cunard Steamship Co. When he wrote, Graveson was correct to conclude that "the English courts have given parties far greater freedom to choose what law they wish to govern their contracts than have the American courts." However, subsequent history has shown him to have been incorrect in his assessment of the relative importance of the Siegelman and Gerli cases.

Graveson's position was understandable at the time, but the dim view of the prospects for party autonomy as a rule of law that has been


298 See Graveson, supra note 5, at 98.

299 48 F.2d 115, 117 (2d Cir. 1931): "Some law must impose the obligation, and the parties have nothing whatever to do with that . . . ."

300 Graveson, supra note 5, at 100.
taken by later writers is somewhat surprising. In 1964, it was said that there was a "strong and ... growing opposition to allowing parties the choice of the law governing their contract."³⁰¹ Two years later, the answer to the question whether a choice of law clause was valid "where a foreign contract contemplates United States law or where a domestic contract contemplates foreign law" appeared to be "no,"³⁰² because there was "in courts' attitudes toward party autonomy a general malaise."³⁰³ When Leflar published the second edition of his treatise in 1968, "the enforceability of choice of law clauses [was] even yet a matter of some doubt in American law,"³⁰⁴ because "[a] clause in the contract specifying the law intended to govern will be helpful, but might not be respected."³⁰⁵

If the sixth tentative draft of the Restatement (Second),³⁰⁶ published in 1960, did not persuade these writers that the day of autonomy had come, then neither did the Proposed Official Draft, published eight years later.³⁰⁷ Even now, according to one writer, "[c]hoice of law clauses are honored in the vast majority of cases only when courts' conflicts rules coincide with the stipulation of the proper governing law."³⁰⁸

Opposing this string of pessimistic comment, there has battled a very small band. Professor Reese, Reporter of the Restatement (Second), has of course beaten the drum for party autonomy.³⁰⁹ But otherwise, one finds little published scholarly belief that the principle is part of American law. One exception is a leading article by Weintraub,³¹⁰ who, ironically enough, in other respects disagrees rather vehemently therein with the contracts rules of the Restatement (Second).³¹¹ It is submitted that Reese and Weintraub are correct. Indeed, with the authority of the American Law Institute behind them, they are not in quite the minority that the foregoing head-count

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³⁰¹ Schliesser, International Sales Agreements, 10 PRAC. LAW., Jan. 1964, at 45, 49.
³⁰² Johnston, Party Autonomy in Contracts Specifying Foreign Law, 7 WM. & MARY L. REV. 37, 60 (1966) (emphasis in original)
³⁰³ Id. at 53.
³⁰⁵ LEFLAR 366.
³⁰⁶ RESTATEMENT (SECOND) § 332a (Tent. Draft No. 6, 1960).
³⁰⁹ E.g., Reese, supra note 9.
³¹¹ Id. at 410-12.
would indicate. The *Restatement (Second)* rule has already been extensively and favorably cited by American courts, even before its final publication.\(^{312}\) The rule of at least the more important American jurisdictions appears to be, as in England, that parties may expressly select the law to govern their contracts. There are certain exceptions, limitations, and qualifications to this general rule at which point English and American law significantly diverge.

4. Qualifications Upon Party Autonomy

a. General: The Narrower Field Allowed to the Doctrine in England. The terms of *Restatement (Second)* section 187\(^{313}\) make it clear that parties' discretion to select the law to govern their contracts is not unlimited. As might be expected, the position in England is similar. A number of specific qualifications upon party autonomy may be identified. But before these are discussed, certain more general restrictions should be mentioned.

First, it must be emphasized that "party autonomy" as used in this article is a doctrine of the conflict of laws. It can therefore have no application to a wholly domestic contract. Parties to such contracts may not avoid mandatory rules of domestic law by purporting to select some other law to govern their relationship, although they are of course free under most domestic legal systems to incorporate foreign rules of law by reference into their contracts in place of otherwise applicable facultative laws. This is a question of construction, not of the conflict of laws.

Second, it will be noticed that when individual limitations upon autonomy are discussed, English courts generally appear to allow more latitude to contracting parties than do American ones. There are historical reasons for this difference. England never passed through the dogmatic vested rights era that beset the United States;\(^{314}\) consequently, autonomy in England is by no means a fresh idea to be handled gingerly.

But more important, the American rule, contained in *Restatement (Second)* section 187, has a far wider applicability over the varied issues that may arise in contract litigation than does the corresponding rule of English law. For example, no suggestion has been discovered that Lord Atkin's dictum\(^{315}\) favoring the law chosen by the parties should apply to questions of contractual capacity so as to allow parties to

\(^{312}\) 3 *Restatement (Second)* 628-30 (Appendix).
\(^{313}\) F. 491-92 *supra*.
\(^{314}\) See text following note 25 *supra*; notes 28-35 and accompanying text *supra*.
\(^{315}\) Text accompanying note 280 *supra*. 
endow themselves by means of a choice of law clause with a capacity which they would not otherwise enjoy. Here there is an exception to the general rule that the proper law, identified by a choice of law clause where there is one, governs most aspects of a contract. Such an exception may be viewed almost as a concession by English jurisprudence to the American issue-by-issue approach, an acknowledgment that, however flexible a choice of law rule may be, the field of contracts is too broad for one formula to cover all cases.

On the other hand, in American courts that have adopted the principles of interest analysis, there is no reason for the issue of capacity to be treated any differently than that of, for example, essential validity. Consequently, the Restatement (Second) expresses the view that the parties' express choice of law is at least primarily what will govern their contract for issues of capacity. But although questions of capacity and essential validity may be approached in the same fashion, the actual operation of section 187 may be expected to vary somewhat depending upon the issue at bar. Section 187(2) contains built-in limitations upon party autonomy; broadly, there must be a substantial or other reasonable relationship between the transaction and the law chosen, and application of the law chosen must not be contrary to a fundamental policy of the law that would be applicable in the absence of a choice of law clause. Domestic law relating to capacity is likely to be indicative of a strong social policy. Therefore it may be expected that with respect to cases in which the issue is contractual capacity, the limitations on the freedom conferred by section 187(2) will play a relatively important role.

Here, the key word is "relatively." The issue-by-issue approach adopted by section 187 means that there need be no difference in kind of treatment of one type of issue from another in contract cases. The emphasis will simply vary with the facts of the case. In this manner, the basic rules of section 187 (supplemented by section 188 where there is no express choice of law) are applicable to all the different issues that may arise under a contract, including, inter alia, formalities, misrepresentation, illegality, usury, construction of terms, and quantum of damages.

A rule of such broad applicability may be expected to have broad exceptions. Because of these exceptions, the English limitations with respect to specific qualifications upon party autonomy, the subject of

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316 See text accompanying notes 38-40 supra.
317 Restatement (Second) § 187(2) & comment d at 564; id. § 198(1).
318 Id. § 187(2).
319 See id. §§ 198-207 for a complete list.
the succeeding sections, will generally be found to be less stringent than their American counterparts.

b. Requirement of Substantial Relationship. In the same case in which he declared that "[c]onnection with [the chosen law] is not as a matter of principle essential,"\textsuperscript{820} Lord Wright also said that the parties' choice must be "bona fide and legal."\textsuperscript{821} This requirement finds its American parallel in the demand of the \textit{Restatement (Second)} that the "chosen state [have some] substantial relationship to the parties or the transaction and there [be some] other reasonable basis for the parties' choice."\textsuperscript{822} Exactly what it meant by a "bona fide and legal" choice of law is unclear, but the English rule does seem to favor a less limited freedom of choice than that adopted by the \textit{Restatement (Second)}.

Is there a rational basis for arguing that party choice should be confined to laws substantially related to the contract? In favor of an affirmative answer to this question, it may be argued that the law of a state without any (or any significant) interest in a contract should not govern that transaction. But the plausibility of this argument crumbles in the face of the consideration that as between two laws closely connected with and almost equally interested in the contract, it is certainly open to the parties to choose the law with the lesser connection, that is, the law of the state with the lesser interest in the transaction. This is the law in England and America. If the state of the closest connection may be excluded by party stipulation, it seems difficult to argue that there must be any connection between the chosen law and the contract. At any rate, merely ensuring such a connection would not seem to have value in its own right. However, this reasoning naturally does not preclude the imposition of other limitations, such as that the choice must be in some manner reasonable or not evasive of important provisions of law that would otherwise be applicable.\textsuperscript{823}

The leading English case on the question of substantial relationship is probably \textit{Vita Food Products, Inc. v. Unus Shipping Co., Ltd.}\textsuperscript{824} In that case, a Nova Scotian company contracted to carry goods by sea from Newfoundland to New York. The goods were damaged in transit, allegedly through the negligence of the captain of the defendant shipping company. By Newfoundland statute,\textsuperscript{825} the contract should have


\textsuperscript{821} Id.

\textsuperscript{822} \textit{Restatement (Second)} § 187(2)(a).

\textsuperscript{823} Professor Reese makes this argument. \textit{See} Reese, \textit{supra} note 52, at 53.


\textsuperscript{825} Carriage of Goods by Sea Act, 1932, 22 Geo. 5, c. 18, s. 3 (Newf.).
been subject to the Hague Rules and an express term to that effect included in the bills of lading. In fact, the bills omitted reference to the Hague Rules and instead expressly chose that English law govern. An exception clause in the bills, valid under English law and, incidentally, under the Hague Rules clearly protected the defendants from their captain's negligence. The case reached the Privy Council on appeal from the courts of Nova Scotia. The Judicial Committee upheld the parties' choice of law and found for the defendants on the basis of the exception clause. The clear implication of the Committee's advice is that the exception clause would have been found valid whether or not Newfoundland law coincided with English law on this issue, in spite of the absence of any connection between the transaction and English law and the conceded fact that the contract was most closely connected with Newfoundland.

It is true that Lord Wright, speaking for the Committee, mentioned that the ship's underwriters were likely to have been English, and that "[i]n any case parties may reasonably desire that the familiar principles of English commercial law should apply." But these remarks were really quite supplementary to His Lordship's decision, already unequivocally stated, that "connection with [the chosen law] is not . . . essential."

It is sometimes argued that no English case, taking both its facts and its decision, conclusively shows that parties may stipulate for the application of a wholly unconnected law. *Vita Food Products* is minimized because of the passing reference to English underwriters. Nevertheless, in at least two other cases a choice of law has been up-

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326 Carriage of Goods by Sea Act, 1924, 14 & 15 Geo. 5, c. 22.
327 A modern American court would probably, therefore, decide for the defendants by holding that a false conflict existed. Cf. Cheshire & North 208.
328 At the time, the Hague Rules were also part of English law, but applied only to outward shipments from England. See [1939] A.C. at 287-89, [1939] 1 All E.R. at 519-20; Cheshire & North 208.
330 Id. at 290, [1939] 1 All E.R. at 521.
331 Id. The Reporter of the Restatement (Second) in his Notes to § 187 misconceives the effect of *Vita Food Products*, citing it as authority for the proposition that there must be some substantial connection with the chosen law or some other reasonable basis for the parties' choice, on the assumption that Lord Wright's reference to the underwriters and to English commercial law form part of the *ratio decidendi* of the case. Restatement (Second) § 187, Reporter's Note, comment f at 574. This is not the accepted English view of the case. See Cheshire & North 208.
332 "At least" is used because numerous cases in which the only connection with the state of the chosen law was that it was also the chosen arbitral forum can also be said to support the argument made here. See Prebble, *Part II*, notes 624-50 and accompanying text.
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held in transactions with no connection with that law. These are *British Controlled Oilfields v. Stagg* and *Tzortzis v. Monark Line A/B* in the High Court.

Stagg involved a contract between a Canadian company (the plaintiff) with a branch office in London and an Ecuadorian citizen, engaged in business in that country, for the sale of mineral rights in Ecuador. A clause in the contract read: "It is agreed that while for convenience this agreement is signed by the parties in the city of New York, United States of America, it shall be considered and held to be one duly made and executed in London, England." The plaintiff company invoked the jurisdiction of the English court under the Rules of the Supreme Court, which read in relevant part as follows:

>[S]ervice of a writ, or notice of a writ, out of the jurisdiction is permissible with the leave of the Court . . . to recover damages or obtain other relief in respect of the breach of a contract . . . by its terms, or by implication, governed by English law.

Despite the lack of connection with England, Mr. Justice Sargant denied the defendant's motion to dismiss, holding that the clause quoted was an effective choice of English law and therefore of English jurisdiction.

In *Tzortzis*, Swedish sellers contracted to sell a Swedish ship to Greek buyers, deliverable at a Swedish port, with payment to be made in Swedish money. The contract was in English, the money of account was sterling, and a clause provided for arbitration in London. Disputes arose under the contract and were submitted to arbitration. Before going into the substantive issues between the parties, the arbitrators first considered the question of whether English or Swedish law was the proper law of the contract. The arbitrators' award on this preliminary point was stated as a special case for the opinion of the Queen's Bench Division, Commercial Court. Pursuant to the rule of *qui elegit judicem elegit jus*, then applicable in English arbitration cases, Mr. Justice Donaldson held that, "notwithstanding that the procedure may have an exclusively Scandinavian flavour, the parties by inference have indicated the choice of English [law] as the proper law of the contract."

Subsequent cases have held that parties by choice of a particular arbitral forum do not automatically choose the law of that place to gov-

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233 127 L.T.R. 209 (Ch. 1921).
238 RULES OF THE SUP. CR., ORDER 11, r. 1(f)(ii).
ern their contractual obligations, but no doubt has been cast on Mr. Justice Donaldson's basic assumption that parties may choose a law unconnected with their contract if they do so unambiguously.

The majority of American decisions are quite to the contrary, going far beyond the Restatement (Second) in demanding some substantial relationship between the transaction and the law chosen. The following statement of law from William Whitman Co. v. Universal Oil Products Co. is typical:

[T]he jurisdiction whose law is adopted by the express intent of the parties must be one which has a real connection with one or more of the various elements of the contract and parties may not arbitrarily select the law of some jurisdiction which has no relation to the matter in controversy.

Despite statements of this nature, the rapid change in American conflicts law may mean that the more flexible rule of the Restatement (Second) permitting a reasonably based choice of an unconnected law represents the current majority rule.

A superficial overview suggests that in England, party autonomy is unfettered by a substantial relation test, whereas in America, a choice

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339 "The generally acceptable connections are: the place of making, the place of performance, the place of domicile of the parties, the place with integral connections with the contract, sets of rules well known to professional or business groups, the situs of the security." Johnston, supra note 302, at 49.


341 Id. at 147. Further references are collected in Johnston, supra note 302, at 48-53.

342 What is a "reasonable basis" for a choice of a law unconnected with the contract cannot be exactly defined. A good example is the case where parties are contracting in a state whose legal system is unfamiliar or undeveloped, which might reasonably cause them to select a more familiar law of a state with a developed system of commercial law. See Restatement (Second) § 187, comment f at 566-67. But see Weintraub 412. Weintraub argues that even though a state's legal system may be strange or immature, if the interest analysis approach is adopted and if that state is the only one with substantial contacts with the transaction, it is the only state interested; consequently, its laws should apply. This argument is a sophisticated version of the fallacy revealed in the text preceding note 323 supra.

Another example might be a case in which two parties from different countries are each unwilling to agree to be bound by the law of the other. A reasonable compromise could be to choose the law and perhaps also the courts of a third country to govern any disputes that might arise under the contract. Not all American courts would, however, respect such a choice. But see M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

343 The recent pronouncement of the Supreme Court in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), may hasten the total acceptance of this rule, depending upon the scope given to the narrow holding of the Court by lower tribunals. See 58 CORNELL L. REV. 416, 421-23 (1973); notes 108-16 and accompanying text supra.
of law must either be substantially connected with the transaction of which it forms part or have some other reasonable basis. However, this difference may in reality be more one of evidentiary requirements than of substance. Of course, different rules of evidence are as capable of producing opposite results in cases with similar facts as are different substantive rules. Admittedly without authority better than inferences from certain dicta, it is submitted that the true difference is in fact as follows. In America, a choice of law must be shown to be substantially connected with the contract or otherwise reasonably based. In most cases, this would not have to be specifically proved, since it would be obvious from the circumstances. But in an acute case, a party relying on a choice of law clause may be called upon by his adversary to show that there was a reasonable basis for that choice. In England, the prima facie inference is in the opposite direction. That is, even where a chosen law does not seem to have any particular connection with the contract, the onus will be on the party attacking the choice to show that it is in some way legally objectionable. Support is lent to this evidentiary interpretation of the English rule by two cases. In Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society Ltd., it was said that if "the parties have in terms in their agreement expressed what law they intend to govern... prima facie their intention will be effectuated by the Court." And in In re Herbert Wagg & Co., Ltd. the court held that the parties' choice was "prima facie evidence as to the proper law."

Thus, as far as English courts are concerned, it appears that there is at most a highly attenuated requirement that an autonomously chosen law be substantially connected with the contract. Other limitations on the autonomy principle in England are similarly mild.

c. Evasion of Law. No general doctrine has been developed in Anglo-American law whereby transactions may be struck down because they are somehow artificially constructed in order to avoid the provi-

345 Id. at 240, [1937] 4 All E.R. at 214.
tions of otherwise applicable law. The twin concepts of freedom under and faith in the rule of law have combined to give individuals the assurance that if they arrange their affairs so as to be out of reach of the common law, that law will not seek to impose itself upon them. It is thus "possible but rare" in America to find judicial denunciations of "a fraud on the law," and no English case at all has been found in which a choice of law has been termed evasive.

Nevertheless, a leading authority is surely correct to say that if a choice of law must be bona fide, then

[n]o court . . . will give effect to a choice of law (whether English or foreign) if the parties intended to apply it in order to evade the mandatory provisions of that legal system with which the contract has its most substantial connection and which, for this reason, the court would, in the absence of an express or implied choice of law, have applied . . . . An evasive choice of law is unreal and unreasonable and therefore without effect.

Although the issue of evasion of law has not arisen in any reported English case, the question cannot be regarded entirely as academic. With increasing complexity of international business and increasing sophistication among legal draftsmen, it cannot be said that there may not arise in the future a case involving a choice of law that could be stigmatized as evasive according to the view adopted here. In America, of course, this problem should not arise. Any choice of law sufficiently evasive to be ineffective in terms of the present discussion would

An exception is found in the legislation of those American states that have adopted the Uniform Marriage Evasion Act, or similar statutes, to prevent their citizens from contracting marriages in another state of which they would have been legally incapable at home. See Graveson, The Doctrine of Evasion of the Law in England and America, 19 J. Comp. Leg. 21 (1937).

See Graveson, supra note 55, at 356; Graveson, Comparative Aspects of the General Principles of Private International Law, 109 Recueil des Cours 1, 51 (1963): "Fundamentally, [freedom under the law] rests on the liberal conception of law as an exception to liberty rather than of liberty as the residue left by the law."

International Harvester Co. v. McAdam, 142 Wis. 114, 118, 124 N.W. 1042, 1044 (1910).


DICEY & MORRIS 699. But see M. WOLFF, supra note 347, at 421. Wolff, who is skeptical of just how even-handed English courts are, claims that "[n]o restriction whatever of the autonomy of the parties to a contract will be recognized in those cases where the law of the forum coincides with the law chosen by the parties." Id. (emphasis in original).

See DICEY & MORRIS 699.

Nevertheless, it is difficult to conceive of a choice of law likely to be struck down in England as evasive of a forum rule which would not be caught under the next limitation to be discussed—the requirements of public policy.
scarcely pass the "reasonable basis" test formulated by the Restatement (Second).

d. Public Policy

i. Public Policy of the Forum

English law accords to the parties to a contract a wide liberty to choose both the proper law and the curial law which is to be applicable to it. . . . [T]he English courts will give effect to their choice unless it would be contrary to public policy to do so.855

This statement by Lord Diplock is probably the most explicit of the few judicial pronouncements regarding the requirement that an express choice of law not have an effect contrary to forum public policy. But to discover what is meant by public policy, it is necessary to refer to other conflict of laws cases. It may be assumed that public policy considerations identified in other cases (e.g., disregard of the fundamental conceptions of English morality or justice) are also relevant here.856

Although there is general agreement that a choice of law is subject to the requirements of public policy,857 there appear to be no recent reported cases that show how this exception to the autonomy rule works in practice in England. Australian courts, however, have lately been grappling with the problem, with mixed success. On the credit side may be put the decision of the Supreme Court of Queensland in Golden Acres Ltd. v. Queensland Estates Pty. Ltd.858

In Golden Acres, the claimant company had contracted to find a buyer for the defendant's Queensland land and now was suing for its commission. The defendant relied upon a Queensland statute that would have provided a defense to this action as, inter alia, a claim by an unlicensed real estate agent. But the claimant contended that Queensland law did not apply, for the contract, although made in Queensland, specified that "[f]or all purposes arising under this agreement, the same shall be deemed to be entered into in the colony of Hong Kong,"859 under whose law the claim was good. Although there were some contacts with Hong Kong, the court had no doubt that

the attempt to invoke the law of Hong Kong was for the express

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856 See notes 134-37 and accompanying text supra.
857 See, e.g., CHESNOR & NORTH 209; SCHMITTHOFF, NEW LIGHT ON THE PROPER LAW, 3 MAN. L.J. 1, 12 (1968-69).
859 Id. at 383.
purpose of avoiding the application of the Queensland law. Without going into details, were it not for [the choice of law clause] the "proper law of the contract"... would clearly be Queensland.

... Whilst appreciating that public policy can be an unclear concept, generally speaking it would be contrary to public policy for the legislative intention to be stultified by parties to a contract, of which the proper law would be Queensland, selecting some other law for the purpose of avoiding the application of Queensland law.\footnote{Id. at 384-85. There appears to be a mixture here of both the public policy and evasion exceptions; \textit{i.e.}, the evasion of Queensland law is the public policy contravened in the instant case. See notes 348-54 and accompanying text supra.}

Consequently, the claim was tested, and rejected, by Queensland law.

The earlier case of \textit{Kay's Leasing Corp. v. Fletcher},\footnote{116 Commw. L.R. 124 (1954).} before the High Court of Australia on appeal from the Supreme Court of New South Wales presented a different picture. Fletcher acquired a tractor from Kay's Leasing by a contract that allegedly contravened legislation of both New South Wales and Victoria regulating credit sales. The statutes of the two states were similar, except that New South Wales provided that, in the circumstances allegedly existing in the case, the seller was required to refund any monies paid by the purchaser, whereas Victoria had no such provision. Fletcher lived in New South Wales, where the tractor was to be used at his place of business. The negotiations prior to the sale took place in New South Wales, and Fletcher signed the contract documents there, although the contract as a legal entity did not come into existence until it was executed by Kay's Leasing at its place of business in Victoria. The contract by its terms was governed by Victorian law.

Although disagreeing in other respects, the five judges of the High Court were at one that the New South Wales legislation could "have no application to the case of a hire-purchase agreement entered into outside that State."\footnote{Id. at 134 (Barwick, C.J., McTiernan & Taylor, JJ); see \textit{id.} at 144 (Kitto, J., concurring); \textit{id.} at 146-47 (Menzies, J., concurring). Mr. Justice Menzies did not give reasons, but agreed with his brethren on this issue.} The option of Mr. Justice Kitto explores this choice of law question in great detail.\footnote{Id. at 139-46 (concurring opinion).} To him, the question was largely one of construing the New South Wales legislation, which contained no directions on its sphere of application. He observed:

Where a [statutory] provision renders an agreement void... especially where the requirements can be seen to embody a specific policy directed against practices which the legislature has deemed oppressive or unjust, a presumption that the agreements in con-
templation are only those of which the law of the country is the proper law according to the rules of private international law has no apparent appropriateness to recommend it, and indeed, for a reason of special relevance here, it would produce a result which the legislature is not in the least likely to have intended. It would mean that provisions enacted as salutory [sic] reforms might be set at nought by the simple expedient . . . of inserting in the agreement a stipulation that validity should be a matter for the law of some other country.\footnote{\text{364}}

Of course, if there is a relevant specific statutory choice of law rule, a court must follow it. But it is a strange and parochial approach to the choice of law problem to disregard all the learning of the conflict of laws and to attempt to construe a forum statute couched in general terms according to what Mr. Justice Kitto called its "policy," without any reference to the tenets of private international law. These principles should surely be included in the ingredients that make up the "policy" of any rule of law, unless specifically excluded by statute. Stranger still is Mr. Justice Kitto's conclusion that despite this strong policy of New South Wales, the statute should be construed as not governing the transaction between Kay's Leasing and Fletcher because it was "not possible to hold that the hire-purchase agreement was entered into in New South Wales,"\footnote{\text{365}} and the statute was to be confined to contracts made in that State. New South Wales had considerably greater interest in this transaction than did Victoria, both because most of the contacts were with New South Wales and because the legislation was designed to protect buyers (\textit{e.g.}, the New South Wales party in this case) and not sellers. Mr. Justice Kitto was unwilling to allow the "simple expedient" of a choice of law clause to override this interest. And yet he made no such objection to another "simple expedient": organizing the transaction so that the contract was finally concluded in another jurisdiction—clearly as easy a way to avoid the New South Wales law as is a choice of law clause.

Mr. Justice Kitto was not necessarily wrong to hold that New South Wales public policy should override the express choice of law in this case. But that argument should have been reached as a conclusion only after weighing the competing claims of forum public policy, the interests of the parties, and the law of Victoria. Mr. Justice Kitto's reasoning considers forum public policy entirely in isolation, thereby lending to it an exaggerated importance.

\footnote{\text{364}} Id. at 143.  
\footnote{\text{365}} Id. at 144.  
\footnote{\text{366}} Text accompanying note 355 \text{supra}.
In the United States, there has long been support for a rule similar in terms to that enunciated above by Lord Diplock. In *London Assurance v. Companhia de Moagens do Barreiro*, the Supreme Court held that it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by, so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own.

The language of the Restatement (Second) is similar in effect. The chosen law will not be applied if its application would run counter to a fundamental policy of a state having a greater interest than that of the chosen state.

The Restatement (Second)'s comments on this section are a refreshing contrast to Mr. Justice Kitto's reasoning in *Kay's Leasing*. It is emphasized that to override an express choice of law, a policy must be fundamental. Also, whether such a fundamental state policy will be found to exist depends partly upon how closely connected the disputed transaction is with the particular state relative to the contacts with other states. Statutes effecting strong social policies, such as protection of insured persons, will more likely be found to represent a fundamental policy than, for instance, will an obsolete rule on the contractual capacity of married women.

ii. Public Policy of Jurisdictions Other than the Forum. Restatement (Second) section 187(2)(b) contemplates that an express choice of law may be struck down by the forum as contrary to the public policy not merely of the forum, but possibly of some other state. This provision seems somewhat broad. Consider, for example, a contract made in East Berlin to smuggle a man to the West for payment, expressed to be governed by the law of New York. Should a New York court refuse to hear the claim of the smuggler because of the affront to East German public policy? This example suggests that the extent to which the forum applies the public policy of a second state should at least be qualified by the forum's own public policy.

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366 167 U.S. 149 (1897).
368 Id. at 161.
369 Restatement (Second) § 187(2)(b). It may be noted that this subsection contemplates more than just forum public policy, for the forum will not always be the state of the otherwise applicable law. Treatment of the public policy of nonforum states is discussed in notes 373-81 and accompanying text infra.
370 Restatement (Second) § 187, comment g at 567-69. As in England, case law in this area is scarce. Authorities are collected in id., Reporter's Note, comment g at 574.
371 Id., comment g at 568.
372 Id.
There is little evidence that American courts do, in fact, consider the public policy of foreign jurisdictions, as the *Restatement (Second)* contends. In support of this position, Professor Reese cites the *Fricke v. Isbrandtsen & Co., Inc.* That case was a suit for personal injuries sustained while the plaintiff was a passenger on the defendant's ship. The defendant moved for summary judgment on the grounds that the suit had been commenced outside a time limitation contained in the contract ticket. This limitation was clearly valid under United States law, which was stipulated to govern the contract. The contract was written in English, but entered into in Germany. The plaintiff, a German, was unable to understand English.

Denying the defendant's motion, the court observed:

> It may be that German law affords protection to parties in this plaintiff's position by not attaching great significance to "objective expectations" as expressed in steamship tickets, and perhaps such protection might even amount to a strong national policy. It would seem that federal conflicts law should take cognizance of such an attitude by the foreign sovereign where it is coincident with so many of the significant contacts.

Taken alone, this passage clearly supports Professor Reese. But in context, it seems that rather than allowing foreign public policy to override an otherwise valid choice of law, the court's main line of reasoning was that the choice of law, buried in a lengthy standard form contract written in a language the plaintiff did not understand, was ineffective anyway. The court said:

> A contract of the type in this case is not formulated as a result of the give-and-take of bargaining .... Instead, standard provisions .... are submitted to the passenger-contractor on a take-it-or-leave-it basis.

> ... [U]nilaterally imposed provisions of this nature should not be enforced unless the party urging enforcement provided the other, illiterate in the language of the contract, with knowledge of what was intended. If, for example, plaintiff had been given a German counterpart of the contract and had understood its terms, the stipulation of United States law would probably be binding upon her.

The court was simply making its choice of law decision as if the

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373 *Id.*, Reporter's Note, comment g at 574; see Reese, *supra* note 52, at 54.
375 *Id.* at 468.
376 *Id.* at 467-68. For a discussion of contracts of adhesion as an exception generally, see notes 382-92 and accompanying text *infra*. 
express clause did not exist. Under this analysis, German law was clearly applicable, and therefore German rules or policy on limitation clauses would apply as part of the *lex contractus*. Had the court really been willing to apply German public policy in the same way as it might apply forum public policy, it could not reasonably have contemplated an overriding of that policy simply by the defendant’s clarifying to the plaintiff the terms of the contract.377

In England, the situation is somewhat clearer. Dicey and Morris state rather baldly, without citing authority, that “no court applies the public policy of any country but its own,”378 although the absence of decisions to the contrary is probably authority enough. This is not to say that the English courts never recognize the public policy of other jurisdictions. It has already been mentioned that when a transaction prejudices the interests of the United Kingdom or its good relations with foreign powers, it will be unenforceable as contrary to English public policy.379 Clearly, a transaction violative of the policy of a foreign power, if enforced in England, might well prejudice good relations with that power. In *Regazzoni v. K.C. Sethia (1944) Ltd.*,380 for example, an English seller had agreed to supply jute bags to a Swiss buyer c.i.f. Genoa, Italy. Both parties were aware that the bags would have had to be acquired in India and that their ultimate destination was to be South Africa. These circumstances made the export of the bags from India a criminal offense in that country, because of Indian economic sanctions against South Africa. On its face, however, the contract could be performed quite legally. English law was expressly chosen to govern the transaction. Viscount Simonds applied basic principles of comity in refusing to enforce a contract which would have involved a violation of foreign law on foreign soil.381

iii. Contracts of Adhesion. A lively debate is currently being waged concerning whether the peculiar problems of adhesion contracts

377 Professor Reese does cite two other cases to support his position, in *RESTATEMENT (SECOND)* § 187, Reporter’s Note, comment g at 574: Massengale v. Transitron Electronic Corp., 385 F.2d 83 (1st Cir. 1967) and Forney Indus., Inc. v. Andre, 246 F. Supp. 333 (D.N.Dak. 1965). But in each of these cases it was only forum public policy by which the choice of law clause was tested.

378 DICEY & MORRIS 554. In context, this passage purports to refer also to American courts, but in the light of the *Restatement (Second)* and the *Fricke* case, the position can hardly be claimed to be without uncertainty.

379 See note 136 and accompanying text supra.


381 *Id.* at 318-19, [1957] 3 All E.R. at 290. Viscount Simonds emphasized that he was referring only to a friendly foreign country (*id.* at 318, [1957] 3 All E.R. at 289), thus avoiding the problems faced by the *Restatement (Second)* when a question arises of the public policy or law of an unfriendly power.
containing choice of law clauses may be solved by the public policy limitation or whether such clauses in these contracts should be simply disregarded, or at most treated merely as one factor in the choice of law process.

Ehrenzweig points out with some force that

\[\text{[i]f . . . the common intent of the parties to be held to each facet of their agreement is the most important single factor in the formulation of . . . a rule of choice of law [for contract cases], the establishment of this rule requires conscious segregation of contracts of adhesion from which such a common intent is absent by definition.}^{882}\]

With each adhesion contract being considered on its own facts, rather than according to a single rule, the effect of the choice of law clause would vary with the circumstances.\textsuperscript{883}

Ehrenzweig's theories are appealing and harmonize well with the current growth of protective social legislation and the retreat from laissez-faire freedom of contract. But it is difficult to contend that his views reflect the law, although a few cases have followed his argument to some extent.

Ehrenzweig claims that his view was "referred to with approval" in Zogg v. Penn Mutual Life Insurance Co.\textsuperscript{885} Although the court in that case did, indeed, cite two of his articles,\textsuperscript{888} this was done more to demonstrate the confusion in this area of the law than to signify approval.\textsuperscript{887}

\begin{enumerate}
\item[A. Ehrenzweig, supra note 235, at 454-55.]
\item[883 Most obviously, where the adherent had sought out his partner in another state, he could expect to comply with the latter's law, if it were stipulated for in the contract. But a nationally (or internationally) operating business, soliciting customers in many jurisdictions, might expect the courts of those jurisdictions to override an adhesive choice of the law of, for example, the main office of that business. Id. at 458.
\item[884 Id. at 457 n.21.
\item[885 276 F.2d 861, 863-64 (2d Cir. 1960).
\item[886 Ehrenzweig, Contracts in the Conflict of Laws, 59 Colum. L. Rev. 973, 986, 1014 (1959); Ehrenzweig, Adhesion Contracts in the Conflict of Laws, 53 Colum. L. Rev. 1072 (1953).
\item[887 W. G. Paul, an expert in life insurance law, lends some support to Ehrenzweig:
\item[The trend is away from applying [the] intention rule, even where governing law is stipulated in the policy. Insurance policies are contracts of adhesion, and the insured has virtually no bargaining power as to specific terms of a policy. Consequently, he has no intention as to law governing the policy, even if a policy provision says he does.
\item[Paul & Plain, Choice of Law in Life Insurance Litigation, 6 A.B.A. Forum 1, 3 (1970). Paul, however, cites no authority for his sweeping statements. One case, Frick v. Isbrandtsen Co., 151 F. Supp. 465 (S.D.N.Y. 1957), does furnish direct judicial authority for Ehrenzweig, although it is the only reported case found to do so. See notes 882-87 and accompanying text supra. Several cases that may indirectly support the "ineffective consent"]}
\end{enumerate}
The Restatement (Second), apparently influenced on this point by Ehrenzweig, chooses to categorize adhesion contracts as possible examples of contracts whose choice of law provision will be disregarded if consent of one of the parties to its inclusion in the contract was obtained by improper means, such as by misrepresentation, duress, or undue influence, or by mistake. Choice-of-law provisions contained in [adhesion] contracts are usually respected. Nevertheless, the forum will scrutinize such contracts with care and will refuse to apply any choice-of-law provision they may contain if to do so would result in substantial injustice to the adherent.

To focus on the reality of the adherent's consent is to avoid the real issue of whether there has been "substantial injustice," i.e., a violation of forum public policy. Few adhesion contracts involve consent defective according to the traditional criteria of contract law. Consequently, a less conceptually objectionable approach to dealing with contracts containing choice of law clauses that produce socially offensive results is simply to strike them down as contrary to public policy.

This recommended solution also avoids another problem—determining what contracts are adhesion contracts. It is easy enough to think of examples, but to define the genus is impossible. Yet such a definition is essential if Ehrenzweig's proposed rule is to work efficiently. His rule requires that contracts be divided into two categories, adhesive and non-adhesive, and, essentially, that a different choice of law rule be applied to each. This is almost a return to choice of law by classification, a practice condemned by Ehrenzweig himself.

Categorization of contracts as Ehrenzweig would seem to require, besides being impossible in difficult cases, would introduce an unnecessary and unhelpful rigidity into the choice of law process.

The English law in this area is somewhat obscure. There is no decisive case on the effect of even duress or mistake upon a party's consent to a choice of law clause, and certainly no case on the reality of consent in adhesion contracts. But the better view would appear to be that English courts would regard adhesion contracts in argument are collected and discussed in Restatement (Second) § 187, Reporter's Note, comment b at 570-71.

Restatement (Second) § 187, comment b at 562. The Supreme Court in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), also gives some credence to this view by way of dictum, stating that forum clauses would be considered binding absent "fraud, undue influence, or overweening bargaining power." Id. at 12.

Cf. Yntema, supra note 4, at 64.

A. EHRENZWEIG, supra note 235, at 314.

See generally Dicey & Morris 741.
no different light than any other contract when the issue is one of consent. Rather, English courts in dealing with these contracts will simply strike down choice of law clauses which would have an ultimate effect contrary to English public policy, just as in the case of any other contract. As far as adhesion contracts are concerned, this public policy is likely to be manifested in the form of protective legislation applying to insurance or to retail credit sales, for example. Such legislation may perhaps be interpreted as mandatory, and therefore override a choice of law clause, or it may be applied as a reflection of a strong public policy of the forum to avoid the express choice.392

e. Must the Stipulated Law Be the Law of Some Sovereign State?

i. General Contracts. The freedom of choice of law allowed to contracting parties does appear to have one fairly strict limitation; the law chosen must be the law of some sovereign jurisdiction (including, of course, states with their own laws as part of federations). Parties may not, for instance, choose international law to govern their relationship. The rationale and extent of this limitation are unclear. In particular, it may be that where a contract contains an arbitration clause, parties may wish to stipulate that the arbitrator should not be bound by the rules of any particular legal system. The problem therefore falls into two parts, which will be considered in order—contracts without and those with arbitration clauses.393

First is the thesis of what may be called the school of the modern lex mercatoria. These scholars assert to varying degrees that international contracts are not subject to municipal law in any event. The extremist is Professor G. O. Sundström, who writes:

The legal basis for an international commercial contract ... rests in the party autonomy rather than in an a priori existing legal system. The contract is based on clausal law, and thus neither the contract nor the parties have any significant contact with a legal system. There can never be a competing rule belonging to a different system of law, because there is no different system of law. The only proper law of the contract is thus reduced to the clausal law as manifested in the provisions of the contract.394

392 See generally id. at 732-34.
393 This order is more a matter of convenience than indicative of the relative importance of the two sections. Because of the increasing popularity of international commercial arbitration, and because of a tendency among contracting parties who do provide for arbitration also to require the arbitrator to act, for example, ex aequo et bono, the issues discussed here are most likely to arise in the context of a contract containing an arbitration clause.
Less extreme is the view of Professor Clive Schmitthoff. He contends that much of the law of international trade has been taken out of the hands of national governments by merchants in cooperation with such bodies as the International Chamber of Commerce and the United Nations Economic Commission for Europe, whose compilation of standard contract forms has, it is asserted, formed a new field of law, separate from municipal systems.  

Sundström and Schmitthoff prove either too much or too little. Apart from such unsupported assertions as that just quoted, there is no evidence that the law of international trade is somehow independent of any municipal law. Moreover, a close reading of Sundström’s work shows that he hedges this thesis with so many exceptions and limitations that it becomes a platitude. He writes:

> It is necessary to accept that facts may be not only of a material character but also equally well of a legal nature, and that in both cases any choice of an alleged alternative means an alteration of the facts upon which the case rests. All such matters which affect the property of being a contract are thus to be treated as factual in this sense. . . . [A] contract which has been concluded according to certain prevailing legal conditions cannot be considered to have been concluded under any other circumstances.  

Sundström appears to mean that mandatory rules of municipal law that apply to contracts, such as rules relating to form and capacity, are simply not likely to be the subject of choice of law by contracting parties, for they apply to contracts coming within their scope without any volition of those parties. From this, it may be seen that the odd expression “clausal law” used in the first passage in fact includes no more than that area of contract law in which it is always within the discretion of the parties to formulate their own terms. But there is no particular problem here, for it is not seriously disputed that in this area parties may either make up their own terms or fill out their contract by incorporating within it the provisions of some other legal system or appropriate standard form. Sundström’s somewhat grandiose references to a “clausal law” separate from existing legal systems

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895 Sundström, supra note 394, at 128.
896 See also E. Rabel, Das Recht des Verkaufes 36 (1957); Darby, supra note 254, passim.
897 See Restatement (Second) § 187(1).
therefore mean no more than that many of the facultative provisions of contract law have been standardized among different countries for the purposes of international trade.\textsuperscript{398} In fact, the rigid conceptualism and denial of a significant role to party autonomy that is inherent in his thesis shows that, far from identifying a broad, new trend in private international law, Sundström's reactionary stance would not have disgraced Beale himself.

The alleged existence of a modern \textit{lex mercatoria} is a dubious claim.\textsuperscript{399} Nevertheless, if Anglo-American law accepts the autonomy principle, why should parties not be able to choose to have their contracts governed by rules not necessarily part of any municipal system? The authority for such a choice might be found in the conflict of law rules of the forum, just as Anglo-American fora, through the principle of autonomy, authorize more familiar choices of law. Apart from national laws, there are several possible laws or sources of law that contracting parties might choose to govern their obligations. Among the most obvious of these are public international law and the rules derived from formulæ such as "general principles of law recognized by civilized nations." Outside the context of contracts containing arbitration clauses, there has been little study of the validity of such a choice, but the comments of common-law scholars hold that it is incompetent for private parties to stipulate for these "laws."\textsuperscript{400} Similarly, it is said that parties "are not at liberty to subject their contract to a legal system which is no longer in force, or to the draft of a foreign code or to a system which they have freely invented."\textsuperscript{401}

\textsuperscript{398} Similarly, Schmitthoff, in referring to standard forms compiled by the ICC and the UNECE, surely is saying no more than that it has become customary for merchants to incorporate these forms into their contracts by availing themselves of the principles of autonomy found in their several national laws.

\textsuperscript{399} There is possibly an exception under Dutch law. In Sayers v. International Drilling Co. N.V., [1971] 1 W.L.R. 1176, [1971] 3 All E.R. 163 (C.A.), it was shown by the defendant company (and not disputed by the plaintiff) that Dutch law provides for "international contracts" which are not subject to the normal requirements of Dutch domestic law. Therefore, although the exception clause at issue in \textit{Sayers} was void under both English and Dutch domestic law as applied to contracts of employment performable locally, it was valid under Dutch law as part of an "international contract." The exception is, of course, only a quasi-exception because it was a provision of Dutch law (that providing for the existence of these special international contracts) which saved the clause.

\textsuperscript{400} See, e.g., M. \textsc{Wolff}, \textit{infra} note 347, at 416-17; Reese, \textit{infra} note 52, at 67, 69 (in reply to questions). Neither Wolff nor Reese cites authority, although Reese claims that the problem is unlikely to be of great practical importance because of the slim probability of parties' electing to have their obligations governed by the ill-defined rules of international law or the general principles of law recognized by civilized nations.

\textsuperscript{401} M. \textsc{Wolff}, \textit{infra} note 347, at 417.
Judicial authority is sparse, but in *Hurwitz v. Hurwitz*, the Appellate Division of the New York Supreme Court, in an action on a marriage settlement, held that the parties could not choose to govern their contract by the laws of Moses and Israel. Of course, they could have defined their respective rights and privileges by reference to those laws so long as these choices were not contrary to the relevant mandatory laws of New York.

A related question deals with whether the parties can elect to freeze the law they choose at the time of contracting insofar as it applies to their relationship. This course is clearly permissible, if not presumed, with regard to facultative rules that are merely incorporated as part of the contract. But on matters of law not normally within the parties' discretion, English authority does not allow this latitude. This limitation is, of course, consistent with the rules already discussed, since repealed or amended rules are no longer part of the law of a sovereign state.

American law is probably the same. Clearly, where the parties make no particular stipulation, the applicable law includes changes subsequent to the making of the contract. However, there are cases suggesting that it may be open to the parties to freeze the applicable law when they enter their contract.

Although there is general agreement that a choice of law must select the law of a sovereign jurisdiction, only one attempt at a rationalization of this limitation has been found. P. R. H. Webb and D. J. Latham Brown believe that not to impose this restraint would be tantamount to making the parties sovereign legislators. It is difficult to see any more justification for this argument in the present context....

403 Id. at 366, 215 N.Y.S. at 188.
404 See Cummings v. London Bullion Co., [1962] 1 K.B. 327 (C.A.); *In re Chesterman's Trusts*, [1923] 2 Ch. 466 (C.A.); *In re Helbert Wagg & Co.*, [1956] 1 Ch. 323, [1956] 1 All E.R. 129 (1955). In Chesterman, which did not involve an express choice of law, the court said: "The mortgagees cannot take [the applicable law] as it exists at one time and claim that their rights must be regulated by its then state however it may be changed in the future." [1923] 2 Ch. at 478.
405 E.g., Dougherty v. Equitable Life Assurance Soc'y, 266 N.Y. 71, 193 N.E. 897 (1934).
407 P. WEBB & D. BROWN, A CASEBOOK ON THE CONFLICT OF LAWS 332 n.4 (1960): "Neither can the parties invent their own law—for to allow them to do this would be tantamount to giving them the authority of sovereign legislatures." In its context, this reasoning appears to be meant to apply not only to purely invented law, but also to a choice of public international law or a defunct system of law.
Although in strict logic the restraint may have some merit, there is no reason why it should not be overridden by the requirements of justice and convenience in appropriate cases. Nevertheless, contractual stipulations for international law, the laws of Moses and Israel, or "general principles of law recognized by civilized nations" clearly do not constitute appropriate cases. The difficulties of discovering and applying the rules and principles of these laws would far outweigh any advantage gained from judicial recognition of the parties' choice.

There is a justification for according different treatment to parties' attempts to freeze their chosen law at the time of contracting. Such attempts are conceptually the same as a choice of a defunct system or of international law. But practically speaking, it is no more difficult for a court to discover the law of, say, five years earlier than to determine what the chosen law is at the time of the hearing. However, neither is it any easier for a court to discover "frozen law." One might therefore justify or at least explain any American ambivalence toward stipulations for law as of the time of contracting; to recognize such choice is, practically speaking, more efficient than to apply an old-fashioned, conceptual choice of law test. But as far as the courts are concerned, such recognition furnishes no additional advantages over the ordinary rule that limits choice to existing legal systems. It may be as easy to ascertain the law of ten years ago as it is to discover what the law is currently. But from the point of view of simplification of the judicial task, there is no special merit in this exercise over and above that of merely finding out what the law is today.

ii. Contracts Containing an Arbitration Clause. When a contract contains an arbitration clause, the question of whether the autonomy principle permits submission of disputes to a nondomestic legal system assumes a different complexion. Certain European writers claim that there exists a distinct legal genre that may be called international arbitration, and that international arbitration between persons from different jurisdictions may and does escape from the purview of any municipal law. Professor Charles Fragistas claims:

408 See notes 263-71 and accompanying text supra.
409 Cf. F. MÁDL, supra note 269, at 110-11. Discussing Hungarian law, Mádl maintains that there is "no problem whatever" for parties who wish to freeze the stipulated law at the time of contracting (id. at 110), although earlier he states that parties must submit their contracts to a particular legal system. Id. at 101.
410 Special considerations arise when the contract is between a private person and a sovereign government or one of its organs. See Mann, State Contracts and International Arbitration, 42 B.U.R. Y.B. INT'L L. 1 (1967). The present study is concerned only with contracts between private individuals.
Supranational arbitration must . . . be an international arbitration, that is, an arbitration that escapes the bounds of any national law, to be submitted directly to international law.

...I believe that supranational private arbitration is a social fact, a reality which cannot be ignored. In international transactions, there are often cases where the parties assuredly desire to raise themselves above any particular national order, and to have their eventual litigation decided by a truly international arbitration.

Berthold Goldman goes further: "[A]ny search for a 'systeme de rattachement' [connecting factors] corresponding to the nature of international arbitration leads one to the ineluctable necessity for an autonomous, not national, system."

The arguments of Fragistas and Goldman have been criticized often. Their thesis fails to consider that every arbitrator's award, to be effective, may ultimately need to be enforced by some national law and therefore must be based on principles recognized by that national law. F. A. Mann states:

Just as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every [international] arbitration is a national arbitration, that is to say, subject to a specific system of national law.

... No one has ever or anywhere been able to point to any provision or legal principle which would permit individuals to act outside the confines of a system of municipal law; even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects. Similarly, every arbitration is necessarily subject to the law of a given State. No private person has the right or the power to act on any level other than that of municipal law. Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called the lex fori, though it would be more exact (but also less familiar) to speak of the lex arbitri . . . .


413 Mann, Lex Facit Arbitrum, in INTERNATIONAL ARBITRATION, LIBER AMICORUM FOR MARTIN DOMKE 157, 159-60 (P. Sanders ed. 1967) (footnote omitted); cf. Klein, L'Arbitrage International de Droit Privé, 20 ANN. SUISSE DE DR. INT’L 41 (1963); Schlesinger & Gündisch, Allgemeine Rechtsgrundsätze als Sachnormen in Schiedsgerichtsverfahren, 28 RABELS ZEIT-
There are only two kinds of authority upon which an arbitration may be founded: international treaty and national law. International treaties are, of course, effective only among states, although insofar as they have been incorporated into national law, individuals may be able to take advantage of their terms. But, as Mann emphasizes, individuals must anchor their arbitral submission in some national juridical system if they are to be able to enforce the resulting award. To be sure, in many cases there will be no question of enforcement. Most large and respectable corporations operating internationally will comply with an arbitrator's award without further pressure. But the common situation should not be allowed to cloud the issue. Arbitral awards must sometimes be enforced, and this will be possible only if the arbitral proceedings making the award comply with the requirements of some national law as to what will be deemed a legally effective arbitration.

It does not matter particularly which national system the parties choose. No legal system which provides for the enforcement of arbitral awards is known to forbid consenting parties to agree to submit to arbitration under its law, whether or not the disputed issue has any connection with that system. Neither is it inevitable that an arbitration will be anchored in the state wherein the arbitrators sit. That is, of course, normal, but the parties might prefer the procedural rules of some other state. Assuming that second state has no objection to arbitrators who purport to follow its rules sitting outside its borders (and no such state is known) the arbitration will be effectively anchored in that second state.\footnote{\textsuperscript{414}}

\textsuperscript{414}For example, in Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd., [1970] A.C. 583, [1970] 1 All E.R. 796, the House of Lords was undisturbed by the possibility that the parties to an arbitration which took place in Scotland might have intended that the English Arbitration Act, 1950, 14 & 15 Geo. 6, c. 27, apply to the proceedings. A more striking example is to be found in the case of Amtorg Trading Corp. v. Camden Fibre Mills, Inc., 304 N.Y. 519, 109 N.E.2d 605 (1952). There, the New York
The laws of the state in which the arbitration is based (usually the state in which the arbitrator sits) will not only supply the applicable rules of procedure, but also will determine what, if any, choice of law rules the arbitrator must follow and whether, on substantive issues, he must apply the rules of some national legal system. This is true simply because that state has determined that when its courts are asked to enforce arbitration awards, the arbitrator must have followed certain procedures which that state deems necessary. If he has delivered an award without following these procedures, and the award is complied with, that compliance is not a result of any legal force inherent in the award.

International law, as with other systems of non-national law, is incapable *ex proprio vigore* of sustaining a private contract; no magic is added by appending an arbitration clause to the contract. But it is, of course, unexceptionable for a particular municipal legal system by its own national law to authorize contracting parties to stipulate for some non-national law to be applied by the arbitrator. Here English and American law diverge.

In England the law is fairly clear. Arbitrators are under a duty to apply rules of law to cases submitted to them, and this duty may be enforced by either party through a request that the arbitrator state any question of law arising, or the award itself, as a special case for the opinion of the High Court. A provision purporting to prevent a party from exercising his right to ask for a special case to be stated is void as an attempt to oust the jurisdiction of the court.

Nevertheless, although parties clearly may not contract out of these formal requirements of the arbitration law, on normal principles of contract law it might be expected that they could agree that duly appointed arbitrators should be free to decide their cases *ex aequo et bono*, for example. Indirect support for this view is found in *Russell on Arbitration*, the leading English treatise:

Court of Appeals ordered enforcement of an arbitration agreement that provided for a submission to the U.S.S.R. Chamber of Commerce Arbitration Commission in Moscow, it being agreed by both parties that the arbitral hearing should be conducted according to the procedures laid down in the New York Civil Practice Act, Article 84.

E.g., David Taylor & Son, Ltd. v. Barnett, [1953] 1 W.L.R. 562, 568, [1953] 1 All E.R. 843, 846 (C.A.): "The duty of an arbitrator is to decide the questions submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable under the circumstances."

Arbitration Act, 1950, 14 & 15 Geo. 6, c. 27, s. 21.


There is an analogy, though somewhat imperfect, with the quite legitimate
It is the duty of an arbitrator, in the absence of express provision in the submission to the contrary, to decide the questions submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable under the circumstances.\textsuperscript{419}

There is, however, direct judicial authority to the contrary, in \textit{Orion Compania Espanola de Seguros v. Belfort Maatschappij Voor Algemene Verzekeringen}.\textsuperscript{420} The arbitration agreement under litigation contained the following clause: "The Arbitrators . . . are relieved from all judicial formalities and may abstain from following the strict rules of the law. They shall settle any dispute . . . according to an equitable rather than a strictly legal interpretation of its terms . . . ."\textsuperscript{421}

Mr. Justice Megaw held this clause invalid, declaring:

The essence of the matter, as I see it, is that, so long as the Courts of this country have a statutory supervisory jurisdiction over arbitrators in England, it must remain a firm principle of the law governing arbitrations that that which is, in English law, a question of law, shall remain in all respects and for all purposes a question of law; and it cannot be turned into something other than a question of law by any agreement of the parties in their agreement to arbitrate or otherwise.\textsuperscript{422}

Mann, probably the leading English expert in the field, accepts Mr. Justice Megaw's holding as correct.\textsuperscript{423} For practical purposes, he is right, but Mr. Justice Megaw's opinion is not wholly invulnerable to criticism. First, the learned judge purportedly followed a 1935 decision of Mr. Justice Goddard in a case involving a similar clause.\textsuperscript{424} However, the validity of the clause was not really in issue in the 1935 case, as it appears that the arbitrators had ignored it and rather applied the law of a sovereign state (Germany) to the dispute.\textsuperscript{425} If anything, the case is authority against Mr. Justice Megaw, since Mr. Justice Goddard observed in dicta that the clause had possibly been included practice of leaving a term of a contract incomplete, to be filled in by a third party. \textit{See G. Treitel, The Law of Contract} 42 (2d ed. 1966).


\textsuperscript{420} [1962] 2 Lloyd's List L.R. 257 (Q.B. (Com. Ct.)).

\textsuperscript{421} Id. at 257.

\textsuperscript{422} Id. at 264.

\textsuperscript{423} Id. at 264.

\textsuperscript{424} Mann, supra note 413, at 173.

\textsuperscript{425} Maritime Ins. Co. v. Assecuranz-Union von 1865, 52 Lloyd's List L.R. 16, 16 n.* (K.B. 1935): "[T]he arbitrators . . . shall interpret this treaty rather as an honourable engagement than as a merely legal obligation . . . and may abstain from following the strict rule of law."

\textsuperscript{425} Id. at 18.
to indicate that the agreement was not to be legally binding at all. 426 Such a stipulation is, of course, valid. 427 Second, Mr. Justice Megaw did not consider the argument derived from the principle of freedom of contract discussed above. Third, the learned judge remarked that the parties might be allowed to agree that an arbitration between them would be governed by the principles of public international law, 428 a suggestion which is of course diametrically opposed to his holding in the case. Nevertheless, in the face of the Orion case, it would be a bold draftsman who included an ex aequo et bono clause in a contract stipulating English arbitration; Mr. Justice Megaw's judgment is unlikely to be challenged.

In America, the position is quite the reverse of that in England because of the lack of statutes providing for the compulsory statement of a special case at the instance of a single party. 429 It has been judicially stated that, absent a contractual provision to the contrary, arbitrators are free to ignore judicial precedent; the rationale for this freedom is the often nonlegal background of arbitrators. 430 A fortiori, if it is specified that arbitrators need not follow strictly the laws of any particular municipal system, a clause to that effect must be valid.

Theoretically, there is thus a marked distinction between the duties of English and American arbitrators, the former bound to apply the rules of law, the latter able to ignore them. In practice, this distinction is blurred, for two reasons. First, although English arbitrators are bound to apply the law, they are not bound to give a statement of their reasoning in delivering their awards unless this is requested by the parties in their submission or by one party in invoking the special case provisions of the Arbitration Act, 1950. 431 It is therefore usually difficult to detect an error of law which could be relied upon to defend an action brought on that award. 432 Second, although American arbitrators are not bound to follow rules of law in coming to their decisions and although their usual practice, too, is not to deliver written opinions, the fact remains that an arbitrator must decide a submission before him somehow. If he is a lawyer, which is common in large inter-

426 Id. at 20.
429 States which have passed arbitration statutes are listed in Note, supra note 241, at 624 n.11. American arbitration acts occasionally provide for the reference of a point of law to a court at the instance of all parties. E.g., CONN. GEN. STAT. REV. § 52-415 (1958).
431 See notes 415-17 and accompanying text supra.
432 See 3 INTERNATIONAL COMMERCIAL ARBITRATION: A WORLD HANDBOOK 61 (P. Sanders ed. 1965).
national cases, he will often welcome argument from the parties' counsel upon questions of choice of law and will probably render his decision according to the law as he sees it.433

On one point, however, the distinction between English and American law is not blurred, but quite marked. This is the case in which an arbitrator is directed to apply "general principles of law recognized by civilized nations" or some similar formulation. It seems that the American arbitrator in this situation must obey the direction and must do his best to discover just what those general principles are, whereas in England an arbitrator remains bound by the Arbitration Act, 1950, to apply rules of law.434

5. Choice of an Invalidating Law

The Restatement (Second) proposes an eminently sensible rule to govern the choice of an invalidating law:

On occasion, the parties may choose a law that would declare the contract invalid. In such situations, the chosen law will not be applied by reason of the parties' choice.[435] To do so would defeat the expectations of the parties which it is the purpose of [section 187] to protect.436

Scholarly opinion on the correctness of this view is divided. Arguing from a rather conservative viewpoint, Carlyle Maw supports the Restatement (Second)'s view:

[A]s [an express choice of] law clause cannot avoid an otherwise applicable law or policy, by the same token it should not be construed as importing an otherwise inapplicable law or policy.

The object of a governing law clause is to facilitate the consummation of the intent of the contractual parties. . . . Consequently any stipulation of otherwise inapplicable law that clearly frustrates the intent of the parties should be disregarded.437

433 This observation is based upon conversations with Professor R. B. Schlesinger of the Cornell Law School, who has practiced extensively in the United States as an arbitrator and as counsel before arbitrators.

434 Schlesinger & Gündisch, supra note 413.

435 That law may, however, be applied by virtue of being the law most significantly connected to the issue at hand. Restatement (Second) § 187, comment e at 565; id. § 188.

436 Id. § 187, comment e at 565. Authorities are collected in id., Reporter's Note, comment b at 572-73. The Reporter notes there that these authorities appear to be contrary to the rule stated but that they are inconclusive, because in every case, possibly except one whose facts are not reported, the contract invalid under the chosen law was also invalid under the law most significantly connected to that contract.

437 Maw, Applicable Law and Conflict Avoidance in International Contracts, 25 N.Y.C.B.A. Record 365, 374-75 (1970). It will be noted that Maw's argument relies essentially upon vested rights reasoning. The Restatement (Second) would certainly not agree with the premise that "[an express choice of] law clause cannot avoid an otherwise applicable law or policy."
Weintraub, on the other hand, discerns an inconsistency in Restatement (Second) section 187. He points out that in effect the rule is really a rule of validation, in that it applies the law chosen by the parties only if the contract is thereby valid. If that law would invalidate the contract, then the parties' choice is ignored. Why not, therefore, simply formulate the rule in terms of the *lex validitatis*? Logically, there does not seem to be an answer to this criticism. But, practically speaking, it must be recollected that the Restatement (Second) is attempting to state the law as modern courts apply it and not necessarily as academicians would like it to be. Furthermore, the number of cases in which parties actually do choose an invalidating law is extremely small, and the exception to the general rule of section 187 that has been created to cover the situation therefore results in at most a small inconsistency.

Judicial authority is inconclusive. A case too recent to have been included in the Restatement (Second) illustrates this problem rather neatly. *Painton & Co., Ltd. v. Bourns, Inc.* involved a royalty contract between a California licensor (Bourns) and a British licensee (Painton) expressly governed by California law. Bourns claimed that royalty payments on certain secret but nonpatented processes should continue according to a built-in formula after the contract had been "terminated." The court held that the payments did not have to continue. It is Maw's opinion that this case is wrongly decided, and that it is authority against his (and thus the Restatement (Second)'s) view on the effect of a choice of an invalidating law by the parties. However, a close reading of the case suggests that although *Painton* does not support the Restatement (Second), Maw is unduly pessimistic regarding its holding, for a number of reasons.

First, the court decided that on the facts the contract could not be construed to require "post-termination" royalty payments in any event. Therefore, it did not matter that the expressly chosen California law would have invalidated any provision for post-termination royalties, since there was no part of the contract that purported to require such payments. Second, the Licensee did not plead that English

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438 Weintraub 410-11. Ironically, Ehrenzweig, with whom the concept of the *lex validitatis* is most closely associated, believes that the law chosen by the parties should be applied even if it invalidates their contract. Ehrenzweig supra note 386, 59 COLUM. L. REV. at 991-92.

439 The relevant authority is collected and discussed in RESTATEMENT (SECOND) § 187, Reporter's Note, comment b at 572-73.


441 Maw, supra note 437, at 374.

442 309 F. Supp. at 275.
law or any other law apart from that of California should govern. Third, there was no evidence that English law was any different from California law on the issue of post-termination payments. On the facts, therefore, the court's decision to disallow the claim is no authority one way or the other.

Maw's reasoning seems to be based on an alternative ground for decision found early in the opinion. The court said that if the contract was governed by California law, this in effect meant federal law, under which a royalty contract for the unpatented process was, in the circumstances of the case, unenforceable, since it was contrary to the policy of applicable federal law. This result followed even if under California law alone the contract was unexceptionable. Therefore, assuming the contract had provided for the alleged royalty liability, Maw has some grounds for believing that the court, in respecting the stipulation for California law, would have been giving effect to a mistakenly chosen invalidating law. But the plethora of conditional clauses and phrases in this last observation demonstrates how hypothetical and removed from the facts of the case this possibility is. Furthermore, contrary to Maw's opinion, the law most significantly connected with the contract was that of California (that is, federal patent law), the law of the seller of the information, not the law of England. The alleged provision in the contract would thus have been unenforceable in any event, for if the express choice is disregarded, then the most significantly connected law governs. Finally, in the part of its judgment concerned with this "alternative ground," it is not at all clear that the court is applying the federal invalidating rule as part of the chosen California law. On the contrary, the court appears to regard this federal rule as binding upon the parties because of mandatory federal public policy not to be contracted out of by choice of law or otherwise.

In England, the law in this area is more certain, although not

443 Id. at 273-74.
445 Maw, supra note 437, at 374.
446 There is here the suspicion of the existence of a federal rule of public policy, that is, a rule imposed pursuant to federal constitutional mandate, which may be of greater force than the normal rules of public policy of the forum and may override otherwise applicable choice of law rules. The court does not appear to be aware of this possibility, and it would be a mistake to interpret Painton as indicating that it is more difficult for parties by choice of some foreign law to contract out of rules or policy of federal law than those of state law. It simply did not occur to the court, at least as far as may be seen from its opinion, that the United States's policy of strict regulation of inventions and patents might not be the sort of policy that under accepted criteria of the conflict of laws should be given such weight at the forum as to override normal choice of law rules.
thereby more commendable. English courts will hold parties to a choice of law that avoids part or all of their contract and thus defeat their expectations.\footnote{447} This fairly draconian rule is accepted without much question by the commentators.\footnote{448} In view of the fact that even where there is no express choice of law the rule ut res magis valeat quam pereat is not decisive in a court's determination of which of two laws it will choose to govern a contract,\footnote{449} it is not surprising that Dicey and Morris find it unobjectionable that "the court may find that the intention of the parties was in fact directed towards a law under which, in the event, their contract—or part of it—turned out to be void."\footnote{450} The explanation of the relative severity of the English rule as compared to that of the \textit{Restatement (Second)} is probably to be found in the generally more inflexible nature of English contract law and construction taken as a whole.\footnote{451}

6. Choice of Two or More Laws To Govern Different Issues Under the Contract

The \textit{Restatement (Second)} wholeheartedly embraces an issue-by-issue approach to choice of law.\footnote{452} It is therefore somewhat surprising to read in the comments to section 187 that "[t]he extent to which the parties may choose to have the local law of two or more states govern matters that do not lie within their contractual capacity is uncertain."\footnote{453}

If parties may choose to govern their contracts by otherwise inapplicable laws, it is difficult to see any reason, apart from the usual limitations on autonomy, why they should not choose, for example, one law to govern essential validity and another to govern performance. The problem seems only to be a lack of authority;\footnote{454} parties rarely in

\footnote{448} E.g., Graveson, supra note 347, at 28.
\footnote{449} \textit{See} Dicey \& Morris 708.
\footnote{450} \textit{Id.}
\footnote{451} For example, English rules with regard to privity and consideration are much more rigid than their American counterparts. The existence of fairly strict versions of the Statute of Frauds (virtually totally repealed in England) in American states appears to be evidence to the contrary, but only to one unaware of the swaths of exceptions that American judges have cut through the Statute.
\footnote{452} \textit{See} pp. 455-57 supra.
\footnote{453} \textit{Restatement (Second)} § 187, comment \textit{i} at 570.
\footnote{454} In \textit{Restatement (Second)} § 187, Reporter's Note, comment \textit{i} at 575, the Reporter without much enthusiasm cites \textit{In re} Elec. \& Missile Facilities, Inc., 38 Misc. 2d 423, 286 N.Y.S.2d 594 (Sup. Ct. 1962), as "a case suggesting that the parties may choose a special law to govern the validity of an arbitration clause contained in an agreement." But even this
fact want to subject different parts of their contracts to different laws.  

In England, there is no objection to parties’ utilizing this technique. Although “it is doubtless true to say that the courts of [England] will not split the contract . . . without good reason,” “good reason” would surely include a clearly expressed intent by the parties.

Why is it that English courts seem willing to allow parties to choose more than one governing law, whereas the Restatement (Second) is unsure whether pursuant to section 187(2) parties may do the same thing? The reason appears to be that the present discussion is to a degree making a false comparison. Choice of law under section 187(2) is not exactly the same as the exercise of party autonomy under English law. Section 187(2) purports to cover the whole field of contracts, including such areas as capacity and legality. The English autonomy principle, however, does not necessarily extend to these fields. It is therefore probable that the editors of the Restatement (Second) would agree that different laws could be chosen to cover essential validity and performance, for instance, as is the law in England. But they are concerned with more difficult issues, which in England are probably not even arguable subject to the autonomy rule in any event.

Nevertheless, if this assessment of the position of the Restatement (Second) is correct, it is to be criticized for over-generalization in its statement of the relevant law. For example, although it is admittedly uncertain whether parties may choose different laws to govern the issues of capacity and formality, it would appear to be entirely consistent with the fundamental issue-by-issue approach adopted by the Restatement (Second) for a contract to provide that each party’s obligations in performing the contract should be governed by the lex loci minimal reliance on Missile Facilities seems misplaced. The contractual clause in issue was in fact an arbitral forum- (not law-) selecting clause which, according to the court, “evince[d] that the parties clearly intended New York law to govern as to the arbitration provisions of the contract.” Id. at 425, 236 N.Y.S.2d at 596 (New York was the selected forum). Nevertheless, the court did not consider whether any other law might govern any other parts of the contract, for that was not in issue. In fact, the court mentioned that the contract was made in New York, apparently in order to indicate that New York law governed the rest of the contract as an additional argument supporting the contention that that law controlled the validity of the arbitration clause. Id.

457 P. 492 supra.
458 See notes 313-19 and accompanying text supra.
459 “For example, it is uncertain whether the parties may effectively provide that their capacity to make the contract shall be governed by the local law of one state and the question of formalities by the local law of another.” Restatement (Second) § 187, comment f at 570.
460 See text accompanying note 454 supra.
solutionis, even if the contract also required each party, or even one party, to execute his obligations in a different jurisdiction.

7. Autonomy and the Uniform Commercial Code

Cutting across the common law choice of law rules applicable in American courts is the Uniform Commercial Code. The Code greatly modifies the general choice of law rule for those types of contracts to which it is applicable and somewhat varies the rule in the particular case of contracts containing an express choice of law clause. Enacted in every American state but Louisiana, the Code's basic choice of law rule, section 1-105(1), reads as follows:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

Apart from its direct impact upon transactions covered by the Code, section 1-105(1) has an indirect importance for American choice of law thinking. Clearly, the section adopts not only the autonomy principle, but also a generally modern (or at least non-vested rights) approach to the whole question of choice of law. The section has therefore been cited in a number of cases not involving Code questions by courts of Code states seeking to justify a change from vested rights reasoning to interest analysis, with the object of showing that there is at least oblique legislative approval of the modern reasoning.

Section 1-105(1) has had more attention from the courts in this indirect fashion than it has in cases where it has been directly in issue. Consequently, the full import of its terms is as yet uncertain. In particular, it is not entirely clear what the limitations are on parties' free-

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461 This exception refers to individual choice of law rules for certain specific types of contracts such as those involved in bank deposits, bulk transfers, and investment in securities.

462 Uniform Commercial Code § 1-105(1), Comment 1. With minor exceptions, the Code applies to the following: sales of goods; commercial paper; bank deposits and collections; letters of credit; bulk transfers; warehouse receipts, bills of lading, and other documents of title; investment securities; and secured transactions, including sales of accounts, contract rights and chattel paper. The Code concerns chiefly the essential and formal validity and effect of contracts. However, a full description of all the contractual issues it covers would involve an examination of a large proportion of the Code's provisions themselves, which is beyond the scope of this article.

dom to choose the law to govern their contracts. The requirement that there must be a "reasonable" relation to the forum state or to another state or nation before a choice of law will be recognized would appear to be similar to the general limitation contained in Restatement (Second) section 187(2)(a).

The requirement of a reasonable relationship between the chosen law and the transaction could possibly create a somewhat bizarre situation. For if forum law were chosen and it did not pass this test, the Code would still apply if the transaction nevertheless bore an "appropriate" relation to the forum. It is therefore conceivable that a court might consider striking down an express choice of forum law as not being "reasonably" related to the contract, but nevertheless apply that same law as "appropriately" related. Such a result is unlikely, however; it appears that "appropriate" and "reasonable" in this context are supposed to have the same meaning. If so, then when a choice of law is struck down as being not reasonably related to the contract in dispute, a court will simply have to fall back on common law rules of choice of law.

A more serious difficulty with section 1-105(1) is that it makes no provision for the case of a choice of the law of one of two states with which the transaction has a reasonable relation but neither of which is the law of the forum, for the section authorizes application of an autonomously chosen law only in cases where the contract bears a reasonable relation to the forum. Where there is no such relationship, if the conclusion in the previous paragraph is correct, section 1-105(1) cannot apply at all, for neither will there be an "appropriate" relationship with the forum. Again, the court would be thrown back to common law rules.

Assuming, however, that a choice of law clause has successfully run the gauntlet of section 1-105(1), there may be other limitations on party autonomy contained in the Code that might strike down that choice of law. In particular, section 1-105(1) has no requirement as is

404 P. 492 supra; cf. notes 320-47 and accompanying text supra.
405 Uniform Commercial Code § 1-105(1).
407 These would presumably be rules applicable in cases in which the parties have made no choice of law or in which their choice has not been recognized, because if the law chosen neither is reasonably related nor bears an appropriate relation to the contract for the purposes of the Code, it would seem unlikely that it would qualify under the substantial or other reasonable relation test of Restatement (Second) § 187(2).
408 Here, contrary to the situation envisioned in note 407 supra, the autonomy doctrine could be applied in appropriate circumstances.
found in the common law formulated by *Restatement (Second) section 187(2)(b)* that application of the parties' chosen law should not offend a fundamental policy of an otherwise applicable law. The important role of state policy in American conflicts law has been stressed above, and the particular limiting effect of public policy upon autonomous choice of law has been examined. But on the face of the section, it seems that a choice of law valid by section 1-105(1) is entirely unreviewable on public policy grounds. No problem arises when forum (that is, Code) law is chosen, of course, but what of a choice of some law reasonably, not necessarily most significantly, related to the transaction whose application in the case entirely offends forum public policy?

There are two possible lines of attack on such a choice. First, if the transaction is in fact a contract of adhesion, it may be argued that the parties never did "agree," at least in any real sense, that the chosen law should apply. This argument has been discussed in the context of adhesion contracts generally.

Another argument may be built on section 2-302(1) of the Code, which provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Unconscionability in this context involves consequences to one contracting party that are regarded by the forum as so harmful that they should be mitigated by judicial intervention. These consequences might be either unforeseen or foreseeable at the time of the contract but agreed to by the party injuriously affected because of an inferior bargaining position on his part. The consequence of a choice of law clause should probably be put into the "foreseeable" category; that is the reason for making the choice. Therefore, it is important to know whether section 2-302(1) is intended to cover foreseeable harm. The Official Comment to the section reads: "The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power."

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469 See notes 104-99 and accompanying text supra.
470 See notes 355-81 and accompanying text supra.
471 See notes 382-92 and accompanying text supra.
473 *Uniform Commercial Code* § 2-302, Comment 1. *But see* Frostifresh Corp. v.
Although the Official Comment is not law, it must certainly be highly persuasive for a court construing the section. Nevertheless, it is perhaps possible for a court desirous of striking down an express choice of law clause to avoid the implications of the Comment. The Official Comments within the Code are not wholly consistent on the meaning of "unconscionable." Under section 2-718(1), "a term fixing unreasonably large liquidated damages is void as a penalty," but this section makes no provision for unreasonably small liquidated damages. Instead, the Official Comment to the section reads: "An unreasonably small amount would be subject to similar criticism and might be stricken under the section on unconscionable contracts or clauses." This Official Comment, therefore, does not envision section 2-302(1) being limited to unforeseeable harm.

There is also the influence of the Restatement (Second)'s treatment of contracts of adhesion, which suggests that autonomous choices of law in these transactions should at least be scrutinized closely before being applied even if, on the facts, it cannot be denied that there was consensus ad idem in the traditional sense. The views of the Restatement (Second) might be expected to carry at least some weight with a court construing the Code in a case on a contract of adhesion. Finally, even if section 2-302(1) is limited to the prevention of unfair surprise and oppression, it is arguable that a choice of law clause may produce results that can be said to "surprise" a party although conventional contract terms, such as those regulating rates of interest and effect of nonpayment, give advance warning of the consequences of signing the contract. The distinction is that a choice of law clause refers only indirectly to the rules defining the parties' obligations and rights. Perhaps, therefore, a layman could reasonably claim to be unfairly surprised or oppressed in finding out just what those rules are.

The Uniform Commercial Code not only carves its own path across the American law of contracts; it also cuts into the symmetry of the argument of this article to a certain extent. There is no legislation


474 See, e.g., Freuhauf Corp. v. Yale Express Sys., Inc., 370 F.2d 433 (2d Cir. 1966).

475 UNIFORM COMMERCIAL CODE § 2-718, Comment 1.

476 See note 388 and accompanying text supra.

in England that makes a similarly broad modification of the common law rules for contract cases. It is thus not possible to draw any useful comparisons between the Code and English law.\textsuperscript{478}

\textsuperscript{478} This section has attempted to cover the important questions relating to party autonomy in English and American law. However, a complete examination of the law relating to choice of law clauses might include other relatively minor matters, perhaps not all strictly questions of the conflict of laws, such as the effect of an unclear choice (really a question of construction), the results of failure to plead and/or prove a foreign law that has been stipulated in a contract (a matter of procedure), and the tendency that may still be found in some jurisdictions to make use of the old vested rights escape routes, such as procedural characterization, to justify a choice of law that is otherwise indefensible, at least according to the philosophy of that choice of law system. These matters are exhaustively dealt with by Johnston, \textit{supra} note 302.