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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John Prebble, Choice of Law to Determine the Validity and Effect of Contracts a Comparison of English and American Approaches to the Conflict of Laws, 58 Cornell L. Rev. 635 (1973)
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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 II*

John Prebble†

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* Part I of this article was published in the March 1973 issue of the Cornell Law Review.
V

CONTRACTS CONTAINING NO CHOICE OF LAW CLAUSE

A. Contracts Where a Choice of Law Can Be Clearly Inferred

Often a contract will contain no express choice of law clause, yet the circumstances are such that an inference may be drawn that the parties intended a certain law to govern. This inference may as strongly
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indicate a particular law as would a specific choice of law clause. In both England and America, as long as it can be established "that the parties have chosen the state of the applicable law," the case will be treated as if the parties had actually made an express choice. But in America at least, "[i]t does not suffice to demonstrate that the parties, if they had thought about the matter, would have wished to have the law of a particular state applied."

Although there are limitless circumstances in which a court might be justified in inferring a choice of law from the terms of a contract, one group of cases deserves special mention: those involving contracts containing a clause selecting an arbitral forum. Until 1969, English courts treated contracts containing such clauses as cases in which an inference should be drawn that the parties intended to select the law of that forum to govern their obligations. Such a clause was thus tantamount to an express choice of law, "since for better or for worse English law [was] committed to the view that qui elegit judicem elegit jus." This is no longer the rule, and a clause selecting an arbitral forum is now merely evidence of intent as to choice of law, or simply a factor to be taken into account in considering with which law the contract is most significantly connected.

B. Contracts Where a Choice of Law Cannot Be Clearly Inferred

1. Statement of the Significant Contacts Rule

According to the Restatement (Second) of Conflict of Laws, where a contract contains neither an express nor a clearly inferable choice of law, the American rule is as follows:

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the

479 Restatement (Second) of Conflict of Laws § 187, comment a at 561-62 (1971) [hereinafter cited as Restatement (Second)].


481 Restatement (Second) § 187, comment a at 562.


483 See cases cited in note 480 supra.
principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.\footnote{484 \textit{Restatement (Second)} § 188.}

When sections 187\footnote{485 See Prebble, \textit{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}, 58 \textit{CORNELL L. REV.} No. 3 (1973), notes 237-478 and accompanying text [hereinafter cited as Prebble, \textit{Part I}].} and 188 of the \textit{Restatement (Second)} are read together, it becomes apparent that American law, as formulated by the \textit{Restatement (Second)}, divides contracts into three categories for choice of law purposes. The first group, contracts containing an express choice of law, are decided under the rules of section 187. The second group, which may be called inferable intention cases, are those in which it is established "that the parties have chosen the state of the applicable law."\footnote{486 See notes 479-80 and accompanying text \textit{supra}.} These cases are also governed by section 187. Finally, where there is no expressed or inferable intention, section 188 governs.

English law divides cases into three categories which are very similar to the American classifications. However, the category of inferable intention cases is wider in England than in the United States.\footnote{487 See text following note 502 \textit{infra}.} A second difference between English and American law is the method of formulating the choice of law rule applicable to the third category of cases. \textit{Restatement (Second)} section 188 refers to the law with "the most significant relationship" to the transaction, while English judges generally speak of the "system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection."\footnote{488 See, e.g., Bonython v. Commonwealth of Australia, [1951] A.C. 201, 219 (P.C. 1950) (Austl.).}

The wider limits in England of the second category of cases may occasionally be
Probably the clearest description of the three categories is found in *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* The following passage from the opinion of Lord Justice Widgery in the Court of Appeal's decision was adopted by Viscount Dilhorne on appeal in the House of Lords:

To solve a problem such as arises in this case one looks first at the express terms of the contract to see whether that intention is there to be found. If it is not, then in my judgment the next step is to consider the conduct of the parties to see whether that conduct shows that a decision in regard to the proper law of the contract can be inferred from it. Finally, if one fails in this inquiry also and is driven to the conclusion that the parties never applied their minds to the question at all, then one has to go to the third stage and see what is the proper law of the contract by considering what system of law is the one with which the transaction has its closest and most real connection.

The similarity to the three categories of the *Restatement (Second)* is evident. But an examination of the facts of the *Whitworth* case reveals that the similarity is deceptive, given the broader sweep of the English inferable intention category of cases.

*Whitworth*, an English company owning premises in Scotland, contracted there with *Miller*, a Scottish construction company, to make certain alterations in those premises. The architect was English. At his request, the English standard form of the Royal Institute of British Architects (RIBA) was used to formalize the contract, rather than a Scottish version which was available. The English form reads in relevant part:

> [1]n case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor . . . then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties, or, failing agreement, . . . a person to be appointed on the request of either party by the president or vice-president for the time being of the Royal Institute of British Architects.

of decisive significance in choice of law decisions. On the other hand, the different methods found in England and America of expressing the choice of law rule for the third category of cases, as well as the English internal dispute as to what the correct formulation should be, serve more as sources of confusion than as potential causes of significantly divergent results in category three cases before the courts of the two countries.

491 Apart from questions of estoppel, only conduct up to the time of making the contract may be considered. See [1970] 1 A.C. at 611, [1970] 1 All E.R. at 805.
492 *Id.* (Viscount Dilhorne).
493 See *id.* at 585, [1970] 1 All E.R. at 800.
Disputes arose, and Miller commenced an action against Whitworth in England. The action was stayed pending arbitration. Since the parties were unable to agree on an arbitrator, Miller applied to the RIBA president, who appointed a Scottish architect to arbitrate. The architect in turn appointed a Scottish solicitor as clerk in the submission.\(^{494}\) The clerk told Whitworth by letter that he intended to follow Scottish procedure. There was no objection, and the arbitration commenced in Scotland. Points of law arose, and the English company asked for the arbiter\(^{495}\) to state his award as a special case for the opinion of the High Court.\(^{496}\) Since that procedure is not available under Scottish law, the arbiter refused. Accordingly, Whitworth obtained an order from a Master that the arbiter state a case. On appeal, this order was rescinded by a judge of the High Court, restored by the Court of Appeal, and again rescinded by the House of Lords in the decision now under discussion.

The issue, as stated by Lord Reid, was quite simply whether this was a Scottish or an English arbitration.\(^{497}\) Only if the curial\(^{498}\) law was English was the Master's order correct. The House was unanimous in holding that the curial law of the arbitration did not have to be the same as the law governing the substance of the contract. In this case the curial law was Scottish, but because the Court of Appeal had concluded that the arbitral procedure was properly governed by English law, it was necessary for the House of Lords to discuss that issue. Their Lordships decided by a majority of three\(^{499}\) to two\(^{500}\) that the proper law of the contract was English. At the same time, the majority softened this holding by their decision that since the arbitration itself was to be governed by Scottish law, the arbiter could not be compelled to state a special case for the High Court.

On these facts, Whitworth appears at most to be a case where it was “demonstrate[d] that the parties, if they had thought about the matter, would have wished to have the law of [England] applied”\(^{501}\) as the proper law of the contract. The second category of the Restatement (Second) would apparently be inapplicable. Nevertheless, Vis-

\(^{494}\) See id. at 583, [1970] 1 All E.R. at 796.
\(^{495}\) The Scottish term for arbitrator.
\(^{496}\) Under the Arbitration Act of 1950, 14 & 15 Geo. 6, c. 27, s. 21, either party to an arbitration may require the arbiter to state his award as a special case for judicial opinion on a point of law.
\(^{498}\) “Curial” was used to refer to the procedural laws applicable at the arbitral forum.
\(^{499}\) Lords Hodson and Guest, and Viscount Dilhorne.
\(^{500}\) Lords Reid and Wilberforce.
\(^{501}\) Restatement (Second) § 187, comment a at 562.
count Dilhorne clearly determined that Whitworth was a stage two case according to the test enunciated by Lord Justice Widgery and himself. Two important consequences follow. First, less conclusive evidence is needed in England for a court to infer an intention to make a choice of law. Second, the third class of cases, where the test is what constitutes the law of either the most significant relationship (America) or the closest and most real connection (England), is necessarily more restricted in England than in America. Cases with identical facts may thus be categorized differently in English and American courts, resulting in different judicial choices of law. Whitworth itself is almost certainly such a case, for Viscount Dilhorne clearly states that

[i]f in this case one had to reach the third stage and consider with which system of law the transaction had its closest and most real connection, . . . I would hold without any hesitation that the Scottish system of law was the one . . . .

I do not, however, think that in this case one gets to that stage for . . . both parties intended that the contract should be governed by the law of England.

In an American court adhering to the Restatement (Second), Whitworth probably would have reached the third stage.

The Widgery-Dilhorne test is believed to formulate accurately the English rule for the third category of cases, that is, cases containing no express choice of law clause. But English courts have always been more willing than their American counterparts to give effect to the intention of the parties. English judicial opinions, even in category three cases, ascribe to contracting parties a presumed intention as to choice of law where no expressed or inferable intention is found. Lord Atkin, in Rex v. International Trustee, held that “the intention will be presumed by the Court from the terms of the contract and the relevant surrounding circumstances.” The rule was put even more strongly in Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd.:

The parties may not have thought of the matter at all. Then the Court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract.

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502 See note 492 and accompanying text supra.
In addition to sharing the weakness of any legal fiction, the presumed intention approach also raises a question of whether the court should attempt to presume what these parties would have decided (the approach of Lord Atkin) or what reasonable persons ought to have intended in the circumstances of the case (the Mount Albert approach). Lord Atkin's reasoning has in fact been almost entirely abandoned in English cases. But the law has gone further.

In attempting to determine the parties' presumed intent, a court can only consider the terms and circumstances of the contract to see what law the parties most probably would have stipulated had they considered the matter. A court must usually assume that this would have been the law most closely and significantly connected with the contract. Consequently, reference to a presumed intent is redundant; it is an unnecessary intermediate step that does not advance the court's reasoning. It follows that the proper law of a contract where there is no express or inferable choice, as stated in Bonython v. Commonwealth of Australia, is simply "the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection." The Bonython formulation, which is clearly reflected in the passage quoted from Lord Justice Widgery and Viscount Dilhorne, appeared to have become indisputably the English rule. Here the matter should have rested. Unfortunately, not all of Their Lordships who took part in the recent Whitworth and Tunisienne cases agreed with this appraisal.

Lord Hodson briefly observed in Whitworth that the court must

508 It was approved again by the House of Lords in Tomkinson v. First Penn Banking & Trust Co., [1960] 2 W.L.R. 969, [1960] 2 All E.R. 332 (H.L.). The rule, as stated in the 1958 edition of Dicey's Conflict of Laws, the leading English text, read:

When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.

A. Dicey, Dicey's Conflict of Laws 731 (7th ed. J. Morris ed. 1958). In the eighth and latest edition, however, the rule was changed to point to "the system of law with which the transaction has its closest and most real connection." A. Dicey & J. Morris, Dicey and Morris on the Conflict of Laws 691 (8th ed. J. Morris ed. 1967) [hereinafter cited as Dicey & Morris].

"fix the presumed intentions of the parties as best it can."\textsuperscript{511} Although this statement clearly ignores previous House of Lords authority, without a fuller statement of his rationale it would be difficult to say that Lord Hodson really intended to direct the law back to the pre-\textit{Bonython} state.\textsuperscript{512} But Lord Hodson was not alone. Lord Wilberforce questioned "what intention ought to be imputed to [the parties]."\textsuperscript{513} Lord Reid agreed with Viscount Dilhorne, but cited \textit{Bonython}.\textsuperscript{514} Lord Guest's views are opaque on this issue.\textsuperscript{515} The \textit{Whitworth} result is therefore inconclusive.

Matters were clarified somewhat in \textit{Tunisienne}. In that case, a clear majority, Lords Reid,\textsuperscript{516} Morris,\textsuperscript{517} and Diplock,\textsuperscript{518} favored the closest connection test. Lord Wilberforce re-emphasized his view that the parties' intention is to be inferred, but found no essential difference between his view and the \textit{Bonython} formulation.\textsuperscript{519} Viscount Dilhorne did not expand upon his views in \textit{Whitworth}, but, somewhat surprisingly, pronounced himself entirely in agreement with the opinion of Lord Wilberforce.\textsuperscript{520} It can only be assumed that he, too, saw no difference between the imputed intention and the closest connection tests.

Such a position is not unreasonable. Clearly, the law with the closest and most real connection to the contract is very probably the law which just and reasonable persons may be presumed to have intended to govern their obligations.\textsuperscript{521} Furthermore, in no reported case has the result turned upon whether the court adopted the presumed intention or the closest connection test. The American significant contacts formulation appears to be so close to the English closest and most real connection rule that it is difficult to imagine a case of such facts

\textsuperscript{512} See note 508 supra.
\textsuperscript{514} \textit{Id.} at 604, [1970] 1 All E.R. at 799.
\textsuperscript{515} \textit{Id.} at 607-08, [1970] 1 All E.R. at 802.
\textsuperscript{517} \textit{Id.} at 587, [1970] 3 All E.R. at 77.
\textsuperscript{518} \textit{Id.} at 603-04, [1970] 3 All E.R. at 91. Lord Diplock was particularly emphatic, stating:

\textit{[T]he proper law is that system of law with which the transaction has its closest and most real connection . . . .}

My Lords, this is applied as a positive rule of English law. It is applied not because it is the choice of the parties themselves but because they never intended to exercise their liberty to make a choice, or, if they did, they have failed to make their choice clear.

\textsuperscript{519} See \textit{id.} at 595, [1970] 3 All E.R. at 84.
\textsuperscript{520} See \textit{id.} at 593, [1970] 3 All E.R. at 82.
that the results could turn upon the verbal differences between the rules of the two countries.

However it is phrased, the choice of law rule for category three cases is not particularly definite. It has the virtue of flexibility, although it does admittedly make predictability of results less than certain in some cases. The situation is certainly not helped by having two conflicting judicial formulations of the rule current in England, even though those favoring a presumed intention test appear to be in a distinct minority.

In order to alleviate the confusion, the presumed intention version of the rule should be discarded. A presumed intention must always remain a legal fiction. At best, the dignity of the law in the eyes of a party is not enhanced when he is told that as a reasonable man (doubtless he never considered himself otherwise) he is presumed to have intended to subject his contract to the provisions of a law to which he honestly knows he never would have acceded had he considered the matter. At worst, it is conceivable that the same court applying different formulations to the same facts might decide the case differently.\footnote{522}

In neither \textit{Tunisienne} nor \textit{Whitworth} is there overt evidence that any of Their Lordships recognized that they were at variance with the English rule for finding the proper law.\footnote{523} In most cases, this variance will not be significant, but it is unfortunate that English law has slightly regressed from the position of certainty seen in \textit{Bonython} and the rule as it is found in Dicey's eighth edition.\footnote{524}

If English judicial authority lacks unanimity, American case law is even more inconclusive. Nevertheless, the trend is clearly towards the \textit{Restatement (Second)}. Since 1960, leading cases in several jurisdictions have either cited section 188 favorably,\footnote{525} or have expressly applied it.\footnote{526}

Except for the results of Beale's interference,\footnote{527} the development

\begin{itemize}
  \item \footnote{522} The risk that different formulations will result in different decisions is slim, as illustrated by the \textit{Whitworth} case. In \textit{Whitworth} Lords Reid and Wilberforce applied respectively the \textit{Bonython} and the presumed intention tests, and both concluded that the proper law was English, while the majority of the House decided on Scottish. \textit{See} notes \textit{511-15} and accompanying text \textit{supra}.
  \item \footnote{523} Of course, the lack of unanimity of the result of applying this rule is apparent enough.
  \item \footnote{526} \textit{See}, e.g., \textit{Haines v. Mid-Century Ins. Co.}, 47 Wis. 2d 442, 177 N.W.2d 328 (1970).
  \item \footnote{527} \textit{See} Prebble, \textit{Part I}, notes 28-37 and accompanying text. The interference is
of American case law has been rather similar to that of English case law; that is, early cases espoused views quite akin to the presumed intention test, while more recent cases emphasize the importance of "connection" and "contact." In Pritchard v. Norton,528 the United States Supreme Court followed the "principle that in every forum a contract is governed by the law with a view to which it is made."529 Despite the subsequent appearance of the vested rights doctrine, Arthur Nussbaum, who may be described as an early-modern commentator, was able to conclude after a detailed examination of the cases that, in 1942,

the law of the country, with which in the expressed or presumed intent of the parties the contract had its most important connection, shall govern, taking into account the various territorial "contacts" of the contract, such as the place of contracting, place of performance, domicile of the parties, suits of the res, etc.530

Since Nussbaum wrote, the deficiencies of the presumed intention formulation have become more apparent to American judges, and it has been progressively abandoned. Although it was not the first contract case to break away from the mechanical vested rights rules and the presumed intention theory, the celebrated decision of Auten v. Auten531 marks a watershed in the development of choice of law rules in contract cases. In Auten, Judge Fuld, writing for the New York Court of Appeals, clearly repudiated both the mechanical dogmatism of vested rights and the imputation of fictional intentions to contracting parties. The court instead adopted the "center of gravity" or "grouping of contacts" approach in order to apply the policy and laws of the jurisdiction "most intimately concerned with the outcome of [the] particular litigation,"532 and also in order to "give effect to the probable intention of the parties and consideration to 'whether one rule or the other produces the best practical result.'"533 Thus, the court recognized that the closest connection approach is likely to reveal the law intended

particularly obvious in the first Restatement's adoption of the strict rules of lex loci contractus and lex loci solutionis.

528 106 U.S. 124 (1882).
529 Id. at 136.
530 Nussbaum, Conflict Theories of Contracts: Cases Versus the Restatement, 51 Yale L.J. 893, 896 (1942).
532 Id. at 161, 124 N.E.2d at 102, quoting Note, Choice of Law Problems in Direct Actions Against Indemnification Insurers, 3 Utah L. Rev. 490, 498-99 (1953).
by the parties, but did not make the mistake of seeking that presumed intent as an end in itself.

By 1960, Willis Reese was confident that the Auten rule was "soon to become, if it [was] not so already, the majority rule in [America]." Since Auten, the center of gravity approach has been developed and refined into its present "significant contacts" form, found in section 188 of the Restatement (Second). This section represents the current majority rule.

If the two rules are correctly stated by the Widgery-Dilhorne test and by section 188, they are basically similar, at least in form. However, English and American approaches to the choice of law problem, that is, jurisdiction selection and interest analysis, are fundamentally quite different. Because of the importance accorded by both legal systems to a clear choice of law clause contained in a contract, the differences between the two approaches are greatly muted when in the case at issue the contract contains an express stipulation for a particular law. There are greater differences in cases where this harmonizing element is absent. English courts do not examine the content of specific competing rules; they simply select the jurisdiction whose rule is to apply to the particular case, whatever (within the limits of forum public policy) that rule may be. English courts do not embrace the issue-by-issue approach; they tend to seek one proper law to govern most aspects of a contract rather than to concentrate on the particular issue at bar. Consequently, considerations such as the "better rule of law" or the interests of the conflicting jurisdictions in post-contract events cannot arise in England.

It could be argued that this limitation is so weighty that English courts are incapable of applying the significant contacts test in any way consistent with the spirit of the Restatement (Second), and that although they are superficially similar, the rules of the two countries have entirely different bases. This argument is difficult to refute on theoretical grounds. Practically speaking, however, the basic differences between the English and the American approaches to choice of law are rarely evidenced by any significant difference in the disposition of con-

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635 Cases illustrating the development of the significant contacts test are collected and discussed in Weintraub, Choice of Law in Contract, 54 IOWA L. REV. 399, 412-13 (1968).
636 See generally Prebble, Part I, notes 69-71 and accompanying text.
637 Cf. id., text following note 12.
tract litigation. There are two reasons for this similarity of result in contract cases.

First, the area of private contract law is not one in which government policy or interest tends to be very influential. Therefore, even under the interest analysis approach, an American court will be unlikely to reach a conclusion different from an English court despite the fact that English courts do not subscribe to interest analysis.

Second, contract law, at least commercial contract law, is a relatively homogeneous area. English courts applying the Widgery-Dilborne rule may not focus specifically on particular issues in quite the same way as American courts following the Restatement (Second), but the English closest connection test is sufficiently flexible to produce much the same result. The general choice of law rules applicable to contracts not containing express stipulations of governing law exemplify the phenomenon that English and American rules, although based on widely different theoretical premises, generally yield the same result.

2. Application of the Significant Contacts Test

The significant contacts test is fundamentally uncomplicated. It is simply incumbent upon each party to adduce evidence of relevant facts supporting his side in order that the court may decide with which of two laws the contract is most closely connected. The matter is not, of course, wholly one of evidence, and some decisions may appropriately be referred to by way of precedent in later cases. But because there is an infinite variety of possible contracts, there is at least theoretically a similar diversity of possible results when these contracts come to be the subject of litigation.

Both the strength and the weakness of the significant contacts test lie in its case-to-case flexibility. Albert Ehrenzweig, with a certain justification, criticizes the test on the grounds that

588 The Restatement (Second) neatly illustrates this point. Sections 189-97 concern choice of law in nine different common types of contracts, including transfer of land, sale of chattels, suretyship, and transportation. In each of these sections, the Restatement (Second) identifies a particular contact which will usually be the most significant in relation to the type of contract which is the subject of the particular section. For example, in a sale of land, the situs of the land will usually be the most relevant contact. See Restatement (Second) § 189. Each rule is thus a particular application of the significant contacts rule; to make the point abundantly clear, each section also contains a passage to the effect that the identified contact will control unless, in the particular case and with respect to the issue at hand, some other state has a more significant relation to the transaction and the parties. This formulation of subrules may not be particularly helpful. See notes 576-79 and accompanying text infra.
what should be a conclusion reached by the use of a rule of choice of law, namely the ascertainment of the "center of gravity," the "most significant relationship" or "the proper law," is offered to us as a premise for the choice.539

An important consequence of the ad hoc nature of the significant contacts test is that it is of only limited usefulness to make lists of what contacts a court should examine to determine whether they are of significance in any particular case. An attempt at systematization has been made in section 188(2) of the Restatement (Second),540 but this list is certainly not exhaustive. English authorities have tried to produce their own lists. Cheshire's inventory, for example, offers considerably greater detail than the Restatement (Second)'s list, but it is essentially similar in approach.541 Cheshire is finally forced to conclude that any "fact which serves to localize the contract"542 may be a contact to be considered by the court.

Every contact between a contract and a particular jurisdiction may potentially be considered significant by the courts. There is therefore a great temptation for courts, and even more for partisan counsel, to emphasize circumstances connected with a contract which, in the case of that contract, could not reasonably be regarded as legally significant. Counting rather than weighing contacts has regretfully been a feature of some cases both in England and America. Enumerating the competing contacts associated with a particular contract, and basing a decision on numerical strength one way or the other, is easier than evaluating each contact carefully and rejecting those contacts which, in a particular case, should not be considered significant.

The Restatement (Second) forbids mere contact counting: "[C]ontacts are to be evaluated according to their relative importance with respect to the particular issue."543 This rubric is by no means always

540 For the text of § 188(2), see text accompanying note 484 supra.
541 The court must take into account, for instance, the following matters: the domicile and the residence of the parties; the national character of a corporation and the place where its principal place of business is situated; the place where the contract is made and the place where it is to be performed; the style in which the contract is drafted, as, for instance, whether the language is appropriate to one system of law, but inappropriate to another; the fact that a certain stipulation is valid under one law but void under another; the nationality of the ship in maritime contracts; the economic connexion of the contract with some other transaction; the fact that one of the parties is a sovereign State; the nature of the subject-matter, or its situs; the head office of an insurance company, whose activities range over many countries . . . .

G. Cheshire & P. North, supra note 482, at 203-04 (footnotes omitted).
542 Id. at 204.
543 Restatement (Second) § 188(2).
complied with. For example, contact counting occurred in the case of *Haag v. Barnes.*

The defendant in that case was a Chicago businessman who, on a trip to New York, caused the plaintiff, a New York resident, to become pregnant. The subsequent birth was in Illinois, and a settlement for the care of the baby was entered into there. The contract contained a stipulation that Illinois law would govern. The arrangements were made on the advice of the defendant's lawyer, who successfully manufactured several contacts between the settlement contract and Illinois. The plaintiff sued for increased maintenance in New York. Under the law of New York the settlement was no defense, because it was subject to judicial review. The New York Court of Appeals based its decision to apply Illinois law on two alternative grounds. First, it held that if the intention of the parties was to govern, then the choice of Illinois law was effective. Alternatively, the court suggested that since New York probably does not recognize the autonomy doctrine, the significant contacts test governs. Applying this rule, the court again concluded that Illinois law controlled.

The matters which, added to the choice of law clause, the court considered decisively indicated Illinois law included:

1. both parties are designated in the agreement as being “of Chicago, Illinois,” and the defendant's place of business is and always has been in Illinois;
2. the child was born in Illinois;
3. the persons designated to act as agents for the principals (except for a third alternate) are Illinois residents, as are the attorneys for both parties who drew the agreement; and
4. all contributions for support always have been, and still are being, made from Chicago.

The court was merely stating the same thing in different ways—that the putative father was a domiciliary and resident of Illinois. Little was added by saying that the defendant's place of business was in Illinois and that he paid for the support of the child from there. Despite the contract's terms, the mother was never really "of Chicago, Illinois," except for a short time before and after the birth of the baby. Her contacts with Illinois were simply the result of the defendant's asking her to come there for the birth.

On the other hand, the court dismissed as relatively unimportant the fact that the parties' liaison took place in New York, and that the

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545 175 N.E.2d at 443, 216 N.Y.S.2d at 67.
546 175 N.E.2d at 444, 216 N.Y.S.2d at 69.
547 216 N.Y.S.2d at 67.
mother and child were resident there at the time of the case, and, presumably, that if the defendant ceased to support the child responsibility for its welfare would fall on the state of New York.

The court's final choice of Illinois law is not criticized here. The case was a close one. It would not be unreasonable to say that the parties' choice of law, and the defendant's domicile, justified the application of Illinois law. What is objectionable is the court's splitting of the domicile-residence contact into several different parts, and giving them each separate weight. The court's uncritical acceptance of the genuineness of the contacts between the plaintiff and Illinois, which were to a large extent engineered by the defendant, is also open to criticism.

*Haag v. Barnes* was not an easy case. The plaintiff seems to have been less than entirely meritorious, while the defendant had been quite generous in the original settlement, and his contributions to the child's support had in fact gone beyond what was required by its terms. The court therefore had no difficulty in holding that the choice of law clause need not be struck down to avoid a result contrary to forum public policy. Following an argument similar to Otto Kahn-Freund's doctrine of the "'relativity' of public policy," the court pointed out that its duty was not to decide whether Illinois law, which did not require submission of this agreement to judicial approval, was contrary to New York policy. Rather, the court was obliged to determine on the facts of the case before it whether support received by the child under the settlement satisfied the requirements of New York policy. The court felt that in the instant case it clearly did.

The type of reasoning found in the *Haag* case has received more than its share of scholarly comment, and the specific instructions of the *Restatement (Second)* may be expected to alert American lawyers and judges to the need for care in applying the significant contacts test.

548 *Id.* at 558, 175 N.E.2d at 443, 216 N.Y.S.2d at 67.


550 9 N.Y.2d at 560-61, 175 N.E.2d at 444, 216 N.Y.S.2d at 69-70.

Perhaps the court was not anxious to save the defendant from having to demonstrate the reasonableness of an obviously fair settlement before the New York courts, at the instance of a woman who apparently wanted more than her pound of flesh. If this was its sub silentio inclination, it is regrettable that the court's overt reasoning was not more respectable. On the facts, the choice of Illinois could have been justified either by the autonomy doctrine (the public policy exception being inapplicable because the agreement in question provided for support of the child in excess of New York requirements) or by a significant contacts test, minus undiscriminating contact-counting.

Haag v. Barnes probably evidences the growing pains accompanying the adoption of modern choice of law rules, although English judges, with much longer experience in applying the significant contacts test, are occasionally open to similar criticism.

English courts do not formally subscribe to a mechanical, contact-counting approach. For example, Lord Wilberforce in Whitworth indicated that “the correct course [is] to ascertain from all the relevant contemporary circumstances including, but not limited to, what the parties said or did at the time, what intention ought to be imputed to them on the formation of the contract.”

Lord Reid in the same case agreed; he would not consider just any circumstance, only relevant ones. But his actual treatment of the case belied any such assurance. His Lordship observed, for example, that clause four of the RIBA standard form used by the parties required the contractor to comply with Acts of Parliament and bylaws. “As all the work was to be done in Scotland,” Lord Reid continued, “that can only mean Scottish legislation.” But what is the significance of this conclusion? Clause four requires compliance with local legislation by the contractor, but the clause would require this compliance wherever the place of performance. That Scotland was the locus solutionis was of course highly significant, but it added nothing to point out that Scottish building regulations would therefore apply to the contract, and that under the contract the builder had to comply with those regulations. Whatever the proper law of the contract, it would naturally be incumbent upon the contractor not to break any local bylaws or other legislation pertaining to the work he was doing.

In another leading case, The Assunzione, it was held by Lord

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553 Id. at 603, [1970] 1 All E.R. at 798.
554 See note 493 and accompanying text supra.
556 Id.
557 There is another possible explanation for Lord Reid’s argument. Perhaps His Lordship had already decided that the proper law of the contract was Scottish law, and was therefore trying to fit the facts to this conclusion. This hypothesis is supported by Lord Reid’s treatment of certain clauses in the contract which utilized specifically English terminology. For example, he believed that the contract’s reference to “property real and personal,” terms without meaning in Scottish law, must have been intended to mean “property heritable or movable.” Id. In the circumstances, the use of this English terminology, in a form specially preferred by the English architect, could have been assumed to show an intention that English law should govern.
Justice Singleton that "we must have regard to . . . all the surrounding facts."\(^{559}\) He then added that it was necessary to "look at all the circumstances and seek to find what just and reasonable persons ought to have intended."\(^{560}\) If pressed, he would doubtless have conceded that he meant only relevant facts and circumstances. But, as seen from Lord Reid's reasoning, such a mental reservation is insufficient to prevent unwarranted weight from being given to irrelevant matters. The omnibus "consider everything and sift out the irrelevancies later" approach sometimes adopted by English courts lends itself to mechanical contact counting.\(^{561}\)

Whatever the errors in the opinions of the New York Court of Appeals in *Haag v. Barnes*,\(^{562}\) and of Lord Reid in the *Whitworth* case,\(^{563}\) these cases demonstrate that the flexibility of the significant contacts test does make its application difficult. Certain American scholars believe that this problem can be overcome by refining the test to form numerous specific rules to cover particular types of, and issues in, contract cases. Prominent among these scholars is Willis Reese. Professor Reese believes that the significant contacts test is merely an "approach," which should be resolved into a series of rules as soon as conveniently possible.\(^{564}\)

Some of Professor Reese's lack of esteem for the significant contacts test seems to be merely terminological in origin, and in fact to depend upon his own terminology. Although a directive is formulated in broad terms, it may still constitute a rule and need not be stigmatized as merely an "approach" which should be abandoned as soon as possible in favor of a stricter formulation. Professor Reese doubtless does not intend to deprecate the significant contacts test as both a widely formulated rule and a mere approach. But by choosing to label it an "approach," he leaves the unwarranted impression that the rule is only second-class law, or not really law at all. In reality, it is merely a rule open to some criticism for its flexibility. And criticisms of the rule may well be unwarranted. For many years in England the signifi-

\(^{559}\) *Id.* at 175, [1954] 1 All E.R. at 289.

\(^{560}\) *Id.* at 179, [1954] 1 All E.R. at 292.

\(^{561}\) The English approach may be contrasted with the continuous emphasis of the *Restatement (Second)* upon the evaluation of contacts according to their relative importance in each individual case. See note 543 and accompanying text supra.


\(^{564}\) See Reese, *Choice of Law: Rules or Approach?*, 57 CORNELL L. REV. 315 (1972). The criticism of Reese is directed at his theories insofar as they apply to contract cases. No judgment is intended to be passed as far as tort cases are concerned.
cant contacts test has proved itself to be a workable principle. Conversely, Professor Reese's proposal of specific subrules under the umbrella of the significant contacts "approach" would not in fact result in the greater measure of certainty and foreseeability of result which he claims.

In England, the concept of the proper law, a fundamental component of which is the significant contacts test, can trace its history back at least to Lord Mansfield. Its very flexibility, which allows it to take cognizance of the infinite variety of contracts that men may devise, has been its strength. The rule is applied with general success and without complaint from the courts that it gives insufficient guidance. In recent years there has been no attempt to refine the proper law into a number of more detailed rules of narrower application to cover particular types of, and issues in, contract cases. On the contrary, the proper law concept has proved to be the most successful choice of law rule applied in English courts. There is growing evidence that English judges intend to substitute this technique for the less flexible choice of law rules now found in other areas of the law.

Although the proper law concept in English law has developed in such a fashion as to be satisfactory to both courts and scholars, historically there has been some concern in England, just as there is now in America, for the lack of specificity of the significant contacts test. In the nineteenth century, courts developed certain presumptions concerning the proper law to solve this problem. The importance of such presumptions has declined in recent years. Not only are presumptions apt to mislead courts into overemphasizing one item of evidence at the expense of another, but they are generally not in accord with the modern objective of seeking the law of the closest connection rather than the law that the parties are presumed to have intended. Nevertheless, there remains a body of opinion, led in England by Professors Dicey and Morris, that the presumption approach should be utilized in determining choice of law.

Dicey and Morris formulate two presumptions, one in favor of the *lex loci contractus* and the other in favor of the *lex loci solutionis*,

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565 See Prebble, Part I, notes 17-18 and accompanying text.
567 For example, a contract of affreightment, not containing a choice of law clause, would presumptively be governed by the law of the ship's flag. See Lloyd v. Guibert, [1865] L.R. 1 Q.B. 115. The headnote to this case rather overemphasizes the importance of this presumption. For cases illustrating the diminishing importance of the law of the flag, see *Diccy & Morris* 796-99. Similar presumptions may be found in pre-interest analysis American cases. See, e.g., Commissioner v. Hyde, 82 F.2d 174 (2d Cir. 1936); Kleve v. Basler Lebens-Versicherungs-Gesellschaft in Basel, 182 Misc. 776, 45 N.Y.S. 882 (Sup. Ct. 1940).
to be used depending on the facts of the case.\textsuperscript{568} These presumptions are advanced tentatively; they "may sometimes"\textsuperscript{569} apply. Dicey and Morris present a detailed defense of their view of the law based on an analysis of English cases over the past 150 years.\textsuperscript{570} Admittedly, the totality of these cases does indicate a presumption-like approach. But insufficient weight is given to the more modern cases, which generally either repudiate presumptions as unhelpful in this area of the law,\textsuperscript{571} or simply ignore the presumption approach altogether.\textsuperscript{572} This development is to be welcomed. Although there are certain difficulties in applying the significant contacts test, it is doubtful that burdening the rule with preconceived presumptions can improve its operation. For example, it is doubtful that Lord Reid's opinion in \textit{Whitworth}\textsuperscript{573} would have been at all improved had His Lordship commenced his reasoning by reference to a presumption about building contract law, rather than by simply looking for the law of the most significant relationship as he did. Cheshire concludes:

It is doubtful, even, whether any useful purpose is served by the traditional practice of regarding certain facts, such as the \textit{locus contractus}, the \textit{locus solutionis} or, in the case of a contract of affreightment, the nationality of the flag, as presumptive evidence of the governing law. To enter upon a search with a presumption is only too often to set out upon a false trail. It may tend to divert attention from the necessity to consider every single pointer. . . . The proper course is . . . to fall back on a presumption only when the circumstances, viewed as a whole, fail to reveal with reasonable certainty the law to which the contract naturally belongs.\textsuperscript{574}

\textsuperscript{568} When the intention of the parties to a contract with regard to the law governing it is not expressed and cannot be inferred from the circumstances, the contract is governed by the system of law with which the transaction has its closest and most real connection.

\textit{First Presumption:} If a contract is to be performed wholly in the country where it is made, it may sometimes be presumed to have its closest and most real connection with the law of the country where it was made (\textit{lex loci contractus}). This presumption is strongest where all parties were present in that country when the contract was made.

\textit{Second Presumption:} If a contract is made in one country and is to be performed either wholly or partly in another, it may sometimes be presumed to have its closest and most real connection with the law of the country or of one of the countries where performance is to take place (\textit{lex loci solutionis}). This presumption is strongest where all parties have to perform in one country.

\textsc{Dicey} \& \textsc{Morris} 712.

\textsuperscript{569} Id.

\textsuperscript{570} Id. at 712-25.


\textsuperscript{573} See notes 553-57 and accompanying text supra.

\textsuperscript{574} \textsc{G. Cheshire} \& \textsc{P. North}, supra note 482, at 202-03.
It is submitted that Cheshire, apart from his final sentence, is correct from the standpoint of both legal theory and the modern authorities. It is, however, difficult to agree with the idea of falling back on presumptions when all else fails. In a hard case, in which the contract points almost equally in two directions, any reference to a presumption to solve the problem could only produce an arbitrary result, depending upon which presumption the court chose to apply. Also, in a hard case there would usually be more than one possible presumption available.

English courts, then, have found that to discover the proper law of a contract it is neither necessary nor desirable to have a rule of thumb formulated in terms of a presumption. This is not to say that previous cases presenting similar facts have no precedential value, but simply that a court will approach each case with an open mind, not guided by a presumption.

For Professor Reese, this method of tackling choice of law problems is merely an "approach" which leaves the courts with insufficient guidance. The Restatement (Second), therefore, contains nineteen black-letter rules, expressed in terms of presumptions or other indefinite terms, to govern particular types of, and issues in, contract cases. For example, the Restatement (Second) notes that in the absence of a valid choice of law by the party, the validity of a contract for the transfer of an interest in land is to be determined

by the local law of the state where the land is situated unless, with respect to the particular issue, some other state has a more significant relationship . . . to the transaction and the parties, in which event the local law of the other state will be applied.

Another section of the Restatement (Second) states that the capacity of a party to contract "will usually be upheld if he has such capacity under the local law of the state of his domicil."

The problem with such rules is that in easy cases they are unnecessary and in hard cases they will probably not help. It requires little expertise in the conflict of laws to realize that most cases involving the sale of land should be governed by the lex situs. Likewise, where the issue is contractual capacity, a court that has adopted the interest approach will be unlikely to find any compelling reason to invalidate

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575 See generally Reese, supra note 564.
576 See Restatement (Second) §§ 189-207.
577 Generally, the Restatement (Second)'s rules are in the form of presumptions for specific types of contracts, and are indefinite for specific issues, merely referring the reader to §§ 187-88. There are a few exceptions where a definite rule is laid down. See, e.g., Restatement (Second) § 206: "Issues relating to details of performance of a contract are determined by the local law of the place of performance."
578 Id. § 189.
579 Id. § 198(2).
the contract if the party whose capacity is in question had capacity to enter the contract under his *lex domicilii*.

Professor Reese hopes that from the type of rule proposed in the *Restatement (Second)* there will develop other specific rules which may be applied by a court without the necessity of deciding whether "some other state has a more significant relationship . . . to the transaction." However, the nature of contracts and contract law makes such an evolution of rules seldom possible, and, if possible, unnecessary.

It is currently possible to divide all contracts into two groups: the mass-produced or standard form, and the custom-made or individual draft prepared for clients requiring unique provisions.

In mass-produced contracts are found certain fairly typical situations, provisions, and geographical contacts between the transactions evidenced by these contracts and different systems of local law. Specific rules of the type advocated by Professor Reese could probably be developed with regard to such contracts. The necessity for such rules, however, is questionable. For these contracts, the principle of stare decisis within the framework of the significant contacts test will be adequate. Granted, the final results of case-by-case development through stare decisis, or of the adoption of a priori specific rules, would be somewhat similar. The body of precedent developing from the case-by-case approach could eventually be expected to function similarly to the framework of rules proposed by Professor Reese. But it is submitted that the law will better reflect the needs of the courts, the individual, and the business community if it is built up gradually, though precedent. To establish rules in advance is to risk a repetition of the mistakes of the vested rights period, when facts were awkwardly fitted to theories that had been developed with insufficient reference to the practical problems which they were supposed to solve.

Although it may be possible to develop practical (if not very meritorious) specific choice of law rules for mass-produced contracts, the same cannot be said for custom-made agreements. The possible variety of fact situations, provisions, and contacts with different jurisdictions is

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680 Id. § 189; see Reese, *supra* note 564, at 324-25.

681 It is a mistake to point to § 206, quoted in note 577 *supra*, as an example of a rule which has been refined to definite terms and which therefore demonstrates that other rules covering other issues can eventually be so developed. It is obvious enough that an issue which involves no more than a detail of performance should be governed by the *lex loci solutionis*. But about most other issues, one cannot be so certain. Moreover, § 206 is by no means as precise as it at first appears. There remains ample room for argument whether a particular issue involves a detail of performance, or is more correctly regarded as a question of the extent of the performer's contractual obligation.

682 See Prebble, *Part I*, notes 23-33 and accompanying text.
infinite. Just as each contract is individually prepared, so should it be individually judged. Any attempt to formulate preconceived choice of law rules must surely result in even more serious problems of fitting facts to principles than would be encountered in the case of standard form contracts.

A final difficulty with Professor Reese’s proposal is this: rules governing contracts are overwhelmingly of a private law nature. This area of the law involves few state policies and interests, apart from a general desire to hold parties to fairly concluded bargains. This policy cannot easily be refined into choice of law rules of even general applicability. Leaving the development of the law to the operation of precedent overcomes this problem, for in individual cases courts are more able to judge how state policies and interests will be affected by their decision. But the development prospectively of any but the most obvious choice of law rules for specific, narrow areas of contract law seems hardly feasible.

English courts tried to develop such rules but realized that the effort was counterproductive.583 In an easy case, the most significant contact can be picked out without the aid of a rule. In a hard case, a presumption is apt to cloud the issue. By concentrating upon one piece of evidence, a court prevents itself from fairly considering the possible significance of other contacts.

Nor does Cheshire’s view—that presumptions should be used as a last resort when all else fails—have any more merit for American courts than for English ones.584 In fact, the contrary is true. American courts, with their rule-selecting approach to choice of law, are more able than English courts to evaluate fully the significance of each particular contact in terms of the results to be produced in a particular case. This rule selection will often be a difficult process, but it could be an abdication of responsibility for a judge to wash his hands of the whole operation and decide a choice of law problem by reference to a “last resort” presumption. There would certainly exist several possible presumptions from which the judge could choose, depending upon the result he wished to reach, and the choice of any one over the others would necessarily involve a measure of caprice.

3. The Lex Validitatis

a. Statement of the Issues. When the issue before a court is the essential validity of a contract, or of a clause in a contract, the court is faced with a particular question: in making its choice of law, should

583 Cf. id., notes 23-27 and accompanying text.
584 This point is mentioned ex abundante cautela. The writer is unaware of any suggestions that American courts should use presumptions in this last resort fashion.
it favor the law under which the contract is valid simply because that law validates the contract? If so, how can the court justify this preference for validation?\footnote{585}

Although the question of validation may arise in a variety of contexts, in America it has specifically been associated with the issue of usury. Courts favoring a laissez-faire approach to commercial contracts have sometimes been reluctant to declare a contract invalid merely because it provides for interest slightly above that permitted by possibly applicable anti-usury laws. One way to avoid striking down such a contract is to apply some other law under which the contract is valid.\footnote{586}

A bias towards the \textit{lex validitatis} may be rationalized under several theories.\footnote{587} Most obviously, it can be said that the parties are presumed to have intended that the contract be governed by the law under which it is legally effective. Such a presumption is appropriate in deciding whether a case may be regarded as a "category two" type, and therefore treated as one in which a choice of law intention may be inferred.\footnote{588} But where the parties clearly have not considered the choice of law issue, this rationalization runs into the same objections that have caused the demise of the presumption approach in other contexts.\footnote{589}

It has been argued that a presumption in favor of validity is so obvious that it necessarily differs in kind from, for example, a presumption in favor of the law of the flag in a contract of sea carriage.\footnote{589} Weintraub hints at such a conclusion: "Unless [the parties] are engaged in some ridiculous charade, their intention is that every promise they have made in the contract be enforceable."\footnote{590} By itself, this state-

\footnote{585} The situation that arises when a contract is valid under one potentially applicable law and invalid under another has been discussed in other contexts. See Prebble, \textit{Part I}, notes 485-51 and accompanying text (express choice); notes 652-58 and accompanying text \textit{infra} (capacity to contract); notes 677-78 and accompanying text \textit{infra} (formalities).

\footnote{586} The usury issue is distinct from the question of validation of other types of contracts. It is discussed separately at text following note 680 \textit{infra}.

\footnote{587} The \textit{lex validitatis} theory should not be confused with the maxim \textit{ut res magis valeat quam pereat}. This principle of construction of contracts was utilized by several of the judges who delivered opinions in the \textit{Tunisienne} case in order to show that the inappropriate clause of the contract (see notes 642-43 and accompanying text \textit{infra}) should be construed as an effective express choice of French law. See \textit{Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A.}, [1971] 1 A.C. 572, 608, [1970] 3 All E.R. 71, 95-96 (1970) (Lord Diplock). Confusion may result in calling the choice of law rule favoring the \textit{lex validitatis} an application of \textit{ut res magis valeat quam pereat}, although literally the maxim is appropriate.

\footnote{588} See note 489 and accompanying text \textit{supra}.

\footnote{589} See notes 522-35 and accompanying text \textit{supra}.

\footnote{590} See note 85 and accompanying text \textit{supra}.

\footnote{591} Weintraub, \textit{supra} note 535, at 406.
ment is unassailable. But it does not follow that the parties must have intended to contract with reference to a *lex validitatis*. There may well have been a mistake. This point is reinforced when it is realized that a defense of invalidity is unlikely to form part of the real issue between the parties. Rather, the potential defense will probably have been discovered by a legal adviser after the dispute has arisen.  

A more defensible rationale for a presumption in favor of the *lex validitatis* might be that application of the validating law "better serve[s] business convenience." Under the significant contacts test, a transaction is held to be governed by the law most significantly connected with it, not because the parties are presumed to have intended this, but because this is the most reasonable and sensible solution. Likewise, where there is no evidence from which intent may be readily inferred, it is arguably the reasonable and sensible solution that the *lex validitatis* should govern, for it is most convenient that parties should be held to their apparent bargains. However, this analogy demonstrates the basic weakness of applying the *lex validitatis* test to a contract where intent is neither expressed nor inferable. English and American law already contain rules to cover this issue: the rules of the significant contacts test. Although both English and American courts often reach the same result when applying the test, this is not always so.

b. *Opinions of Scholars.* The idea of a *lex validitatis* has proved

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592 Suppose in *Tunisienne* the defense had been lack of privity, and that this defense would succeed at English law, but not at French law. Should the plaintiff be able to argue that on the issue of measure of damages French law should apply, because at English law the whole contract is void for an unrelated reason? The defendant could reasonably contend that he had always preferred the English law of damages, and it is simply the plaintiff's misfortune that neither party considered the privity problem when the contract was made. An issue-by-issue approach whereby different issues in the same contract might arguably be governed by different laws is of only theoretical assistance here. Admittedly, it is possible for the parties to have intended that English law should apply to the damages issue, and French law to the question of essential validity. But it strains credulity to suggest that this conclusion may reasonably be reached by means of presumptions, without the assistance of any choice of law stipulation.

593 G. STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 239 (3d ed. 1963). Stumberg, however, does not isolate this argument as a justification of the rule in its own right:

To apply the law which will uphold the contract... would... in carrying out the purposes which the parties had in view in their negotiations, better serve business convenience by making their acts legally, that which they purport to be; i.e. an enforceable promise.

*Id.* (footnote omitted).

594 For an argument that this reasoning is justified, if not mandated, by the commerce clause of the United States Constitution, a fundamental goal of which is presumably to promote business convenience, see Horowitz, *The Commerce Clause as a Limitation on State Choice of Law Doctrine*, 84 HARV. L. REV. 806, 822 (1971).
extremely attractive to American scholars, in particular to Ehrenzweig, who writes:

The . . . Rule of Validation (lex validitatis) is in accord with the general principle, prevailing in many other areas including the conflicts law of wills and trusts, that "if the court has a reasonable choice . . . between applicable systems of law, it should choose the one that results in legal 'validation.'" 596

He adds:

Properly and reasonably, courts of all countries and all ages, with a few clearly definable exceptions, have tended to uphold the parties' "validating intent" and have thus held bargain contracts valid under any "proper law". . . . If any law "governs" the validity of a contract, it is therefore the "lex validitatis," rather than a lex contractus, or lex solutionis or lex gravitatis. 596

Ehrenzweig defends his position that choice of the lex validitatis is in fact the rule in America by the use of elaborate arguments with which it is difficult to quarrel, assuming one accepts his basic premises. These are first that one should not look at what the courts say, but only at what they do, and second that if the courts do anything inconsistent with the lex validitatis principle they are acting erroneously and may be ignored. 597 Neither of these premises is consistent with the operation of stare decisis in common law courts. Although the first, albeit hardly a rule of law, is admittedly blessed by the jurisprudential school known as American Realism, one feels that even Karl Llewellyn would find accepting the second difficult. 598 Ehrenzweig's support for the lex validitatis, contained in one of the most scholarly of modem treatises, must unfortunately be dismissed as wishful thinking rather than legal exposition. 599

596 A. EHRENZWEIG, supra note 539, at 458 (emphasis in original).
597 The vast majority of the decisions that have purported to rely, and that have therefore been cited as relying, on any one of the so-called imperative rules of contracting, performance, or intention, will be found to belong in one of the following categories: cases in which there was no difference, existing or alleged, between any of the potentially applicable laws, cases in which the choice of law was expressly or impliedly agreed upon without interference, . . . cases in which there was no question of choice of law presented at all, and finally, cases involving questions of procedure . . . .
599 Cf. R. LEFLAR, AMERICAN CONFLICTS LAW 369 (2d ed. 1968): "No random sampling
Ehrenzweig has recently been joined by Weintraub, who argues cogently that the choice of law rule for all cases in which the issue is contractual validity should be a rebuttable presumption in favor of the *lex validitatis*. His arguments are compelling, and the rule he proposes may well be superior to that of the Restatement (Second) sections 187 and 188. For example, he avoids the Restatement (Second)'s inconsistency in ignoring an express choice of law where that law would invalidate the contract. But he (as distinguished from Ehrenzweig) rightly concedes that his rule is a proposal, and not law.

c. *Cases on the Lex Validitatis Theory.* Chief Justice Parker recently summarized the English law when delivering judgment for the Ontario Court of Appeal in *Etler v. Kertesz*:

> I do not think that [there is] any general rule to the effect that the proper law of a contract as between the laws of two countries, by one of which it would be valid, and by the other it would be invalid, should be presumed to be in the country where the contract would be valid. Under certain circumstances such a consideration might have some weight viewed together with all the other evidence from which intention might be inferred.

Parker speaks in terms of presumption and inferred intention. From this it might be concluded that the validity test in English cases will be invoked only when the court is attempting to infer an actual intent to make a choice of law, and not when it has abandoned that approach and continued to the third stage of the English test—seeking the law of the closest and most real connection. This conclusion is correct, as far as it goes. But remembering the history of the presumption approach to choice of law, and considering that English courts accord a larger place to inferred intention cases than do American courts, it is believed that an English court may give some weight to a presumption of validity in cases where American courts would apply a strict significant contacts test.

On the other hand, when an English court has classified a case as “category three,” for purposes of the application of the significant contacts test, it could not rationally consider a presumption of validity.

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600 Weintraub, *supra* note 535, at 421. Weintraub discusses certain tests, including anachronism and likelihood of unfair surprise, which may be used to determine whether a presumption should be rebutted in a particular case. *Id.* at 422-27.


602 For a discussion of the three stage English test, see note 488 and accompanying text *supra*. 

of American cases can be conclusive, since the selection of the sample determines what will be shown." Without taking sides, Leflar collects and discusses other scholarly work on the theory of the *lex validitatis*. *Id.* at 367-70.
since theoretically it is not concerned with the content of competing 
rules. This is, of course, not inconsistent with the English conflicts 
theory under which a court considers content of rules in order to infer 
contractual intention. In such a case, the court is really construing the 
terms of a contract, which may or may not choose a certain law, rather 
than making the choice itself.

American courts do not face the same difficulty quite so acutely 
under their rule-selecting approach. Nevertheless, the validation theory 
poses problems. When a court is employing the significant contacts 
test, it has ex hypothesi determined that the parties had no expressed or 
inferable intent as to choice of law. How therefore can it be significant 
that the contract, or a part of it, is valid by only one of two or more 
competing laws? There is no neat answer.

A definite history of judicial support exists in America in favor of 
a lex validitatis approach to choice of law. But the reasoning in the 
cases is not in harmony with the modern conflicts theory and 
with practice.

The view taken by the Restatement (Second) on the question of 
the lex validitatis has undergone certain changes since the Tentative 
Draft was first put to the Annual Meeting of the American Law In-
stitute in 1960. Originally, the Restatement (Second) favored validating 
contracts where reasonably possible. To this end, the Tentative 
Draft listed as one of the “[i]mportant factors in determining the state 
of [the] most significant relationship,” or contacts, “[t]he law under 
which the contract will be most effective.”

In the final version of the Restatement (Second), validity and 
invalidity are not expressly offered as contacts to be considered. But in 
weighing contacts, validity, expressed as “the justified expectations”

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603 This classification may naturally be a little blurred. It could be, for example, that 
the possibility of a reference to the presumption of validity might be what causes a court 
to type a case as category two rather than category three.
605 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332(b), comment b (Tent. Draft 
No. 6, 1960).
606 Id. at 33. When this provision was discussed by the Institute in 1960, that criticism 
which emerged was directed towards encouraging the Reporter to adopt “the principle 
that a contract is valid if it is valid by the law of any jurisdiction with which it has 
any significant contacts.” 37 ALI PROCEEDINGS 505 (1960). Far from acting on this sug-
gestion, the Reporter and his advisers appreciably cooled towards the lex validitatis doc-
trine in preparing the Official Draft of the Restatement (Second) for the Institute’s 1968 
meeting. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 200 (Proposed Official Draft 
1968).
607 RESTATEMENT (SECOND) §§ 6, 188, comment b at 576-78.
of the parties, is, *inter alia*, an important element in determining the relative significance between one contact and another.

In 1968, the Institute approved section 188 without commenting on this change, or on the *lex validitatis* theory generally. This change of heart may be significant. The *lex validitatis* doctrine reflects a laissez-faire attitude toward private contracts. Modern, socially protective legislation often uses the law to invalidate contracts and thus to shelter individual members of society from the predatory tactics of some sections of the business community. The choice of law rule adopted in the *Restatement (Second)* reveals a measure of sympathy for this type of legislation. The rule in its final form retreats somewhat from the earlier position, which was more favorable to the principle of freedom of contract. The influential American Law Institute probably considers that the *lex validitatis* doctrine, if not on the wane, at least has attained the zenith of its effectiveness as a factor in the choice of law process. The *Restatement (Second)* does, however, adopt a policy *in favorem negotii*, halfhearted though it may be.

The *Restatement (Second)'s* rule appears to be derived from language of the Supreme Court in *Kossick v. United Fruit Co.*, where the Court expressed concern for the parties' "justified expectations":

> It must be remembered that we are dealing here with a contract, and therefore with obligations, by hypothesis, voluntarily undertaken . . . . This fact in itself creates some presumption in favor of applying the law tending toward the validation of the alleged contract.

4. *Cases Involving Three or More Jurisdictions, Where Two or More Have the Same Rule on the Disputed Issue*

In *Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A.*, the court was faced with three possibly

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608 45 ALI PROCEEDINGS 497-502 (1968).
610 Id. at 741, citing Pritchard v. Norton, 106 U.S. 124 (1882), and Ehrenzweig, *Contracts in the Conflict of Laws, Part One: Validity*, 59 COLUM. L. REV. 973 (1959). *Kossick* was not strictly a conflict of laws case, since it involved a choice between state and federal maritime law. Nevertheless, it seems clear that the Court felt that the same principles applied.

Neither the *Restatement (Second)* nor the Supreme Court in *Kossick* considers the argument that a party's expectations cannot be "justified" if he merely hopes that his contracts will be legally binding, without turning his mind to the law by which these aspirations are to be realized.

applicable laws: English, French and Tunisian. Lord Reid observed that

until [the case reached the House of Lords] it appears to have been assumed that France and Tunisia could be treated as one country or as having the same system of law. . . . "[N]either side contended for any other system of law" than French or English law. On that basis when one comes to weigh the various factors which tell in favour of French or English law being regarded as the proper law, the fact that Tunisia was to be regarded as the place of performance of the contract would be put in the scale for French law. . . . But I wish to reserve my opinion as to how far in a case of this kind it is proper to disregard the fact that two countries are separate and independent countries, each with its own system of law, on the ground that those systems are or have recently been closely associated, or that their systems of law are very similar but both very different from English law.\(^{612}\)

Of the remainder of Their Lordships, only Lord Diplock adverted to this problem:

As I have already said, for the purposes of this transaction France and Tunisia may be regarded as sharing a common system of law. . . . Clearly French law was the system of law with which the contract had its closest and most real connection.\(^{613}\)

The position in England may be unclear, but according to the Restatement (Second) there is no doubt in the United States:

When certain contacts involving a contract are located in two or more states with identical local law rules on the issue in question, the case will be treated for choice-of-law purposes as if these contacts were grouped in a single state.\(^{614}\)

This assessment appears to be consistent with the authorities.\(^{615}\) Nevertheless, it is difficult to see the justification or the need for this rather rigid formulation of the rule. To take a somewhat stylized

\(^{612}\) Id. at 583-84, [1970] 3 All E.R. at 73-75.

\(^{613}\) Id. at 609, [1970] 3 All E.R. at 96. This holding would seem to resolve the question left open by Lord Reid; unfortunately, what Lord Diplock had "already said" was that "[f]or the purposes of a commercial contract of this kind I would be prepared to assume that the parties regarded France and Tunisia as subject to a common system of law." Id. at 602, [1970] 3 All E.R. at 90.

\(^{614}\) RESTATEMENT (SECOND) § 186, comment c.

\(^{615}\) See, e.g., G.B. Michael v. SS Thanasis, 311 F. Supp. 170 (N.D. Cal. 1970) (action for damage to cargo of copra). One reason for the Thanasis court's choice of United States maritime law over English law was that another potentially applicable law, Liberian law, was presumed to be the same as American. Cf. Walton v. Arabian Am. Oil Co., 233 F.2d 541, 545 n.14a (2d Cir. 1956): "As the tort rules, pertinent here, of New York, Delaware and Arkansas are doubtless substantially similar, there would be no need to choose one or the other."
example, suppose that under the contacts test a case is found to be significantly connected with jurisdictions X, Y, and Z in the proportions of forty-nine, twenty-six, and twenty-five respectively. The laws of Y and Z are the same on the issue at bar, but that of X differs. Is it reasonable to say that the Y-Z law necessarily governs? Surely, the similarity of the laws of Y and Z should be a factor for consideration in the choice of law process, but it should be no more than this.

The same argument should also be persuasive in England. Theoretically, of course, English courts do not, or should not, look at the contents of the laws of X, Y, and Z before making a choice of law decision, and the problem under discussion should not arise. But the House of Lords does not appear to be concerned with that difficulty, as may be seen from the *Tunisienne* case. In fact, any small step by English courts towards flexibility rather than rigid jurisdiction selecting is to be welcomed.

However, for English courts to adopt for these cases a standard practice like that advocated by the *Restatement (Second)* would be a mistake. Different considerations must apply in different cases. For example, when jurisdictions Y and Z are closely related—for example, American states, or France and a former French colony—there is a much stronger argument for treating them as one and for totaling their contacts with the case than when X and Y are, for example, Greece and Japan. In the latter situation, the similarity between the two countries on the issue at bar is much more likely to be coincidental than the result of a shared policy regarding the area of law under consideration, a policy that ought, perhaps, to receive some recognition even in the choice of law processes of English courts.

5. *In England, Is the Contact with a Country or with a System of Law?*

One loosely speaks of the English rule as seeking the law with which the contract has its closest and most real connection. The term "law" is not entirely appropriate. In a jurisdiction-selecting choice of law system, a court is not choosing a particular law, since it does not take cognizance of the actual content of any of the conflicting laws to which its attention has been called. As Lord Reid states in *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.*:

Two slightly different tests have been formulated: "the system of law . . . with which the transaction has its closest and most real connection" (*per* Lords Simonds in *Bonython v. Commonwealth of Australia* [1951] A.C. 201, 219) and "with what country has the transaction the closest and most real connection" (*per* Lord Den-
ning in In re United Railways of Havana and Regla Warehouses Ltd. [1961] A.C. 1007, 1068). It has become common merely to refer to the system of law but I think the two tests must be combined for all are agreed that the place of performance is a relevant and may be the decisive factor, and it is only in a loose sense that the place of performance can be equated to the system of law prevailing there . . . .

In the present case the form of the contract may be said to have its closest connection with the system of law in England but the place of performance was in Scotland and one must weigh the relative importance of these two.616

Lord Denning, who was partly responsible for the birth of the “country” version,617 later repudiated that version in favor of a “system of law” approach.618 His second thoughts express the better rule. First, there is the problem of federal countries. Clearly, if the choice of law is between France and Illinois the word “country” is inappropriate. But, more importantly, “country” gives an unfortunate twist to the significant contacts rule in the hands of a judge who does not approach a case with his mind entirely open as to the relative importance of the various contacts he will be called upon to consider.

In the hands of a sophisticated judge, the verbal distinction should not be significant. Whatever law is eventually chosen will be the law of some country, or at least of some state. If a jurisdiction-selecting court bears in mind that it is selecting rules to decide a case, and not simply attempting to tie a particular contract to the soil of a specific country in pursuit of some undisclosed and possibly irrelevant purpose, then that court’s task of evaluating different contacts will be just as efficiently performed whether it is looking for the country or the system of law having the closest connection to the contract.

The passage quoted from Lord Reid’s speech in Whitworth illustrates that English judges will not necessarily bear these matters in mind. His Lordship gives the word “country” a significance that could not have been intended when it was originally used in judicial formulations of the significant contacts test. Lord Reid does not consider “country” as defining the jurisdictional sphere of a certain body.


Lord Reid’s opinion that the two tests are “slightly different” is not unanimously shared. Lord Hodson said: “I do not myself see that this variation of language is important, although in some contexts one word may be more appropriate than another.” Id. at 606, [1970] 1 All E.R. at 801.


of rules; rather, he emphasizes the word's geographical aspect as referring to a specific section of the world's surface. The result is that in his application of the significant contacts test, he considerably overemphasizes the *lex loci solutionis*. Of course, the construction contract at issue in *Whitworth* was geographically most clearly connected to Scotland. But it is law and not geography that must regulate the rights of the parties. Lord Reid ultimately found himself admitting that the contract was most closely connected with the system of law of England, although deciding that the proper law of the contract was Scottish law.619

Lord Reid was alone in taking this view in the *Whitworth* case.620 Judges in other cases would not be likely to overemphasize the role of the place of performance. Nevertheless, Lord Hodson's lack of concern at the distinction between the two versions of the choice of law rule,621 and the failure of the rest of the House of Lords to mention this problem622 is unfortunate. To formulate the rule in terms of the closest connection with a particular country is to invite the unwary judge to give unwarranted weight to the *locus solutionis*, or, in appropriate cases, to the *locus contractus*.623

6. Contracts Containing a Clause Selecting an Arbitral Forum

The similarity of the significant contacts rule as applied by the courts in England and America has come about in spite of the different fundamental approaches to the choice of law problem prevailing in the two countries. Although the *Restatement (Second)* section 188 logically follows from the principles of interest analysis, the proper law concept is only one, albeit the most sensible, of a number of possible rules which might have been adopted by a jurisdiction-selecting choice of law system such as England's. The flexibility of the English rule is by no means mandated by the English approach as a whole. Conse-
quently, it is not surprising occasionally to find certain rather strict choice of law rules under English law which, applied mechanically, have the potential for producing results as unresponsive to the true interests of the jurisdictions and the parties involved as any American vested rights decision. However, it appears that English courts are not unaware of this problem, and, in the area of contracts at least, have now accepted that in different cases the same connecting factor should not necessarily be given the same weight.

This development is exemplified by the recent abandonment by the House of Lords of the rule *qui elegit judicem elegit jus*. The effect of the rule, according to the English courts, was to make a choice of arbitral forum tantamount to a choice of the law of that forum to govern the parties' contractual obligations, absent a specific choice of law clause. The Court of Appeal so held in three cases: Tzortzis v. Monark A/B,624 Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.,625 and Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A.626 In *Whitworth*, the Court of Appeal applied the converse of the *qui elegit* rule and, finding that the proper law of the contract was English law, held that the law governing the arbitration in Scotland was also English law. The House of Lords reversed the Court of Appeal. Although the majority agreed that the proper law was English, the House held that the parties were at liberty to choose, and had in fact chosen, another law to govern the arbitration procedure.

In *Tunisienne* the problem arose more directly. There, a French company entered into a tonnage contract with a Tunisian company to carry oil for the Tunisian company between two ports in Tunisia. A number of trips over a period of several months were planned. An English standard charterparty form rather than a form for a tonnage contract was used, although it was not really appropriate. Several amendments were made in the form, but as signed it included clause thirteen, which specified that the agreement was to "be governed by the law of the flag of the vessel carrying the goods,"627 and clause eighteen, which provided that "[a]ny dispute arising during the execution of this charterparty [should] be settled in London, owners and charterers each appointing an arbitrator . . . . For the purpose of enforcing awards this agreement shall be made a rule of court."628

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628 Id.
The shipowners had insufficient ships of their own available to perform the contract. Thus they chartered ships of other owners and registry to fulfill their obligations. Disputes arose, and arbitration in London commenced. The arbitrators found that at the time of the signing of the contract the parties intended "at least primarily" \(^{629}\) the oil to be carried in ships owned by the French company. They found that French law governed the contract, and thus raised the issue of measurement of damages, which was the crux of the case. Their award was stated as a special case for decision of the High Court on the issue of choice of law. The alternatives were French or English law, since Tunisian law was considered to be identical to French law in material respects. It was agreed that English procedural law governed the submission. \(^{630}\) Lord Justice Megaw upheld the arbitrator's choice of law. The Court of Appeal reversed his decision, holding that the choice of London as the arbitral forum amounted to a choice of law. The House of Lords reversed the Court of Appeal.

In the House there was, as was the case in *Whitworth*, considerable discussion of the rules for determining the proper law of a contract, which of course were directly in point in this case. In particular, the force of clause thirteen of the contract was extensively canvassed. (It could clearly not take effect literally, since during the first four months of the contract the French company had utilized ships of Norwegian, Swedish, Liberian, French, and Bulgarian registration.) But for the purposes of the present discussion, the most important parts of Their Lordships' speeches in *Tunisienne* are those dealing with the law on the effect in the choice of law process of a forum-selecting arbitration clause, and especially their attempted reconciliation of the decision with pre-existing law. Lords Wilberforce and Diplock in particular went to great pains to explain away the effect of earlier decisions of the House of Lords and other English courts. One might object to their treatment of several of these cases. One example was Lord Diplock's treatment of the speech of Viscount Dunedin in *N. V. Kwik Hoo Tong Handel Maatschappij v. James Finlay and Co. Ltd.* \(^{631}\)

The *Kwik* case involved an application to serve a High Court writ out of the jurisdiction. Such service may be permitted by the court in an action on a contract to be governed by English law by its terms or by implication. \(^{632}\) The issue in the *Kwik* case was whether the contract

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\(^{629}\) Id. at 583, [1970] 3 All E.R. at 74.

\(^{630}\) The issue, of course, was hardly open to argument in view of the provision that "[f]or the purpose of enforcing awards [the] agreement shall be made a rule of court." Id. at 601, [1970] 3 All E.R. at 89. See note 688 and accompanying text infra.


\(^{632}\) See Prebble, *Part I*, note 336 and accompanying text.
in dispute was so governed. The defendants contended that they relied on a particular custom of a certain Javanese port relating to the antedating of bills of lading, and that this custom clearly was not governed by English law, but by the law of Java. The plaintiffs pointed to the arbitration clause in the contract, which read: “Any dispute arising out of this contract is to be settled by arbitration of London brokers in the usual manner, and this submission may be made a rule of the High Court of Justice.”

Viscount Dunedin’s speech in Kwik included the following statements:

The sole question, therefore, is whether the words of the [arbitration] clause quoted lead by implication to suppose that the contract is to be regulated by English law.

. . . . It seems to me that what the parties here did was to submit their possible disputes to a forum which was an English forum, and that they, therefore, impliedly consented that the law which was to regulate their decision was the law of that forum. That does not mean that everything that would have to be decided would necessarily be decided by English law. It means that the underlying law was the law of England, but if by appropriate, that is to say relevant, averment, it was alleged that any incident of the contract fell to be determined by a foreign law, then the English tribunal would proceed to inquire into that law as a question of fact and give judgment accordingly.

I am therefore of the opinion that there is here in the words of the order a clear implication that the matter should be adjudged according to English law.

Lord Diplock in Tunisienne had some difficulty in explaining away these unequivocal words. He concluded that “[i]n this context by ‘underlying law’ [Viscount Dunedin] may well have meant no more than what I have called curial law.”

This lip-service is in fact the only attention Lord Diplock pays to the “context” of Viscount Dunedin’s remarks. Clearly Viscount Dunedin by “underlying law” meant proper law, and in referring to the determination of any incident by foreign law he was merely referring to the long accepted choice of law rule that specific minor details of performance are governed by the lex loci solutionis. A custom as to bills of lading at the Javanese port of shipment could be a minor detail of performance, and the fact that this custom should be governed by the law of Java is in no way inconsistent with a holding that the

634 Id. at 607-08.
proper law of the contract is English law. Furthermore, it is a strained interpretation to say that a contract by its terms or by implication to be governed by English law means a contract that may be governed by foreign law, but which provides for submission to arbitration according to English procedure. Such an unlikely suggestion had never been made before the *Tunisienne* case reached the House of Lords.

What may be inferred from this rather cavalier treatment of earlier decisions by the House of Lords in the *Tunisienne* case? Certainly, the House did not expressly overrule *Kwik*. Lord Wilberforce goes no further than to call the case "ambiguous" and "misunderstood," while for Lord Diplock it is "not . . . in conflict" with the *Tunisienne* decision. The views of both Their Lordships are debatable, and it is certainly arguable that in *Kwik* and *Tunisienne* the English courts are faced with two inconsistent holdings. Given a traditional view of precedent, a court in the future may be free to choose between the two cases, and in fact to decide to return to the *Kwik* rule. For two reasons, however, this is unlikely.

First, in *Tunisienne* the House of Lords made it very clear that it did not regard its decision as inconsistent with *Kwik*. In the past, such an assertion might have been taken at less than face value, for when the House of Lords was bound by its previous decisions, it was naturally more inclined to draw somewhat fanciful distinctions in attempts to reconcile current opinions with past precedents. But since 1966, the Lords have been free to overrule their earlier cases. They chose, however, not to overrule *Kwik*. Thus, it might be somewhat difficult to argue, in the face of strong statements by Lords Wilberforce and Diplock, that *Kwik* and *Tunisienne* are in fact in conflict.

Second, it is difficult to conceive of a case where the court would be tempted to return to the strict *qui elegit* rule found in *Kwik*. The most likely candidate for this regression would be a case involving a contract containing an arbitration clause selecting an English forum, but without other significant contacts with England, in which the court nonetheless desired to hold that the proper law of the contract was English. In these circumstances, even under the *Tunisienne* rule, the court could simply decide that on the facts the most significant contact was the arbitration clause, and that therefore English law governed. This conclusion is reinforced by Lord Wilberforce's discussion in

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636 Id. at 597, [1970] 3 All E.R. at 85.
637 Id. at 598, [1970] 3 All E.R. at 86.
638 Id. at 605, [1970] 3 All E.R. at 93.
639 See Practice Note, [1966] 3 All E.R. 77.
Tunisienne of Naamloze Vennootschap Handels-en-Transport Maatschappij "Vulcaan" v. A/S J. Ludwig Mowinckels Rederi. There, Lord Maugham had held that

the appellants being a Dutch company and the respondents Norwegian shipowners, there was a good reason, if not a necessity for selecting the law which should apply to any future disputes, and the submissions of such matters to the arbitration of two persons in London and of an umpire who in case of difference was to be nominated by the directors of the Baltic Mercantile and Shipping Exchange showed clearly that English law and procedure were to be applied.

Lord Wilberforce commented:

There is nothing here which requires qualification or explanation. I fully accept that, especially where the parties are of different nationality and there is no other relevant factor, a clause providing for arbitration in a third country is a strong indication which, because there is no other, may be called conclusive, in favour of the proper law of that country.

It appears that the Tunisienne rule in effect incorporates the Kwik rule, although making it more flexible. On appropriate facts, a court may still decide, as it could under the Kwik rule, that a contract's proper law is the law of the arbitral forum, despite the fact that there is no other contact with that jurisdiction. At the same time, the court is no longer compelled to reach this conclusion. There is consequently no need for the English courts to return to the Kwik approach, and one may be confident that Tunisienne accurately expresses the English rule in this area.

The qui elegit rule has never been a problem in America. Where an arbitration clause has been before a court, the issue has almost always been the validity of the clause rather than, assuming its efficacy, what law the arbitrator should apply. The reasons are historical. Arbitration clauses have been enforceable for a shorter time in America than in England. Further, the general rule in the United States is that questions of law are for the arbitrator; there is no provision for

641 Id. at 156.
643 Of course, according to the reasoning adopted by Lords Wilberforce and Diplock in the Tunisienne case, courts never were compelled to reach that conclusion.
644 See, e.g., cases discussed in Heilman, Arbitration Agreements and the Conflict of Laws, 38 Yale L.J. 617 (1928).
one party to compel an arbitrator to state a case for judicial opinion, either in federal or state arbitration statutes.\textsuperscript{646}

Nevertheless, there is a discernible tendency in the United States for arbitrators to apply rules of law, and consequently to make choice of law decisions.\textsuperscript{647} The issue may arise as to what effect a clause selecting an arbitral forum should have on this decision. Without the benefit of American authority,\textsuperscript{648} the Restatement (Second) takes the sound view that

\begin{quote}
[p]rovision by the parties in a contract that arbitration shall take place in a certain state may provide some evidence of an intention on their part that the local law of this state should govern the contract as a whole. This is true not only because the provision shows that the parties had this particular state in mind; it is also true because the parties must presumably have recognized that arbitrators sitting in that state would have a natural tendency to apply its local law.\textsuperscript{649}
\end{quote}

This passage also states the rule of Tunisienne, which gives some cause for gratification. English courts may be criticized for a mechanical application of the significant contacts test which does not do justice to the full potential of its flexible approach to choice of law problems. The House of Lords in Whitworth and Tunisienne is by no means immune from such criticism. Nevertheless, when it came to the central

\textsuperscript{646}See id.; Prebble, Part I, notes 429-34 and accompanying text.

\textsuperscript{647}See Prebble, Part I, note 433 and accompanying text.

\textsuperscript{648}It might be thought that the analogous case of a choice of judicial forum would provide some authority. There are of course numerous American cases on jurisdiction by prior consent. See, e.g., National Equip. Rental Ltd. v. Szukhent, 375 U.S. 311 (1964); Washington v. Superior Ct., 289 U.S. 361 (1933). But no cases have been found where the significance of a jurisdiction-selecting clause was considered in relation to a choice of law problem. A court should probably treat a clause selecting a judicial forum in the same manner as is suggested in Restatement (Second) § 218, comment b at 719. But see M. Wolff, Private International Law 437-38 (2d ed. 1950):

Perhaps it is correct to distinguish between the submission to a regular court of a foreign country and the arbitration clause. In the former case it may be justifiable to construe the clause to the effect that the foreign court should apply its own conflict rules in order to find the proper law of the contract. In the case of an arbitration clause such reference will hardly ever correspond to the presumptive intention of the parties. If, for example, they refer the matter to arbitration by the London Corn Exchange they probably expect the arbitrator to decide it just as if it were a purely English case, i.e., to apply English municipal law as he understands it. The task of finding out which law the High Court would apply to the case is beyond what should be demanded from an ordinary arbitrator.

\textsuperscript{649}Restatement (Second) § 218, comment b at 719. The Reporter cites the decision of the Court of Appeal in Tunisienne. Id. at 720. To the extent that the greater includes the lesser, this citation may perhaps be defended. Of course, the Court of Appeal gave far greater weight to the arbitration clause than does the Restatement (Second). The Court applied the qui elegit rule, which makes the arbitration clause virtually conclusive as to choice of law. See notes 629-30 and accompanying text supra.
issue in the two cases, the effect for choice of law purposes of a forum-selecting clause, the House unanimously adopted a flexible approach, and rejected the mechanical formula of \( \text{qui elegit judicem elegit jus} \). The rather slow development of the English proper law rule thus appears to be continuing. If English courts have not embraced the advanced theorizing found in America, at least they are bringing a certain measure of rationality to the problems of choice of law.

7. The Significant Contacts Test Illustrated by Some Particular Issues in, and Particular Types of, Contracts

a. Particular Issues. The focus of this study is upon the essential validity and effect of contracts. At this point, however, three particular issues—contractual capacity, contract formalities, and usury—which arise in both the United States and England will be discussed briefly. The issues of contractual capacity and formalities requirements of contract law have been chosen for two reasons. First, they go to the validity or enforceability of the contract, and are therefore closely related to the main study of essential validity. Second, they illustrate the workings of the significant contacts test in America, and also some of the limits upon the role of the proper law in England.

After capacity and formalities, the issue of usury will be considered. Although consideration of this issue may touch upon contractual validity, its chief interest lies in the variety of significant conflicts problems that are likely to arise in usury cases, especially in relation to public policy. Furthermore, American courts have traditionally solved choice of law problems in usury cases by somewhat exceptional means. Specifically, these cases are often solved by a variation of the \( \text{lex validitatis} \) theory, even by courts which observe the vested rights principle.

i. Capacity to Contract. In England, it appears to be accepted that "[a] person's capacity to enter into a contract is governed by the system of law with which the contract is most closely connected."

Judicial authority is somewhat sparse. A number of cases support the \( \text{lex domicilii} \) of the parties as governing capacity to enter contracts, but most of these cases involved the validity of marriage or marriage settlements, with judges delivering opinions purportedly applicable to contracts generally.

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650 The matter was, of course, considered in reverse in \( \text{Whitworth} \), with the argument proceeding from the question of what was the proper law to the issue of what law governed the arbitration.
651 See Prebble, \( \text{Part I} \), notes 313-19 and accompanying text.
652 Dicey & Morris 744 (footnote omitted).
653 See, e.g., Sottomayor v. De Barros No. 1, [1877] 3 P.D. 1, 5 (C.A.). For other cases,
The most significant difference between the rule governing capacity and that governing questions of essential validity is that party autonomy is not part of the capacity rule. This prevents the "strange result" that would otherwise follow when "in the absence of proof of an evasive intent, an infant could, by agreeing to the choice of a system of law as the proper law of the contract, confer contractual capacity upon himself."654

This argument was not accepted by the editors of the Restatement (Second). Under sections 198(1) and (2), "[t]he capacity of the parties to contract is determined by the law selected by application of the rules of §§ 187-188," and "[t]he capacity of a party to contract will usually be upheld if he has such capacity under the local law of the state of his domicil." This rule means that at least prima facie, parties may obtain contractual capacity for themselves by a choice of law clause. This freedom, however, will naturally be more limited than the parties' freedom of choice in relation to other issues that may arise in contract cases. In particular, the public policy limitation upon contractual autonomy665 may be expected to play a significant role.656

By refusing to permit the parties' choice to govern issues of capacity, English law avoids the need to consider this issue in terms of public policy. If questions of capacity are regulated by the legal system most closely related to the contract, it would be unreasonable for English ideas on capacity to override the rules of that system merely because England is the forum.657

The view of English law taken here is well illustrated by the Ontario case of Charron v. Montreal Trust Co.668 In that case, a husband and wife, domiciled in Quebec but residents of Ontario, where the husband was employed, entered into a separation agreement that was, under Quebec law, void for want of capacity of the parties. On the husband's death, the wife sued his executor in Ontario for arrears under the agreement, which was valid under Ontario law. Delivering the judgment of the Ontario Court of Appeal in favor of the wife, Lord Justice Morden first discussed as tests of capacity the lex loci

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654 Dicey & Morris 745. Of course, in the matrimonial sphere the importance of domicile is far greater than in the area of commercial contracts.

655 Prebble, Part I, notes 355-81 and accompanying text.

656 See Restatement (Second) § 198, comment b at 632.

657 Cf. Dicey & Morris 745. A consequence of this feature of the English rule is that the domicile of the contracting parties becomes less important than it is in America. This is a reversal of the older cases of both countries, when capacity in England was thought to be governed by the domiciliary law, and in America by the lex loci contractus.

contractus and the parties' lex domicilii, with the second standard, in particular, being dismissed as "unrealistic." Rather, he held:

The solution to this problem, in my opinion, is that adopted by the learned writers on private international law and [is] to decide that a party's capacity to enter into a contract is to be governed by . . . the law of the country with which the contract is most substantially connected. He actually went so far as to say that "whether [the husband] was domiciled in Ontario or Quebec at the time of the separation agreement is . . . immaterial."

Lord Justice Morden was entitled to find that in weighing the significant contacts to discover with which provincial legal system the separation agreement was most closely connected, the parties' domicile was of so little consequence that it could be ignored, although in a separation agreement case such a course seems a little extreme. But it was too sweeping to disregard completely the question of domicile as a factor to be weighed. In underemphasizing the importance of domicile, however, Lord Justice Morden highlighted two points that may be made in relation to his judgment. First, the Charron case concerned a separation agreement. If the parties' domicile is so unimportant in such a transaction, a fortiori, in a commercial contract English law may be expected to de-emphasize the role of domicile in deciding with which law the contract is most closely connected. In particular, English courts are unlikely to be moved by any presumptions in favor of capacity in terms similar to those of the Restatement (Second) section 198(2).

The origins of section 198(2) may be traced to the Currie school of interest analysis. Currie argued that where A, domiciled in state
X, where he has contractual capacity, contracts with B in state Y, where A does not have capacity, the contract should be enforceable, because X has declined to protect A, its domiciliary, and Y has no interest in protecting him; therefore, the interests of both states in upholding the bargain should prevail. This type of reasoning has not met with favor in England, at least in the present context. Dicey and Morris argue that

English law should govern the capacity to enter into an English contract, wherever the contracting parties are domiciled, and irrespective of the question whether a person would have had capacity according to his personal law but is a minor according to English law, or whether he is an infant according to the law of his domicile but capable of contracting by the rules of English law.

In context, it is evident that Dicey and Morris are not concerned merely with contracts that are most closely connected with English law, but that they feel that the principle enunciated is of general applicability, no matter to which system of law the contract is most significantly connected.

Assuming that the rules expounded in Charron and Restatement (Second) section 198 are correct for their respective jurisdictions, the issue of capacity presents an unusual contrast between American and English law. The English rule is simply a straightforward application of the significant contacts test, with the result that, theoretically at least, it is possible for English courts to take a rather flexible approach to cases where issues of capacity arise. A court following Restatement (Second) section 198 has a more arduous task. First, it must decide whether to recognize the parties' choice of law clause, if any. And here the reasons for nonrecognition will be stronger than in the case of most issues of contract law. Second, the court is instructed that in cases where a party's domiciliary law does accord him capacity the domiciliary law will generally prove decisive on this issue.

With regard to cases where a party's domiciliary law denies him capacity, one may infer from the Restatement (Second) that here, also, the domicile of that party should be considered a most significant, and in many cases determinative, contact for choice of law purposes.

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666 DICEY & MORRIS 746 (footnote omitted).
668 This inference is drawn from the citation of Lilienthal v. Kaufman, 239 Ore. 1, 395 P.2d 543 (1964), in the Reporter's Note in support of § 198. See Restatement (Second) § 198, Reporter's Note at 634. In that case the Oregon Supreme Court held invalid for lack of capacity a contract between an Oregon "spendthrift" and a California domiciliary.
However, American law, as stated in the Restatement (Second), is clear. Where incapacity by the domiciliary law is alleged, the domicile factor is not conclusive. The regular significant contacts test must be applied, but with domicile being given emphasis. A corollary to the importance accorded to domicile as a connecting factor in capacity cases is the following proviso contained in a comment to section 198, a proviso which typifies an attitude considerably at variance with the English belief that generally speaking rules of capacity should not be treated as manifesting strong state policies or interests.

[R]ules [of capacity] frequently embody a sufficiently strong policy to warrant their application under the circumstances stated in § 188 to the sacrifice of that choice-of-law principle which favors application of a law which would uphold the contract in order to protect the justified expectations of the parties. 669

ii. Formalities of Contracts. Any discussion of English choice of law rules relating to formalities of contracts must be preceded by a caveat: according to Leroux v. Brown, 670 any vestiges of the Statute of Frauds of 1677 that remain in force in England are characterized as procedural, not substantive. Nearly all Statute of Frauds problems before the English courts must now be determined by the lex fori. In Leroux it was held that section four of the Statute, which is the section governing all contracts to which the Statute applied, except contracts for the sale of goods, was purely procedural and thus did not affect “the solemnities of the contract.” 671 This conclusion was based upon the difference in wording between section four and section seventeen, the sale of goods section. 672 The latter was held to be substantive.

Since 1954, the Statute of Frauds has applied only to contracts of guarantee and contracts for the sale or other disposition of an interest in land. In both cases, the relevant provision is framed in terms of section four, that is, “no action shall be brought.” 673 Thus issues raised on the ground that the interest of California in having its validating law applied was not “clearly more important” than the interest of Oregon. 674

669 Restatement (Second) § 198, comment b at 632.
671 Id. at 1129.
672 Section 4 read, in relevant part: “[N]oe action shall be brought [upon certain specified types of contracts] unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing . . . .” An Act for the Prevention of Frauds and Perjuries, 29 Cha. 2, c. 3, s. 4, at 775 (1677). Section 17 read, in relevant part: “[N]oe contract for the sale of any goods wares or merchandises for the price of ten pounds sterling or upwards shall be allowed to be good except . . . that some note or memorandum in writing of the said bargain be made and signed by the partyes to be charged . . . .” Id. s. 17, at 777.
673 In 1894, § 17 was repealed and re-enacted as § 4 of the Sale of Goods Act of 1894,
by pleas of these provisions are necessarily characterized as procedural.

In America, the techniques of interest analysis have made this sort of mechanical characterization obsolete. Questions of formalities are all treated in the same way. Under the Restatement (Second), "[t]he formalities required to make a valid contract are determined by the law selected by the application of the rules of §§ 187-188, [and] formalities which meet the requirements of the place where the parties execute the contract will usually be acceptable." In England, apart from Statute of Frauds questions, it seems that a contract will be formally valid if it satisfies the requirements of either the place of making or the proper law. Although they are phrased differently, the effect of these two rules is in fact much the same.

The English rule, providing for an alternative reference to two possible validating laws, illustrates the modern tendency in both countries to avoid striking down otherwise unexceptionable bargains on grounds of lack of form alone. As Arthur Corbin states: "If a court is convinced that the contract was made as alleged and that there has been no fraud or perjury, it has no sympathy for a party whose only excuse for repudiation is the lack of a statutory formality." The Restatement (Second) section 199 may be expected to follow a similar philosophy. In cases where there is no express choice of law, the Restatement (Second) correctly states that the most significant con-

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56 & 57 Vict., c. 71, at 357. In 1925, § 4 of the Statute of Frauds was repealed and re-enacted as § 40(1) of the Law of Property Act of 1925, 15 & 16 Geo. 5, c. 20, at 58, insofar as the section concerned the disposition of any interest in land. In 1954, the Law Reform (Enforcement of Contracts) Act of 1954, 2 & 3 Eliz. 2, c. 34, at 116, repealed § 4 of the Sale of Goods Act, and § 4 of the Statute of Frauds, except insofar as the latter related to contracts of guarantee.


675 Restatement (Second) §§ 199(1), (2).

676 Dicey & Morris 749-54. Compliance with the lex loci contractus is undoubtedly sufficient. Current opinion is, however, that it is also unnecessary. See id. Ehrenzweig believes that the American rule is also one of alternative reference, with contracts able to qualify as formally valid by one of several rules:

[C]ontracts having foreign contacts quite generally have been upheld by American courts where such contracts have satisfied either the formality requirements of the forum, or those of another jurisdiction provided that the state of the validating law had sufficient contacts with the transaction to justify application of its law.

Ehrenzweig, supra note 610, at 876-77 (footnotes omitted); see A. Ehrenzweig, supra note 589, at 470-75. This purported application of Ehrenzweig's general rule of validation for contract cases has been soundly criticized insofar as it claims to state the law as it actually is applied by the courts. See Currie, supra note 74, at 243-44.

tact with the issue of formality is probably furnished by the place of contracting. Dicey and Morris observe:

Questions of form are less likely than questions of substance to have been considered by the parties in the course of the negotiations preceding the contract because they are of smaller interest to them. Such questions turn up, as it were, suddenly when the moment of completion arrives and when legal advice on them must be available on the spot. Hence, in making their contract, the parties must be able to rely on such legal advice as is available in the place where they are and such advice (and assistance) is not necessarily obtainable with regard to any formalities except those of the local law.\textsuperscript{678}

In cases where the parties have gone to the trouble of adopting a choice of law clause, it may be generally expected that they will also ensure that their contract complies formally with the chosen law. In these cases, their contract would be valid under either the English or the American rule. Where a contract is formally invalid under a stipulated governing law, but valid under the \textit{lex loci contractus}, the English rule of alternative reference will uphold it. In this situation the contract will probably also be upheld by a court applying the Restatement (Second), for where a chosen law invalidates a contract, the Restatement (Second) directs the court to ignore the stipulation for that law and to apply the principles of section 188.\textsuperscript{679} Thus, assuming the case is not "unusual," the contract will be valid under section 199.

The foregoing discussion of formalities has been concerned with the traditional formal requirements that have been imposed upon contracting parties by different laws, such as the Statute of Frauds, stamping laws, notarization rules, and rules on the transfer of corporate stock. When originally enacted, such laws reflected strong social policies, policies designed to prevent fraud and perjury, to provide reliable evidence of transactions, and to encourage individuals to deliberate or to seek advice before binding themselves to important contracts.

These policies are still important. Nonetheless, English courts have developed an alternative reference rule, and American courts are also unsympathetic to pleas of informality. The explanation is, of course, that many of the older laws on formalities, if applied, would tend to frustrate rather than to further the objects of justice and social policy.\textsuperscript{680}

\textsuperscript{678} DICEY \& MORRIS 750 (footnote omitted).
\textsuperscript{679} RESTATEMENT (SECOND) § 187, comment e at 565-66.
\textsuperscript{680} The type of formalities rule that has been the subject of discussion here is not the only sort that exists. In many jurisdictions there is a body of comparatively modern legis-
iii. Usury. The issue of usury has traditionally held a unique place in the choice of law process in America. Courts have, it seems, not considered usurious rates of interest quite as objectionable as have legislatures, and have made efforts to uphold contracts rather than to avoid them under possibly applicable anti-usury statutes. Consequently, an alternative reference rule was developed early. In *Seeman v. Philadelphia Warehouse Co.*, the United States Supreme Court held that a possibly usurious contract should be judged by the law more favorable to the lender of the laws of the place of making and of the place of performance. Even Beale agreed with this rule, finding it an exception to the general vested rights principle. The rule was refined in other cases, so that when every conceivably applicable law would penalize the lender to some extent, the least severe penalty would be applied. Thus, rather than void the contract, the court might reduce the rate of interest.

The flexibility of the alternative reference rule in *Seeman* has a certain modern flavor, which is somewhat spoiled by the requirement that the reference be to one of two laws, that of either the place of making or of performance. These jurisdictions may have no other connection with the contract. Other jurisdictions (for example, the place of negotiating) may have at least as substantial a relationship with the transaction. To remedy this deficiency, there has developed a parallel line of authority holding that the alternative reference can be to any law with a vital or substantial connection to the case.

While the alternative reference rule as developed promoted contractual certainty, it might appear that in some cases the interests of the borrower were unduly sacrificed to those of the lender, or that strong policies of interested states against high rates of interest were overridden. A final gloss on the rule thus developed: a usurious con-

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753; *Restatement (Second)* § 199, comment c at 635.
681 274 U.S. 403 (1927).
tract would be struck down if its interest rate greatly exceeded the allowable rate at the place of making or performance, for otherwise the lender would be not so much obtaining the benefit of a liberal choice of law rule, but actually evading a law that should apply to his business.685

The Restatement (Second) section 203 has retained this traditional choice of law rule686 in its essentials:

The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.

The following gloss on the rule is added in an official comment: "If a contract would be usurious under the general usury statutes of all states to which it has a substantial relationship, the forum will apply the usury statute of that state which imposes the lightest penalty."687

Some commentators believe that this clear leaning toward upholding contracts rather than protecting borrowers in section 203 exhibits a laissez-faire attitude to the forces of the marketplace that is out of tune with modern thought and practice.688 Ehrenzweig, in particular, believes that the issue of usury is one in which the general policy in favor of validating contracts should not (and, he claims, does not) apply. Courts should attempt to protect the economically weaker party, and not allow the lender to shop for a law under which he might maximize his interest.689

In most states the law is uncertain in this area, as it is in other areas where the issue is choice of law in contract.690 On policy

686 The interpretation of the cases adopted here is not universally accepted. Leflar, for example, contends that in the United States usury fundamentally is treated no differently from other issues going to the essential validity of contracts. See R. LEFLAR, supra note 599, at 378-79.
687 RESTATAMENT (SECOND) § 203, comment d at 653. The Restatement (Second) further notes that an express choice of law by the parties "will not secure application of a law that would not otherwise be applicable to sustain a contract against the charge of usury." Id., comment e at 653-57. This is because, considering the liberality of § 203, any other law chosen could hardly have a substantial relationship with the contract, and its provisions, if more liberal to the lender than those of any law possibly applicable under § 203, would almost certainly be contrary to the policy of those laws.
688 See, e.g., R. LEFLAR, supra note 599, at 379.
689 A. EHRENZWIEG, supra note 539, at 482-85.
grounds, the arguments would appear to favor the Restatement (Second) and not Ehrenzweig.

In cases in which one of two possibly applicable laws will hold the contract valid and the other will void it for usury, the rates of interest allowed by the conflicting laws will not vary by much. The policy of the state that would allow the lesser rate of interest will not be greatly offended if the slightly higher rate permitted by the other state is charged. In cases in which the state with the greatest interest in the transaction would regard the interest charged as so excessive as to be beyond all bounds then the exception provided for in section 203 comes into play.

Ehrenzweig's view insufficiently isolates the issue of usury from other contractual questions which should be considered separately. A typical example of a usurious contract is an extortionate consumer credit agreement containing, perhaps, unconscionable terms providing for repossessing of goods by the seller or judgment by cognovit note. One's visceral reaction is that choice of law rules should be fashioned to penalize lenders engaging in such business practices, and if the rules on usury can be applied to this end, so much the better. However, the rules on public policy, adhesion contracts, and the exception in section 203 should be sufficient to protect the borrower in this type of situation. As far as usury is concerned, it does not seem reasonable to strike down a contract merely because it provides for interest slightly above the rate permissible under a possibly applicable law.

Ehrenzweig is perhaps principally concerned with the “typical” usurious contract described above. In fact, many contracts which might be attacked as usurious are negotiated at arms length, and there is no reason to suppose that the borrower is in a significantly weaker position than the lender. Ehrenzweig's rule provides protection for small borrowers that might be better obtained from rules on public policy. His broad principle could at the same time be less than fair to those lenders engaged in ordinary commercial transactions. The recent New York case of Chrisafulli v. Childs provides an example.

In Chrisafulli, the plaintiffs sought a declaration that a promissory note executed by them was void, because the interest provided therein, ten percent, exceeded the six percent permitted under New York law. The conflicting law of Pennsylvania also limited interest to six percent, but merely penalized the lender by making any excess irrecoverable, rather than by voiding the entire transaction as did the New York law. The note was to finance part of the sale of some machinery by Penn-

sylvania sellers to the plaintiffs, whose place of business was in New York. The sellers had arranged with the defendants to make the loan to the plaintiffs, who were represented throughout by counsel.

The court considered applying the significant contacts test *simpliciter*, but finally utilized the *Restatement (Second)* section 203, giving judgment for the defendants for the amount still owing on the note, plus interest at six percent.  To have voided the contract would have produced a windfall for the plaintiffs.

It is uncertain whether *Chrisafulli* settles the law in New York. In stating the possible choice of law rules it might apply, the court did not reject all other rules in favor of section 203. Rather, it “prefer[red] to decide” the case according to section 203 because “the application of [that] rule would produce a just result.” One cannot therefore be sure whether the court in *Chrisafulli* was following what it believed to be the correct New York rule where usury is in issue, or was merely deciding that section 203 is applicable to arms-length transactions where there is clearly no possibility of overreaching or other economic pressure by the lender.

In England, the question of usury is no longer a live issue. Since the Usury Laws Repeal Act of 1854, there has been no restriction on the terms that may be agreed to between a borrower and a lender for the payment of interest. The ordinary principles of contract law apply with one exception, which relates to professional moneylenders as defined by the Moneylenders Acts of 1900-1927. Transactions of money-lending by moneylenders may be reviewed by the courts if the terms are harsh, unconscionable, or otherwise such that a court of equity would give relief. However, until the rate of interest reaches forty-eight percent per annum a presumption of harshness does not arise. This presumption is open to rebuttal by the lender.

As a result of the Usury Laws Repeal Act, there are no reported English cases on the conflict of laws where English law has been applied to a question of usury. Nor do there appear to be any cases where an

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692 Id. at 297, 307 N.Y.S.2d at 705.
693 Id.
694 Id.
695 Id.
696 17 & 18 Vict., c. 90, at 113.
697 See, e.g., Moneylenders Act of 1900, 63 & 64 Vict., c. 51, s. 6, at 157; Moneylenders Act of 1927, 17 & 18 Geo. 5, c. 21, ss. 10(3), 19(3)-(5), sched. 2.
698 Moneylenders Act of 1900, 63 & 64 Vict., c. 51, s. 1, at 155.
699 Moneylenders Act of 1927, 17 & 18 Geo. 5, c. 21, s. 10(1), at 316-17. The Moneylenders Acts are quite obviously not in the same spirit as American anti-usury laws.
700 17 & 18 Vict., c. 90.
English court has applied the anti-usury laws of an American state (or of any other jurisdiction) to a contractual dispute. The usury issue seldom, if ever, arises in international conflicts cases. However, a fairly accurate guess may be made as to the choice of law rule an English court would follow if a foreign anti-usury statute were pleaded in a case before it.

In England there have been numerous conflicts cases on the question of rate of interest, as opposed to the narrower issue of usury. The typical situation is where a moratorium law, or a reduction of interest statute, is passed as an economic measure by, for example, the country of the lender's place of business. In such a case, the rate of interest is governed by the proper law of the contract.\(^{701}\) Consequently, the interest-regulating statute may or may not be applied to the loan.\(^{702}\) Because England since 1854 has shown no particular interest in regulating usury, there appears to be no reason why foreign anti-usury laws should be treated any differently, with regard to choice of law, than any other laws regulating interest rates. It is submitted with some confidence, therefore, that the application of anti-usury laws in English courts depends upon the proper law of the contract.

b. *Particular Types of Contracts.* Just as certain contacts are more significant with reference to certain issues than others, so do different contacts have varying degrees of significance depending on the type of contract involved. This is true both when determining the governing law pursuant to section 188 of the *Restatement (Second)*, and when an English court is endeavoring to discover the proper law of a contract without the aid of a specific choice of law clause. The *Restatement (Second)* sections 189-97 list several important types of contracts, analyzing them to demonstrate in each case which contact is likely to be the most significant. No attempt will be made to duplicate that study; to expand upon it would involve an excessively lengthy disquisition.\(^{703}\) However, a few examples will be given in order to demonstrate the operation of the significant contacts test as applied to certain of the types of contracts identified by the *Restatement (Second).*

i. *Sale of Land.* Contracts for the sale of land provide one of the best examples of both English and American choice of law rules in operation. Under *Restatement (Second)* section 189:

The validity of a contract for the transfer of an interest in land

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\(^{702}\) *Id.* See also cases collected in *Dicey & Morris* 847.

\(^{703}\) For example, one work is devoted entirely to conflicts involving life insurance contracts. G. CarNEAHAN, CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS (2d ed. 1958).
and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the land is situated unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

The rule adopted by Dicey and Morris, although couched in different terms, is to the same effect: "A contract with regard to an immovable is, in general, governed by its proper law. The proper law of such contract is, in general, though not necessarily, the law of the country where the immovable is situate (lex situs)."704

Both the American and the English authorities accept that the autonomy principle (in England as part of the proper law doctrine) applies to land sales. Further, in the absence of an express choice of law, or if there are reasons for ignoring such a choice, the significant contacts test applies. Generally, the situs of the land will be the most significant contact, and this will point to the law to be followed pursuant to either Restatement (Second) section 188 or the proper law doctrine. At the risk of stating the obvious, the reasons for the importance accorded to the lex situs are that it "furthers the choice-of-law values of certainty, predictability and uniformity of result and, since the state where the land is situated will be readily ascertainable, of ease in determination of the applicable law."705 There may, of course, be occasions when other contacts are of sufficient importance to override the situs contact.706

704 Dicey & Morris 786 (footnotes omitted). The rules of both Dicey & Morris and the Restatement (Second) that are quoted here cover more than merely the sale of land. However, these rules do not purport to apply to conveyances of land, but rather to contracts for the sale of land. The validity and effect of conveyances are determined by the law that the lex situs would apply.

705 Restatement (Second) § 189, comment c at 588.

706 An example is suggested by the Restatement (Second):

In state X, A and B, who are domiciled in that state, enter into a contract for the transfer by A to B of an interest in land located in state Y. The contract is invalid under X local law because of A's minority. It is valid under the local law of Y, under which law A has capacity to contract. A fails to complete the transfer, and B brings suit against A for breach of contract in a Z court. Among the questions for the Z court to decide is whether X's interest in the application of its rule of incapacity is outweighed in the particular case by the value of protecting the justified expectations of the parties by upholding the contract as buttressed by Y's interest in the application of its rule of capacity.

Restatement (Second) § 189, illustration 2.

The Restatement (Second) answers this question as follows:

The fact that A and B are both domiciled in X would lend support to the view that X is the state with the dominant interest in the issue of capacity and that accordingly its rule of incapacity should be applied.

Id. In England, a different answer might be given, because English courts decide issues of
ii. Life Insurance. The area of life insurance offers an interesting contrast between the attitudes of the English and the American judiciary as to what contacts are most significant. In the United States, life insurance has proved a very fruitful field for conflicts litigation. The great majority of cases have held the *lex loci contractus* to govern. Nevertheless, no reason appears why modern interest analysis should not replace the place of making rule in this field of contract law. New York has adopted the significant contacts rule for life insurance cases, and other states appear to be following suit. The *Restatement (Second)* would thus appear to be on firm ground in asserting that absent a more significant contact the validity of such a contract is determined by the law of the insured's domicile at the time application for the policy was made. In England, the same basic significant contacts test is applied, but with quite different results:

1. A contract of insurance is governed by its proper law.
2. If an intention to choose the proper law has not been expressed in the insurance policy and cannot be inferred from the circumstances, and if there is nothing to show that the contract is more closely connected with another system of law, the contract is governed by the law of the country in which the insurer carries on his business, and, if he carries on his business in two or more countries, by the law of the country in which his head office is situated.

Why is it that in America the most significant contact is considered to be the domicile of the insured, while in England it is generally the domicile of the insurer? In those insurance cases involving choice of law problems, courts are faced with interests of both the insurer and the insured, which are not really capable of reconciliation by any practical compromise. It is simply a question of choosing one law or the other.

capacity by the law most significantly connected to the contract and not necessarily to the particular issue. Therefore, although X is the state most interested in the capacity issue, an English court might well apply Y law if it feels that Y law is the law most closely connected to the contract as a whole. English reluctance to view the capacity as raising issues of public policy which might override Y law lends weight to this conclusion.


710 RESTATEMENT (SECOND) § 192.

711 DICEY & MORRIS 810 (footnotes omitted).
In favor of the law of the domicile of the insured is his usual position as the economically weaker party on the receiving end of an adhesion contract. In favor of the law of the company's place of business, however, is the consideration that

[i]n insurance, the multitude of contracts concluded by the company constitutes a unity—statistically, economically, and legally. The analysis of risks on the basis of which premiums are calculated is safe only when all policies in force in one group are governed by the same rules of law.\footnote{Lando, Scandinavian Conflict of Laws Rules Respecting Contracts, 6 Am. J. Comp. L. 1, 16 (1957).}

Furthermore, the “adhesion contract” argument cuts both ways. For certainty and predictability, it is arguable that the complex and standardized life insurance contracts of one company should be governed by the same law.

A final argument also points to the law of the company's place of business: it may be in the interest of the insured to have his contract tied to the law of the home office of the insurer.\footnote{These arguments in favor of the place of business of the insurer are detailed in Unger, Life Insurance and the Conflict of Laws, 13 Intr. & Comp. L.Q. 482, 483-89 (1964). Unger also notes that insurance companies generally hold assets in many jurisdictions and that consequently they should be protected from forum shopping. But this argument does not necessarily favor the application of the law of either the insurer or the insured; rather, it supports the adoption of the same choice of law rule in all jurisdictions.}

In some cases, life insurance with a foreign insurer is purchased as a protection against economic vicissitudes at the domicile of the insured, in the hope that the more stable foreign currency will protect his investment. Economic regulations adopted by the insured's domicile, if applied to the insurance contract, are liable to reverse any advantages he might otherwise have gained.\footnote{See, e.g., Varas v. Crown Life Ins. Co., 204 Pa. Super. 176, 203 A.2d 505 (1964); Rossano v. Manufacturer's Life Ins. Co., [1963] 2 Q.B. 352, [1962] 2 All E.R. 214 (1962).}

The reasons for English courts' acceptance of the arguments in favor of the law of the insurer stem from a difference in the types of problems that have arisen in English life insurance cases as compared with American ones, and from a different attitude toward the regulatory legislation governing insurance contracts found in most jurisdictions.

Claims against insurance companies in American courts have tended to involve the defendant's reliance upon policy provisions which are outlawed by an arguably applicable law, frequently the law of the forum, which is also the law of the domicile of the insured.\footnote{See, e.g., cases cited in note 708 supra.} In leading English cases, however, insurance companies have tried to
rly upon exchange control legislation at the domicile of the insured in order to avoid payment under the policy according to the law of the jurisdiction where the head office of the defendant is located. Consequently, if both American and English courts prefer to protect the economically weaker party in life insurance cases, this result will be more frequently brought about by applying the law of the insured's domicile in America, and of the insurer's head office in England.

Further, English international insurance business may be viewed as one aspect of English economic colonialism, or as invisible exporting, depending upon one's point of view. England provides many financial services to persons in other countries, and the tendency has been for parties to favor English commercial law to govern these transactions. Just as head offices of English shipping and financial houses have exported their law with their services, so may insurance companies be expected to do. The American interstate insurance business is rather different. Insurance companies frequently have large offices in many, if not all, states, each of which wants to regulate any insurance business conducted with its citizens. The same reason for domination by the law prevailing at the home office does not therefore exist.

English courts appear to take what would be regarded in America as an old-fashioned view of legislation aimed at protecting the insured from the insurer's superior bargaining power, at least when an English domiciliary is involved. Such legislation would be regarded as indicative of a strong forum policy which would override the normal conflicts rules in any event. The English Insurance Companies Act of 1958, for example, applies "to all insurance companies, whether established within or outside Great Britain, which carry on within Great Britain insurance business." Consequently, at least in the case of insurance business transacted in England with English domiciliaries, English courts would reach the same conclusion as their American counterparts where the issue was regulated by protective legislation.

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716 See, e.g., Rossano v. Manufacturer's Life Ins. Co., [1963] 2 Q.B. 352, [1962] 2 All E.R. 214 (1962). This paragraph is somewhat generalized. There have been numerous cases before American courts where defendant insurance companies have argued that Cuban exchange control regulations apply to their contracts with ex-Cuban domiciliaries, the plaintiffs in their turn claiming that the law of an American state governs. See, e.g., Varas v. Crown Life Ins. Co., 204 Pa. Super. 176, 203 A.2d 505 (1964).


718 See Dicey & Morris 812.

719 Insurance Companies Act of 1958, 6 & 7 Eliz. 2, c. 72, s. 1(1), at 1075.

720 Legislation regulating insurance contracts and containing choice of law provisions is, as might be expected, not uncommon in America. See C. Carnahan, supra note 703, at
Finally, it should be mentioned that the right of parties to determine the law governing the agreement may in some cases be circumscribed. Insurance agreements may be regulated as adhesion contracts in order to protect the rights of the weaker party. These regulations could be rather easily evaded if the parties to an insurance contract were allowed to choose not to be governed by them. Thus, interest analysis, as interpreted by the Restatement (Second), refuses to recognize choice of law provisions in life insurance contracts unless the law chosen is more favorable to the insured than is the conflicting law, or unless the insured had a genuine choice in the matter by being offered two or more possible laws to choose from, or by being represented by a group of one kind or another which, because of its superior bargaining position, is able effectively to represent his interests. English law appears, however, to permit autonomous choice of law in life insurance contracts, although recognizing that the public policy exception will have unusual force in these cases.

iii. The Uniform Commercial Code, and a Particular Example of Contracts Subject Thereto: Sale of Chattels. Where a contract expressly stipulates for a governing law, the choice of law rule mandated by the Uniform Commercial Code is essentially similar to that followed by jurisdictions which follow the autonomy principle. But where there is no express or inferable choice, the rule is quite different from the usual significant contacts test. Under section 1-105(1) of the Code, substantive Code provisions will simply be applied “to transactions bearing an appropriate relation to [the forum] state.”

An official comment to section 1-105 attempts to justify this extreme forum-favoring provision, but does not offer much help on the question of what constitutes an “appropriate relation”:

124-25. This type of legislation is very unpopular with modern conflicts scholars, since it inhibits the free operation of interest analysis. See, e.g., Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U.L. Rev. 267, 272-79 (1966). The rule in the Restatement (Second) § 192 somewhat misleadingly ignores this legislation, although of course all choice of law rules in the Restatement (Second) must be read subject to § 6(1).

721 See Prebble, Part I, notes 382-88 and accompanying text.
722 See Restatement (Second) § 192, comments e-l.
723 See Prebble, Part I, notes 355-81 and accompanying text.
724 See Dicey & Morris 812.
725 See Prebble, Part I, notes 461-78 and accompanying text.
726 It should be noted that there are in the Code certain specific choice of law rules that apply to particular contracts, e.g., bank deposits and collections, and bulk transfers. These specific rules vary even more from the flexible norm of the significant contacts test. They are critically discussed in Rheinstein, Conflict of Laws in the Uniform Commercial Code, 16 Law & Contemp. Prob. 114 (1951).
Where a transaction has significant contacts with a state which has enacted the Act and also with other jurisdictions, the question what relation is "appropriate" is left to judicial decision. In deciding that question, the court is not strictly bound by precedents established in other contexts. Thus a conflict-of-laws decision refusing to apply a purely local statute or rule of law to a particular multi-state transaction may not be valid precedent for refusal to apply the Code in an analogous situation. Application of the Code in such circumstances may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries.\textsuperscript{727}

Assuming that such advice is followed, it appears unlikely that a comprehensive body of precedent could grow up around the meaning of "appropriate," even as that term is used specifically in the present context. Of course, there may be occasions when trial courts make singularly erroneous decisions, holding, perhaps, that some quite insignificant contact between the forum and the transaction furnishes an "appropriate relation," or, although less likely, refusing to apply the Code to a contract clearly significantly connected with the forum state. Through appellate review of such decisions judges might be able to formulate some outside guidelines to the meaning of "appropriate." Generally speaking, however, each case is the subject of "judicial decision," which presumably means that its facts will be considered on their own.

The operation of the Uniform Commercial Code section 1-105(1) may be illustrated by the case of a simple sale of goods with multistate or multinational connections, since the Code also applies to such transactions.\textsuperscript{728} If no express choice of law has been made, and this case comes before a court in a Code state, then the Code will be applied if the sale bears an appropriate relation to the forum. Such a relation, in the case of a simple sale, could include the place of delivery, the place of business of the seller or buyer, or the place of the negotiation of the contract, depending on the circumstances of the case.

Under the most significant contacts test, the sales transaction would be examined, and one law only would be chosen as the law most closely related to the issue at bar. Generally speaking, this law would probably be that of the place of delivery. In fact, the Restatement (Sec-

\textsuperscript{727} Uniform Commercial Code § 1-105, Comment 3.

\textsuperscript{728} See id. §§ 1-105(1), 2-102.
section 191 states the choice of law rule for the sale of chattels in these terms:

The validity of a contract for the sale of an interest in a chattel and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.\textsuperscript{729}

Although discussion of the Uniform Commercial Code, with its specific and mandatory choice of law rules, does not lend itself to exhaustive comparison with English rules, for completeness it may be mentioned that the sale of chattels is in English law quite an ordinary type of contract, to be governed as to validity and effect by the proper law.\textsuperscript{730}

\section{VI}

\textbf{Reference by the Forum to Foreign Choice of Law Rules}

The role of renvoi\textsuperscript{731} in the conflict of laws has been widely treated.\textsuperscript{732} The general utility and the logical conundrums associated

\textsuperscript{729} This rule is of little more than academic interest. However, it does demonstrate the difference between the forum-favoring rules of the Uniform Commercial Code and the significant contacts test of the Restatement (Second). But the Restatement (Second) is of course wrong in saying that § 191 contains the American choice of law rule governing contracts for sale of chattels. That rule is found in § 1-105 of the Uniform Commercial Code. The mistake of the Restatement (Second) is somewhat surprising, since the Restatement (Second) notes the "well-nigh universal adoption of the Code by states of the United States." Restatement (Second) § 191, comment c. It may be inferred from the Restatement (Second) that the Reporter and his advisors are under the impression that the choice of law provisions of the Code are not applicable to international conflicts of law: "In any event, choice-of-law problems involving the contracts dealt with here will continue to arise involving this country's foreign commerce." Id. In this case § 191 would be correct as far as such litigation is concerned. If this inference is correct, the Restatement (Second) is mistaken. Section 1-105(1) expressly covers transactions involving contacts with "another state or nation."

\textsuperscript{730} See, e.g., Jacobs v. Credit Lyonnais, [1884] 12 Q.B.D. 589, 55 L.J.Q.B. 156, 32 W.R. 761 (C.A.). See also cases collected in Dicey & Morris 791 n.32.

\textsuperscript{731} "Renvoi" is used in this article to include either remission, transmission, or both, as appropriate.

\textsuperscript{732} Allemes, \textit{The Problem of Renvoi in Private International Law}, 12 Grotius 63 (1927); Falconbridge, \textit{Renvoi and Succession to Moveables}, 46 L.Q. Rev. 465 (1930); Lorenzen, \textit{The Renvoi Theory and the Application of Foreign Law}, 10 Colum. L. Rev. 190 (1910); Schreiber, \textit{The Doctrine of the Renvoi in Anglo-American Law}, 31 Harv. L. Rev. 523 (1918). For the best general treatments of renvoi in England and America respectively,
with the doctrine\textsuperscript{733} will not be discussed here. Suffice it to say that generally speaking there is considerable uncertainty as to the functions of renvoi.\textsuperscript{734}

Most English and American courts and writers are in agreement that "the principle of renvoi finds no place in the field of contract."\textsuperscript{735} One reason is that to apply renvoi in contract actions would render even more uncertain the already difficult choice of law problems presented by these cases, without providing any compensating advantages of justice or convenience. The doctrine would also almost certainly defeat the intention of the parties.\textsuperscript{736} As Ehrenzweig has pointed out:

Once the fictitious regime of the lex contractus is replaced, as it must be, by a general recognition of party autonomy, renvoi must be wholly rejected. It would clearly be absurd to argue that where the parties have intended application of a foreign law they have also intended application of those rules of the "whole" foreign law which deny their own applicability by referring to another law. Such reasoning would deny effect to the very intention that it invokes.\textsuperscript{737}

Nevertheless, renvoi continues to present problems in the contract field both in England and in America. The difficulties can be traced to three main sources: the judicial history of renvoi, the post-Bealean con-


\textsuperscript{734} "The truth would appear to be that in some situations the doctrine [of renvoi] is convenient and promotes justice, and that in other situations the doctrine is inconvenient and ought to be rejected." J. Morris, \textit{Cases on Private International Law} 24 (4th ed. 1968).

\textsuperscript{735} \textit{In re} United Rys. of the Havana & Regla Warehouses Ltd., [1960] Ch. 52, 96-97, 115 (C.A. 1958); \textit{see} Siegelman v. Cunard White Star Ltd., 221 F.2d 189 (2d Cir. 1955); \textit{cf.} Rosencrantz v. Union Contractors Ltd., 23 D.L.R.2d 473 (1960). This statement is true, even with regard to contracts for the transfer of interests in land. \textit{See} \textit{Restatement (Second)} \S\ 189. However, where the issue is the validity and effect of a \textit{conveyance} of an interest in land, in order to ensure that its decision will be respected a court should apply the same rules as would the \textit{lex situs}; that is, the foreign court theory of renvoi should be followed. \textit{See} note 801 and accompanying text \textit{infra}. \textit{Restatement (Second)} \S\ 223 reads: "(1) Whether a conveyance transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs. (2) These courts would usually apply their own local law in determining such questions."

\textsuperscript{736} \textit{See} \textit{Restatement (Second)} \S\ 187, comment \textit{h}.

\textsuperscript{737} A. Ehrenzweig, \textit{supra} note 539, at 338.
flict of laws revolution, and the English adherence to the pre-interest analysis, jurisdiction-selecting approach to choice of law.

A. Renvoi in America

1. Cases

Contrary to current practice, American courts historically did not hesitate to invoke renvoi in contract cases. Generally, the reason for this was a desire of the court to temper the effect of some otherwise applicable mechanical choice of law rule. The most celebrated of these cases is *University of Chicago v. Dater.* In that case, the plaintiff loaned a sum of money to a married woman domiciled in Michigan on the security of property in Illinois. Parts of the transaction occurred in each state. At the time, married women had contractual capacity in Illinois, but not in Michigan. In an action on the loan against the woman, the majority of the Supreme Court of Michigan decided the case on the assumption that the loan contract was governed by the law of Illinois. It found, however, that Illinois would decide the question of capacity according to the law of the woman's domicile, which in this case was Michigan. The court, therefore, held the contract unenforceable.

While cases of the *Dater* vintage may be dismissed as having been decided by courts whose eyes had not been opened to the theories of interest analysis, the same cannot be said of two more recent cases before the Court of Appeals for the Second Circuit. Although the net result of the two cases is probably to confirm that renvoi has no place in the law of contract, they do demonstrate that even sophisticated judges aware of the modern approaches to the conflict of laws may support the use of renvoi in contract cases.

The first case is *Mason v. Rose.* This case concerned an agreement executed in England between Mason, an actor, and Rose, a producer, to participate in a film-making joint venture. Mason sued in New York for a declaration that the agreement was legally ineffective for indefiniteness, and therefore not binding. It was agreed (as was hardly open to question) that New York conflict of laws rules should decide the applicable law. The choice was between the law of En-

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740 176 F.2d 486 (2d Cir. 1949).
741 Id. at 488.
gland, where the alleged contract was executed, and that of California, where it was to be performed. The majority of the court held that the New York rule pointed to England as the *lex loci contractus.* However, the majority then proceeded to consider how an English court would decide the case, referring to the English rules for finding the proper law of the contract.

An English court, it was decided, would define the proper law of the contract as either the law presumably intended by the parties, or the law with which the transaction had its most real connection. Was this California or English law? The court decided that it was not necessary to answer this question, for under the laws of both California and England the alleged contract was unenforceable for vagueness. Nonetheless, the majority judgment in *Mason v. Rose* furnishes a clear example of renvoi in practice.

Circuit Judge Frank, although concurring in the result, was dissatisfied with the reasoning of the majority. Noting that there was a false conflict between the laws of England and of California, he simply held that the agreement between Mason and Rose was not a binding contract. In view of his later judgment in *Siegelman v. Cunard White Star Ltd.*, it is interesting to note that his concurring opinion in the *Mason* case denounced the majority opinion as “unnecessarily stirring up the hornets’ nest of renvoi along the way.”

*Siegelman* involved a contract of passage from New York to Cherbourg aboard an English ship. One clause of the printed conditions on the ticket stated: “All questions arising on this contract ticket shall be decided according to English law with reference to which this contract is made.”

Upholding the choice of English law as governing the contractual dispute that had come before the court, the majority was adamant that

[t]he provision must be read as referring to [English] substantive law alone, for surely the major purpose of including the provision

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742 Id.
743 In 1949, when *Mason v. Rose* was before the New York Court of Appeals, both these formulations were correct. See notes 504-08 and accompanying text supra.
744 176 F.2d at 488-89.
745 Here, renvoi by transmission: from New York to England, and then, following English conflict of laws rules, to California.
746 Frank did not use the modern terminology. For a discussion of the false conflict concept, see Prebble, *Part I,* notes 157-58 and accompanying text.
747 176 F.2d at 491.
748 221 F.2d 189 (2d Cir. 1955).
749 176 F.2d at 491.
750 221 F.2d at 209.
in the ticket was to assure Cunard of a uniform result in any
litigation no matter where the ticket was issued or where the litiga-
tion arose, and this result might not obtain if the "whole" law of
England were referred to.751

Judge Frank dissented, stating that the clause referred to English law
as a whole, and not merely to its domestic rules.752 Consequently, while
the current rule in the United States is probably represented by the
judgment of the majority in Siegelman, the dissent of Judge Frank in
that case, and the Mason decision, indicate that the position is not ab-
solute.

2. Renvoi and the Vested Rights Doctrine

Despite University of Chicago v. Dater,753 the modern rejection of
renvoi in contract cases is not a departure from traditional learning.
The first Restatement excluded the doctrine from any consideration
not only in contracts, but in nearly every other field touched by the
conflict of laws.754 This attempt failed, as witnessed by Dater and simi-
lar cases,755 for reasons both theoretical and practical. Theoretically, a
rejection of renvoi is inconsistent with a strict application of the vested
rights doctrine.

Although the renvoi doctrine is rejected by the Restatement on
principle, the notion of "enforcement of foreign-created rights" and
of the so-called Conflict of Laws "jurisdiction" of any state to
create "rights" for "recognition" or "enforcement" by another
state, is one of renvoi, for the conception is that the law of the
forum enforces the identical right "created" by the law of the
other state, referring to the particular case at hand, including its
Conflict of Laws features. . . . To speak of "recognition" or "en-
forcement" of "foreign created rights" presents the dilemma of
either renvoi on the one side or misdescription on the other.756

751 Id. at 194.
752 Id. at 203.
754 Restatement of Conflict of Laws § 7 (1934).
755 See, e.g., cases cited in note 739 supra.
555, 560-61 (1935). See also W. Cook, The Logical and Legal Bases of the Conflict
of Laws 374-75 (1942): "[T]he apparent complete rejection of [the renvoi] theory in the
tort and contract cases by Professor Beale, Professor Goodrich, and the Restatement,
can be supported only by an abandonment of the 'vested rights' theory."

This rejection of renvoi is reconcilable with and was probably compelled by other basic
theories of the first Restatement. The Restatement was of the view that the conflict of
laws could and should be reduced to a relatively small body of rules that could be applied
to numerous situations, and that the chief and only important policies of the conflict of
laws should be the encouragement of uniformity and predictability of result, and the
avoidance of forum shopping. See A. von Mehren & D. Trautman, supra note 732, at
The Restatement's rejection of renvoi was also likely to be disregarded in practice. A British observer studying American contract cases, at least before the recent trends in the conflict of laws began to be reflected in judicial decisions, might expect that renvoi would be needed to play a greater part in mitigating the effects of the mechanical American choice of law rules as found in the first Restatement than would be required of it in England, with that country's more flexible doctrine of the proper law.\textsuperscript{757} Renvoi could serve as an escape route for a court faced with an inflexible and unacceptable choice of law rule.\textsuperscript{758}

B. Renvoi in England

1. Minor Cases

Because the English proper law doctrine escaped the stranglehold of Bealeism, there has never been the same necessity for English courts to resort to renvoi in contract cases. Nevertheless, support can be found for the doctrine in a small number of cases.

Although the decision in New Brunswick Railway Co. Ltd. v. British and French Trust Corp.\textsuperscript{759} does not depend upon application of


\textsuperscript{758} This escape-route approach has not lacked scholarly support. Notably, Professor Erwin Griswold argued for the wider use of renvoi in Anglo-American law. See Griswold, Renvoi Revisited, 51 Harv. L. Rev. 1165 (1938). While Griswold did not explicitly contend that renvoi was a suitable tool for the solution of contract cases in general, he gave as an example of the type of situation where renvoi would be useful the case of a principal's alleged ratification of his agent's unauthorized contract. Id. at 1200. Griswold notes:

It is generally said that where a contract is made without authority in state X and the principal subsequently ratifies it in state Y, the validity of the contract is governed by the law of X, even though the principal was always in Y. . . . Might there be value in an approach which said that the principal's act was governed by the law of Y where he acted, but the "whole law" of Y in such a case might well refer to the law of X?

Id. More important, Griswold expressly approved of the majority's reasoning in University of Chicago v. Dater. See id. at 1208. Writers less conservative than Griswold are also willing to recognize that in jurisdictions maintaining a Bealean approach to the conflict of laws, judicious use of renvoi can prevent otherwise unsatisfactory results. See, e.g., von Mehren, The Renvoi and Its Relation to Various Approaches to the Choice of Law Problem, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 380, 385-89 (K. Nadelmann, A. von Mehren & J. Hazard eds. 1961).

\textsuperscript{759} [1939] A.C. 1 (1938).
the renvoi doctrine, since the two laws involved (English and Canadian) were, in relevant respects, the same, a dictum of Lord Romer appears almost unwittingly to use renvoi reasoning.

For in the case of a contract which is governed by English law, but which provides for its performance in a foreign country, a term is to be implied in the contract that such performance shall be regulated by the law of that country, i.e., the lex loci solutionis, and there being no evidence that Canadian law differs from our law in this respect it is to be assumed that this rule prevails in Canada.760

Lord Romer is probably wrong in stating that performance of a contract is governed by the lex loci solutionis.761 However, the point to be emphasized is that his Lordship refers to the lex loci solutionis not by virtue of an English forum choice of law rule, but because he believes that he is directed to do so by the proper law of the contract.762

Ocean Steamship Co. v. Queensland State Wheat Board763 was an appeal against an order setting aside a District Registrar’s order granting leave to serve a writ out of the jurisdiction pursuant to Order XI Rule 1(e) of the Supreme Court, which provides that a writ may not be served outside the jurisdiction unless the contract is, by its terms, to be governed by English law.764 The contract involved was incorporated into a bill of lading issued in Queensland. One clause of the bill expressly chose English law as the governing law of the contract, but another clause provided that the Australian Sea Carriage of Goods Act,765 was to be incorporated into the agreement. Under section nine of the Australian Act, the law of the place of shipment (here Brisbane) governed the contract; any contrary provision was null and void.

In dismissing the appeal, the Court of Appeal first referred to the English law explicitly chosen, and, construing the contract under English law, found that in fact the intention was that Australian law

760 Id. at 44.
762 In Wanganui-Rangitikei Elec. Power Bd. v. Australian Mut. Provident Soc’y, 50 Commw. L.R. 581, 604 (Austl. 1984), a comparable case, Mr. Justice Evatt stated quite definitely, and, it is submitted, wrongly, that although the law of country A is the proper or governing law of the contract, and the law of country B may be referred to in order to determine the method and incidents of performance of the contract, this is because the law of country A itself requires or conceives that the methods and incidents of performance should depend upon the law in force at the locality of performance, that is, country B.
764 This rule is the equivalent of an American long-arm statute.
should govern. The result, in effect, was that the parties were held to have stipulated for renvoi to apply to their contract by express choice. A contract including such a stipulation constitutes an orthodox exception to the general rule that renvoi has no place in contract cases. In the facts and decision of *Ocean Steamship*, however, one finds little to commend this exception. Clearly enough the contractual incorporation of the whole of the Australian Sea Carriage of Goods Act was a mistake, and the shippers, who had drawn up the bill of lading, most probably intended merely to incorporate the Hague Rules, attached to the Act, under which the choice of English law would have been quite valid.

2. *The Vita Food Products Case*

In *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.*, Lord Wright, delivering the advice of the Privy Council, stated:

There is, in their Lordships' opinion, no ground for refusing to give effect to the express selection of English law as the proper law in the bills of lading. Hence English rules relating to the conflict of laws must be applied to determine how the bills of lading are affected by the failure to comply with s. 3 of the Act.

If Lord Wright's reference to English rules of the conflict of laws was an attempt to introduce renvoi into contract cases, his endeavor was successfully turned aside in a very close analysis of the case published the following year. No subsequent English cases or academic studies have cited *Vita Food Products* as authority for such a proposition. The facts of the case certainly do not support a rationale based on renvoi, since all the provisions of English law upon which the case was ultimately decided were applied as part of the proper law of the contract.

One simple explanation of Lord Wright's words is that they were a mistake. A possible cause for such a mistake is suggested by Falconbridge, who feels that Lord Wright may have unintentionally referred to the conflict of laws rules of England as part of the process of deter-

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767 This exception, of course, owes its existence to the autonomy theory. See notes 802-23 and accompanying text infra.
768 See [1941] 1 K.B. at 412, [1941] 1 All E.R. at 160.
770 Id. at 292, [1939] 1 All E.R. at 522.
772 These provisions were simply part of the English common law of contract.
773 Dicey & Morris 695 n.25.
mining what effect should be given in English law to a contract assumed to be illegal in the place where it was made.\textsuperscript{774} Some authorities hold this to be a question for English domestic law when the proper law of the contract under litigation is English.\textsuperscript{776} This argument may seem to involve a measure of sleight of hand, for if English law refers to foreign law, it would certainly appear that English choice of law rules are involved. However, it is contended that such rules are of a different character than those applied by a court as part of the \textit{lex fori}, and cannot truly be called rules of the conflict of laws. The utility of this explanation lies in the context of an English case on a contract whose proper law is foreign, and which is illegal under the \textit{lex loci contractus}. In such a case, if Falconbridge is correct, the English court is not bound by its own choice of law rules to take any notice of the illegality, unless the proper law would do so.\textsuperscript{776} Nevertheless, in English cases it is common enough to find references to illegality under the \textit{lex loci contractus}, references made pursuant to supposed choice of law rules of English law as the \textit{lex fori}. Such references may be either mistaken or intentional.\textsuperscript{777}

Falconbridge's explanation has some attraction, but if Lord Wright did indeed merely make a slip, it was a rather persistent mistake, for His Lordship also appears to have taken the same view on the previous page of the report.\textsuperscript{778} It is more likely that he was classifying the English rules on illegality of a contract by the \textit{lex loci contractus} as "conflictual" rather than domestic.\textsuperscript{779}

If there did exist any serious suspicion that Lord Wright had introduced renvoi into contract cases, this was completely dispelled by a unanimous Court of Appeal in \textit{In re United Railways of the Havana & Regla Warehouses Ltd.},\textsuperscript{780} affirming that renvoi has no place in contract cases before English courts.

Insofar as they are claimed to lend support to an argument for the use of renvoi in contract cases, from an English point of view, New

\textsuperscript{774} See Falconbridge, \textit{supra} note 757, at 404.
\textsuperscript{775} See G. Cheshire & P. North, \textit{supra} note 482, at 226-29.
\textsuperscript{776} At this point, it will be observed that Falconbridge's view raises a problem, for the process here suggests itself as renvoi—reference from the English forum, to the proper law, and on to the illegality by the \textit{lex loci contractus}. But recent English authority clearly holds that renvoi has no place in contract law. \textit{See In re United Rys. of the Havana & Regla Warehouses Ltd.}, [1960] Ch. 52 (C.A. 1958).
\textsuperscript{777} G. Cheshire & P. North, \textit{supra} note 482, at 226-29.
\textsuperscript{780} [1960] Ch. 52 (C.A. 1958). The court did not itself give reasons, but it adopted the arguments of Morris and Cheshire. \textit{See Morris & Cheshire, supra} note 771, at 333-34.
Brunswick, Ocean Steamship, and Vita Food Products deserve only a brief mention as historical anomalies. Lord Wright's dictum in Vita Food Products has been discussed in some detail in order to emphasize by contrast the extraordinary respect accorded it by American opinion. While current orthodoxy in both England and America rejects the renvoi doctrine in contract cases, America, not England, is more likely to incline away from this view.\textsuperscript{781} In the Reporter's Notes in the Restatement (Second), the Reporter cited Vita Food Products\textsuperscript{782} and the Tennessee case of Duskin v. Pennsylvania-Central Airlines Corp.\textsuperscript{783} as "[t]wo exceptional cases to the contrary"\textsuperscript{784} of the general view that renvoi does not apply in contract cases.

The specific reliance by the Reporter on Vita Food Products is surprising in several respects. First, the facts of the case, as correctly set out in the Reporter's Note,\textsuperscript{785} show that the facts involved no question of renvoi. Second, it is clear that the Reporter was aware of the English treatment of Vita Food Products, because in the Sixth Tentative Draft of the Restatement (Second), the predecessor to the section of the Official Draft under consideration, he cited both Dicey\textsuperscript{786} and Falconbridge\textsuperscript{787} on the question of renvoi.\textsuperscript{788} Third, University of Chicago v. Dater\textsuperscript{789} was not cited even though it clearly constitutes better authority for the use of renvoi than Vita Food Products.\textsuperscript{790}

\textsuperscript{781} See notes 757-58 and accompanying text supra. But see Peterson, Conflict Avoidance Through Choice of Law and Forum, 45 Denver L.J. 20, 26 n.15 (1968):

[The normal assumption seems to be that the law referred to by a choice of law clause is the local law of the designated state or country. ... This may be a safe assumption from the American point of view, but there is some danger in assuming that it holds true in other countries. The leading English case on stipulations as to governing law [i.e., Vita Food Products] interpreted such a clause as adopting the whole law, including the conflict of laws rules of the designated country.]

\textsuperscript{783} 167 F.2d 727 (6th Cir.), cert. denied, 335 U.S. 829 (1948).
\textsuperscript{784} Restatement (Second) § 187, Reporter's Note, comment h.
\textsuperscript{785} Id. § 187, Reporter's Note, comment f.
\textsuperscript{786} A. Dicey, Dicey's Conflict of Laws 581 (6th ed. 1949).
\textsuperscript{787} J. Falconbridge, supra note 660, at 142.
\textsuperscript{788} Restatement (Second) of Conflicts of Law § 332, Reporter's Note (Tent. Draft No. 6, 1960).
\textsuperscript{789} 277 Mich. 658, 270 N.W. 175 (1936).
\textsuperscript{790} Oddly enough, Dater is cited in the Reporter's Note to § 332 of the Tentative Draft. This section is applicable when there has been no express choice of law by the parties. Dater did not, of course, involve such a choice, and that may be the reason why the Reporter preferred not to cite it in his note to § 187 of the Restatement (Second) proper, since § 187 deals with cases involving an express choice of law. But unlike § 332 of the Tentative Draft, § 188 of the Restatement (Second), which also deals with cases where there has been no express choice of law, does not consider renvoi,
C. Modern Unorthodox Theories in the United States

In view of the somewhat ambivalent attitude underlying the "no renvoi" orthodoxy of the majority in Siegelman v. Cunard White Star Ltd., it is not surprising to discover that renvoi is by no means dead in America as far as contract cases are concerned. Resort to renvoi is advocated in several situations.

As the theories and techniques of interest analysis spread to more conservative jurisdictions, courts will occasionally resort to the renvoi doctrine as one of perhaps several transitional measures by which some semblance of the integrity of the old Bealean rules may be maintained while the courts move toward what are now seen to be the true policies of the conflict of laws. The result may be an approach not dissimilar to that taken in University of Chicago v. Dater. This revival should be short-lived as more states transfer fully to the reasoning of the modernists.

There is some support, however, for according a more permanent position in contract cases to renvoi, both generally and in certain specific situations. Roger Cramton and David Currie, for example, ask whether "the Siegelman court [was] correct in construing the contractual choice of law provision as referring solely to England's internal law rather than to its 'whole law' (including relevant conflict of laws rules and principles)?" While the learned authors do not answer their question directly, one may infer from the context that they are by no means sure that the answer should be "yes." and consequently does not refer to Dater. Since renvoi is not mentioned elsewhere in the chapter on contracts, it is surprising that § 187 of the Restatement (Second) cites only Vita Food Products and Duskin. The arguments for and against renvoi do not change much whether or not there is an express choice of law (as opposed to an express choice of renvoi, see notes 802-23 and accompanying text infra), and Dater is after all the most celebrated American case on the subject.

The treatment of Vita Food Products by Peterson (see note 781 supra) and the Restatement (Second) may be compared with the treatment accorded by Levin, Party Autonomy: Choice of Law Clauses in Commercial Contracts, 46 Geo. L.J. 260, 261-62 (1957): "There have been two cases [Vita Food Products and Duskin] in which the parties had made [an express choice of law] only to have the courts make the reference to the 'whole law of the jurisdiction, and reach the final governing law through use of a renvoi doctrine.'" See Johnston, Party Autonomy in Contracts Specifying Foreign Law, 7 WM. & MARY L. REV. 58 (1965); cf. Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 203 (2d Cir. 1955) (Frank J., dissenting): "It is significant that [Vita Food Products] construed a clause in a bill of lading providing, 'This contract shall be governed by English law,' to require the application of English conflict rules to such a contract . . . ."
Developing this theme further, Arthur von Mehren and Donald Trautman believe that a categorical answer cannot be given to the question of whether an express choice of law should be treated as a choice of the whole of that law:

Individuals contracting without legal advice usually are not thinking of particular domestic-law rules and principles; instead, they are probably indicating confidence in a particular legal order. Their stipulation for a governing law may then be taken as a desire to have the transaction regulated as it would be by the indicated legal system's courts. If so, the stipulation would include conflicts rules.

On the other hand, if the contract has been worked out by lawyers or by businessmen in a position to be aware of domestic rules, the stipulation is probably designed to render applicable known and preferred domestic rules. Under these circumstances the stipulation would presumably refer to the indicated system's domestic-law rules alone. If, however, the contract was concluded between persons engaged in a given trade, with developed trade practices, and the trade was accustomed to litigate its problems in the courts of the jurisdiction whose law was stipulated, the intention might well be to have the matter handled as it would be by those courts, including their rules respecting choice of law.\footnote{A. von Mehren & D. Trautman, supra note 732, at 530.}

It is difficult to see merit in this viewpoint. Rarely will "[i]ndividuals contracting without legal assistance" be sufficiently sophisticated to consider inserting a choice of law clause in a contract; where such a stipulation is found it may well be inferred that it was made by well-informed persons. This choice is most likely to be the result of an awareness, for example, of the English formalities rules, or of the American Uniform Commercial Code, and not to be based upon any comparison of possibly applicable legal systems as a whole. But where ill-informed, unsophisticated laymen for some reason insert a choice of law clause in a contract, their "confidence in [the] particular legal order" chosen would certainly receive an unpleasant shock were that "legal order" to apply foreign law to their contract. Likewise, it is difficult to follow the reasoning of the last sentence of von Mehren and Trautman. Surely if a trade is "accustomed to litigate its problems in the courts of the jurisdiction whose law was stipulated," the last thing one would expect those courts to do when faced with a contract choosing their own law is to apply renvoi.

While Cramton and Currie, and von Mehren and Trautman see a role for renvoi in cases where there has been an express choice of law, Russell Weintraub finds that the doctrine is suited to the solution of cases where the parties have \textit{not} so clarified their intentions.
In an elaborate study, the main purpose of which was to suggest a better choice of law method for issues relating to the validity of contracts than the Restatement (Second)'s, Weintraub also considered choice of law where the issue is construction of the terms of the contract and the parties have made no express choice. Weintraub would solve these cases as follows: First, eliminate all “false conflict” situations, and apply the law of the “truly interested” state whenever possible. Second, in true conflict cases, if one law is “anachronistic,” apply the other. Third, if the case is still not solved, the sole remaining values are uniformity and simplicity; therefore, apply the foreign court theory of renvoi. Fourth, if it is discovered that the foreign court also adheres to total renvoi, or if it transpires that there are two or more potential foreign courts with different rules, apply the lex fori. Weintraub’s argument for turning to renvoi at the third stage, that is, when there is no false conflict and neither of the competing laws could be termed “anachronistic,” rather than searching for the law with which the issue has the most significant contacts, as required by section 188 of the Restatement (Second), has a certain superficial appeal. The issue, he said, is by definition one of construction; none of the courts whose rules are potentially applicable would have had any objection to the parties’ having initially spelled out their obligations in detail in the same terms as the rules in force in any of the other states. Therefore, it does not matter that the issue is more significantly connected with one law than with another, and a court should simply attempt to obtain such uniformity as is possible.

There are several flaws in this argument. First, Weintraub’s choice of law rule is recommended for general use, but the more

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797 See Restatement (Second) §§ 187-88.
798 Issues of construction, in this sense, are issues where, as between two or more potentially applicable laws, there will be a different result, but where there is no particular public policy involved either way. Thus, such issues could be solved in advance, even under domestic law, by the parties’ spelling out their intentions in full. The law relating to such issues serves essentially a gap-filling function. Rules relating to frustration are an example. Such cases, of course, form a significant proportion of contract conflicts cases litigated.
799 Weintraub, supra note 535, at 431-32.
800 For a discussion of false conflicts analysis, see Prebble, Part I, notes 140-58 and accompanying text.
801 Under the foreign court theory, the forum hypothetically places itself in the position of a court of the jurisdiction to which there has been a reference, and acts as it believes that court would act in the case at bar, applying whatever rules of substantive law, choice of law, and renvoi the foreign court would apply. See, e.g., In re Annesley, [1926] Ch. 692. See also G. Cheshire & P. North, supra note 482, at 58-75. The foreign court theory breaks down, for obvious reasons, if it is discovered that the foreign court also ascribes to it.
courts that adopt total renvoi pursuant to stage three of the rule, the more frequently stage three must be ignored as a *circulus inextricabilis* is created. Second, there is some temptation for a court to discover such a *circulus* in order to apply the forum-favoring rule of stage four, without having to go to the length of denouncing the competing rule as "more anachronistic" than that of the forum. Third, a significant contacts test has an inherent justice to it; the most closely related rule is applied. But Weintraub's method, from the point of view of justice, is quite arbitrary.

D. Renvoi and Autonomy

1. Practical Considerations

Although the arguments of von Mehren and Trautman, and Weintraub may have little effect upon the courts, the same cannot be said for another proposal: that contracting parties should be free to stipulate for the whole law of any chosen jurisdiction.

The Sixth Tentative Draft of the *Restatement (Second)*, which concerns law chosen by the parties, made no mention of a choice possibly including the choice of law rules of the designated law, although the comment to the rules did contain such a reference. However, the Official Draft provided that "[i]n the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law." The editors of *Dicey* agree:

In the absence of strong evidence to the contrary, the parties must be deemed to have intended to refer to the domestic rules and not to the conflict rules of their chosen law, and the connection with a given legal system is a connection with substantive legal principles, and not with conflict of laws rules.

One can take some comfort from the strong presumptions against a finding that the parties have stipulated for renvoi found in both the *Restatement (Second)* and *Dicey*. But there are strong arguments that there should never be such a finding, and, furthermore, that an

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802 *Restatement (Second) of Conflict of Laws* § 332(a) (Tent. Draft No. 6, 1960).
803 Id. § 332(a), comment h at 24. Cavers, who may not have read the relevant comment, complained that the effect of the Draft provision might be to prevent contracting parties from stipulating expressly for renvoi, which, he felt, was contrary to the autonomy theory. See Cavers, *Re-Restating the Conflict of Laws: The Chapter on Contracts*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW, *supra* note 758, at 363.
804 *Restatement (Second)* § 187(3). The change from the Tentative Draft appears to have been caused by certain remarks of Professor Robert Braucher. See 87 ALI PROCEEDINGS 475-78 (1961).
805 *Dicey & Morris* 695; cf. *id.* at 62.
express and explicit choice of the "whole" law should not be honored, even by a court that otherwise accepts the autonomy doctrine.

Only one English case has been found in which the court interpreted the parties' stipulation as if it were an express choice of renvoi. In that case, Ocean Steamship Co. v. Queensland State Wheat Board, the court admitted that its judgment probably defeated the intention of the parties.

An American case involving a similar problem was Duskin v. Pennsylvania-Central Airlines Corp. Duskin involved a poorly-drawn standard form contract under which Mr. Duskin was employed by Penn-Central as a pilot. Duskin died through the alleged negligence of the company in a landing accident in Alabama. The company's defense to his executrix's wrongful death action was that the suit was prohibited by Pennsylvania workmen's compensation legislation. Duskin, in fact, signed two form contracts with Penn-Central, each containing choice of law provisions. The first, the standard Penn-Central employment contract, referred questions of workmen's compensation to the state of the employee's residence. Duskin later signed a special contract for flying personnel, superseding the first contract, under which all matters relating to the employment contract, including workmen's compensation, were to be governed by the law of Pennsylvania. Duskin was domiciled in Oklahoma at the time of contracting, and in Tennessee at the time of the accident. Although the forum, Tennessee, still adhered to the vested rights doctrine, and although the contacts with Pennsylvania were at best tenuous, the court had no difficulty in respecting the autonomy of the parties and upholding the choice of Pennsylvania law. But by its terms, the Pennsylvania workmen's compensation legislation clearly did not apply to Duskin, who was killed in Alabama. The company's defense

806 The contention of the Restatement (Second) that Vita Food Products is another example is not accepted. See note 790 supra.
808 Id. at 412, [1941] 1 All E.R. at 161; see notes 763-68 and accompanying text supra.
809 167 F.2d 727 (6th Cir. 1948).
810 Id. at 729. The terms of neither contract are given in the report.
811 Id.
812 Id. at 730.
813 Id. at 731.
This Act shall ... not apply to any accident occurring outside of the Commonwealth, except to accidents occurring to Commonwealth employes ... engaged in duly authorized business of the Commonwealth, and except accidents occurring to Pennsylvania employees whose duties require them to go temporarily beyond the territorial limits of the Commonwealth, not over ninety days ....

PA. STAT. ANN. tit. 77, § 1 (1952). Duskin clearly fell outside both exceptions.
therefore failed. The court, purportedly still pursuant to the parties' contractual stipulation, turned to the Pennsylvania choice of law rule applicable to tort actions,\(^{814}\) which pointed to Alabama, the place of the accident.\(^{815}\)

While one's pleasure at seeing Duskin's estate swollen by the unwilling bounty of Penn-Central leads to a certain sympathy for the court's decision, this case provides no support whatever for an argument that resort to renvoi may assist a court to effectuate the intention of the parties to a contract. Duskin himself may never have read his contract, let alone formed an intent concerning its governing law,\(^{816}\) but the intentions of Penn-Central in subjecting the contracts of its more hazardously employed personnel to the workmen's compensation law of Pennsylvania are clear enough.

2. **Doctrinal Considerations**

By an ill-considered interpretation of the autonomy theory it is possible to justify recognition of an express contractual stipulation for renvoi. However, to uphold such a stipulation is to run counter to other values that should be found in choice of law rules, not least that these rules should be reasonable. According to the Restatement (Second):

> The forum will not apply the chosen law . . . if the parties had no reasonable basis for choosing this law. The forum will not, for example, apply a foreign law which has been chosen by the parties in the spirit of adventure or to provide mental exercise for the judge.\(^{817}\)

It is certainly difficult to see any reason, apart from those mentioned in this quotation, for stipulating for renvoi in a choice of law clause. If A and B want their contract to be governed by the law of X, there is no advantage in choosing the law of Y whose conflict of law rules, assumedly, point to X in the relevant circumstances. They may expressly stipulate that most of the contract be governed by Y's law, but that some issues be subjected to the law of X.

A more basic doctrinal criticism is that while the autonomy doctrine is now accepted in England, and is almost certainly the majority rule in America,\(^{818}\) its victory over vested rights thinking was not

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\(^{814}\) 167 F.2d at 732.


\(^{816}\) Cf. 167 F.2d at 731.

\(^{817}\) RESTATMENT (SECOND) § 187, comment f.

\(^{818}\) See Prebble, Part I, notes 311-12 and accompanying text.
achieved by chance but because of its easily demonstrable superiority over the old rules. Eschewing reference to legal theory, the Reporter of the Restatement (Second), in the year that the tentative draft of the contracts chapter was published, justified acceptance of the doctrine, asserting that in multistate contracts, allowing the parties to choose the law to govern their relationship is the only way to attain certainty as to the applicable rules, and that in upholding this choice, a court saves itself the otherwise arduous task of deciding what law to apply in subsequent litigation.  

Although judicial recognition of clauses specifying that the domestic law of a certain state or country shall govern a contract may be warranted, this reasoning does not necessarily justify allowing the parties to stipulate for renvoi. It is scarcely tenable to maintain that renvoi can promote certainty in commercial and other types of contracts, and of course it cannot be argued that the doctrine could have the effect of relieving the courts of the task of solving choice of law questions. Quite the reverse effect is an almost inevitable result when a renvoi question is raised in any conflicts case.

The rejection of the traditional techniques of renvoi in contract cases by both Bealean and post-Bealean orthodoxy is thus well founded. Except perhaps as a judicial teething ring for use in hith-

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819 See Reese, supra note 534, at 51. These, in fact, were the grounds upon which the majority of the United States Court of Appeals for the Second Circuit held in Siegelman v. Cunard White Star Ltd., 221 F.2d 189 (2d Cir. 1955), that subject to certain limitations, the parties were free to “stipulate the law by which the validity of their contract is to be judged.” Id. at 195 (emphasis in original); accord, Maxwell Shapiro Woolen Co. v. Amerotron Corp., 339 Mass. 252, 158 N.E.2d 875 (1959).

820 It is not argued that the use of renvoi is never justified, but simply that it is not justified by any tendency to produce certainty or to simplify the task of the courts.

821 It has been suggested that there is one particular type of contract case which should provide a role for traditional renvoi. See Comment, Party Autonomy—Past and Present, 12 S. Tex. L.J. 214, 225-27 (1970). The author of the Comment argues that there may be a profitable resort to renvoi to solve some choice of law problems in cases governed by the Uniform Commercial Code. He contends that the Code's general choice of law rule, § 1-105(1), is drawn so as to leave certain lacunae, so that cases presenting particular fact situations will simply fall outside any rule contemplated by the section. Faced with such a case, a court will simply have to fall back on some other choice of law rule, presumably of the common law.

The author also argues that when a court is implementing the rule it decides to use, it should look to the whole of the law of the state indicated by the choice of law rule, including the conflict of laws rules of that state. For present purposes, it is irrelevant whether the author correctly construes § 1-105(1), or whether indeed the section does not cover certain cases. Assuming that he is right, however, and that there are possible gaps in the coverage of the section, there does not seem to be any particular quality inhering in cases under the Uniform Commercial Code that makes them any less unsuitable for the application of the techniques of renvoi than other contract cases.
erto old-fashioned courts which may find comfort in a short transi-
tional phase between rejecting tradition and wholeheartedly adopt-
ing interest analysis,\textsuperscript{822} the renvoi doctrine can be supported neither in principle nor practice as a problem-solving device in contract ac-
tions in either England or America.\textsuperscript{823}

E. Section 8k Renvoi

One result of the American conflict of laws revolution has been that renvoi, meaning a reference by the forum to the choice of law rules of another state, has appeared in a new guise. This new renvoi is explained in section 8, comment \textit{k}, of the \textit{Restatement (Second)} and is for convenience here called "section 8k renvoi":

An important objective in choice-of-law is to accommodate insofar as possible the interests of the states involved. . . . An indication of the existence of a state interest in a given matter, and of the intensity of that interest, can sometimes be obtained from an examination of that state's choice-of-law decisions.

Section 8k renvoi differs from its traditional predecessor in three fundamental respects. First, its use is consistent only with an interest analysis approach to choice of law problems. While even traditional renvoi may be a Trojan horse with a function basically inconsistent with the jurisdiction-selecting formula of both Bealean and modern English practice, section 8k renvoi in its unashamed perusal and assessment of the choice of law rules of another jurisdiction clearly has no place in English law at present.\textsuperscript{824}

Second, however favorably its techniques are viewed, traditional renvoi is a doctrine to which resort may only rarely be made. At the very least, a court must be confronted with a case where the choice of law rules of a jurisdiction, X, whose law is indicated, refer back to the forum or to a third jurisdiction. Section 8k renvoi, on the other hand, would always consider X's choice of law rules. Should a court

\textsuperscript{822} See note 792 and accompanying text \textit{supra}.

\textsuperscript{823} An argument for recognizing express "whole law" clauses is slightly more tenable in the United States than in England. Although it is difficult to see why English contracting parties should bother with renvoi when they can choose different laws to govern different parts of their contract, there is some suggestion that under American law parties may stipulate for only one governing law. \textit{See} Prebble, \textit{Part I}, notes 452-59 and accompanying text. If this suggestion is correct, an appeal to renvoi might be the only method whereby parties could ensure that a contract liable to be litigated before an American court would be governed by different chosen laws with regard to different issues. This argument is weak. First, it is submitted that the American rule is not in fact as suggested in this footnote, and second, if it is, then that it cannot be supported. \textit{See} Prebble, \textit{Part I}, note 460 and accompanying text.

\textsuperscript{824} Cf. Prebble, \textit{Part I}, notes 69-71 and accompanying text.
using section 8k renvoi find, for example, that the rules of X are in agreement with its own, then it will have found some evidence that the policies of the forum and of X coincide on that particular issue.

Third, traditional renvoi is applied, if at all, only after an initial choice of law has been made, as a late step in a court's reasoning that may cause it to change its original decision. But, clearly "the question posed by the [8k] renvoi approach [should] be asked at the very beginning, before the forum formulates its choice-of-law rule for the case."825

While the techniques of section 8k renvoi should commend themselves to any court that has adopted interest analysis,826 there appears to be one clear limitation on the use of this new doctrine. Its purpose is to assist the court in deciding what interest a second jurisdiction has in a certain issue before the forum. Therefore, if this second jurisdiction is a state or country the relevant choice of law rules of which are in no way based upon an analysis of its interest in the matter at hand, then it seems that no meaningful information as to that state or country's interest in the matter may be found by reference to its choice of law rules.827 This point may be illustrated by a comparison of the celebrated case of Bernkrant v. Fowler828 with the recent decision of the House of Lords in Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.829

In Bernkrant, the Supreme Court of California upheld an oral contract by one Granrud to forgive by will any moneys still owing at his death on a sale of certain Nevada land. Granrud died domiciled in California, where such a contract was invalid for informality; the court found it to have been unexceptionable in Nevada. Chief Justice Traynor held:

It is true that if Granrud was domiciled here [in California] at the time the contract was made, plaintiffs may have been alerted to the possibility that the California statute of frauds might apply.

825 Von Mehren, supra note 758, at 390.
826 The modernists' rejection of renvoi as a cunning trick of the conservatives invented to render the blindfold operation of Bealism more palatable, however, dies hard. A court grappling with the new techniques of modern conflicts law may be tempted to throw the renvoi out with the entire vested rights theory, as happened in Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 141-42, 95 N.W.2d 814, 820 (1959).
827 Possible exceptions may be found where the choice of law rule is statutory. Through enactment of such a rule, the legislature, even of a jurisdiction-selecting forum, may signify an interest, or lack thereof, in certain issues.
Since California, however, would have no interest in applying its own statute of frauds unless Granrud remained here until his death, plaintiffs were not bound to know that California's statute might ultimately be invoked against them. . . . We conclude, therefore, that the contract herein does not fall within our statute of frauds. . . . Since there is thus no conflict between the law of California and the law of Nevada, we can give effect to the common policy of both states to enforce lawful contracts . . . without subordinating any legitimate interest of this state.880

In view of this statement, should a future Granrud die in circumstances similar in all respects to those in Bernkrant, with the exception that the plaintiffs choose to sue his executors on the verbal agreement in, for example, Pennsylvania, the Pennsylvania court can be assured that the law of the testator's domicile, California, disavows any interest in avoiding the contract.

By contrast, no such firm conclusions can be inferred from the speeches of Their Lordships in Whitworth. That case at most reveals that there is no principle of English public policy preventing parties to a contract, in other respects governed by English law, from agreeing that an arbitration on that contract held in another jurisdiction shall be subject to the relevant procedural rules of that jurisdiction. But in determining that Scottish law was applicable to this issue, Their Lordships did not consider, for example, whether this was because England had no interest in the arbitration, or was because the parties' agreement or the locus of the arbitral forum overrode any interest that England had. The reason for this lack of clarity is simply that English courts dealing with choice of law problems do not adopt the interest analysis approach exemplified in Bernkrant v. Fowler.

With regard to jurisdictions which have adopted interest analysis (or "functional analysis" as he calls his version of the modern reasoning), von Mehren is correct to say:

In a fully developed system of functional choice-of-law rules much vital information would be stated in a jurisdiction's choice-of-law rules. In such a system, these rules would be relatively particularized and nuanced; they should state fairly precisely whether the jurisdiction wishes to regulate a given issue at all, and, if so, under what conditions. . . . Choice-of-law rules based on a functional analysis should thus go far in clarifying the question whether a true conflict exists. And, in those situations in which a true conflict does exist, the choice-of-law rules will help . . . to define that conflict precisely and will suggest each jurisdiction's dominant concern or concerns.881

880 55 Cal. 2d at 596, 360 P.2d at 910, 12 Cal. Rptr. at 270.
881 Von Mehren, supra note 758, at 995.
But the position where a state maintains conventional jurisdiction-selecting rules is quite different:

[C]onventional choice-of-law rules are, for the most part, the product of notions of analytic jurisprudence and territorial sovereignty coupled with overgeneralized policy desiderata of uniformity and predictability. As such, the bulk of them simply fail genuinely to reflect the real interest of a state concerning the application of its domestic standards in concrete instances. Consequently, to the extent that conflicts rules are not a rational embodiment of true transnational concerns . . . they cannot be expected to offer any insight into the real interests asserted by the community in question. The information they can provide as to actual public concerns is, at best, by far subordinate to that derivable from a scrutiny of the relevant foreign substantive positions. 832

In rebuttal it may be argued that even though the courts of a Bealean jurisdiction do not phrase their judgments in terms of interest analysis, their actual decisions may be taken as expressions of the relative concern of their state with the facts of particular cases and of particular types of cases. This argument, however, is not compelling. Judges applying the old rules not only speak in terms of vested rights, but also reason in those terms. This method of reasoning means that, except by coincidence, their decisions in conflicts cases are incapable of reflecting the governmental interest of their state. Of course, one can say that even Bealish judges, as state officials, are able to, and do in fact, make decisions that demonstrate the concern or unconcern of their state in particular cases, even though these decisions are reached irrationally. Consequently, courts of other jurisdictions would be justified in considering these decisions in applying the techniques of section 8k renvoi. But this argument also contains certain flaws.

First, a court that has adopted the sophisticated techniques of interest analysis should never permit itself to short-circuit the necessarily difficult task of choice of law by referring to Bealish choice of law rules that do not necessarily reflect either the interests of the state or of the parties. Second, a court in a vested rights jurisdiction probably has no intention for its choice of law rules to be referred to by other courts for the purposes of section 8k renvoi. A court might reach a different conclusion on a choice of law issue if it suspected that its decision might be used by other jurisdictions. But choice of law rules formulated by interest analysis will be the product of courts that are aware of this possible secondary utilization of their declared rules. The rules should

thus be formulated in such a way that another jurisdiction referring to them through section 8k renvoi will do no violence to the philosophy underlying those rules.833

F. Localizing Choice of Law Rules

Their jurisdiction-selecting rather than rule-selecting approach to conflicts problems prevents English courts from adopting section 8k renvoi in contract cases. Choice of law through jurisdiction selection presents a different problem which is consequently faced by English but not by modern American courts. This problem relates to traditional renvoi, and concerns the manner in which a forum should treat certain choice of law rules of X, a second jurisdiction to which it has been referred by English choice of law rules. The X choice of law rules causing the difficulty are of a particular type, variously described as "localizing" or "particular" choice of law rules.834 They have been defined as "rules whose sole function is to limit the application of the substantive laws which they qualify to certain persons, events or transactions connected in a specified way with the State of whose law they form part."835

These rules are by their nature statutory rather than judge-made. A localizing rule was considered by the Privy Council on appeal from New Zealand in Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd.836 In this

833 Courts appear to be adopting the reasoning favored here, and declining to consider the conflicts rules of vested rights states for the purposes of section 8k renvoi. In Pfau v. Trent Aluminum Co., 55 N.J. 511, 263 A.2d 129 (1970), a Connecticut resident was injured in an automobile accident in Iowa while a passenger in an automobile driven by a New Jersey resident. The car was owned by a New Jersey corporation. An Iowa guest statute provides that a host-driver is not liable to his passenger for ordinary negligence. See IOWA CODE ANN. § 321.494 (1966). The defendants pleaded, inter alia, the Iowa guest statute as a defense. 55 N.J. at 513, 263 A.2d at 130. This defense was not available under either New Jersey or Connecticut law. The court was therefore disposed to find a false conflict between the laws of these two states. The plaintiff, however, argued that since Connecticut still applied the lex loci delicti rule in tort cases, Connecticut would allow the guest statute defense on these facts, and that consequently a true conflict existed between the laws of New Jersey and Connecticut. The court rejected this argument:

[We]e see no reason for applying Connecticut's choice-of-law rule. To do so would frustrate the very goals of governmental-interest analysis. Connecticut's choice-of-law rule does not identify that state's interest in the matter. Lex loci delicti was born in an effort to achieve simplicity and uniformity, and does not relate to a state's interest in having its law applied to given issues in a tort case. Id. at 526, 263 A.2d at 137.


835 Kelly, supra note 779, at 249.

case, a New Zealand local authority had borrowed money from an insurance company which was carrying on business in New Zealand and Australia, and was incorporated in the state of Victoria. To secure the loan, the authority issued debentures, secured by a special property tax, levied upon the authority's rateable property. Principal and interest were repayable in Victoria. The Victorian Financial Emergency Act of 1931\textsuperscript{837} provided for the compulsory reduction of interest payments on mortgages,\textsuperscript{838} which were defined to include any "debenture . . . issued . . . by any public or local authority."\textsuperscript{839} Although there was no serious dispute that the law governing the substance of the obligation was that of New Zealand, the borough council contended that the payment of interest was a matter of performance, and that its obligation was therefore reduced by the statute of Victoria, the \textit{locus solutionis}.

Lord Wright, speaking for the Privy Council, gave this dubious argument short shrift.\textsuperscript{840} Although the definition of "mortgage" in the Act clearly covered these debentures, the Judicial Committee held that the Victorian Act was never intended to apply to this loan. First, the court argued that the presumption against giving extraterritorial effect to legislation without clear and precise words to that effect suggested that the relevant section of the Act was not intended to apply to a loan governed by New Zealand law and secured by New Zealand land. Second, it noted that the context of the section clearly indicated that it was intended to apply only within Victoria.\textsuperscript{842}

The localizing rule that was held to limit the effect of the Victorian statute differs from the familiar, two-sided choice of law rule in the following respect: the latter serves to indicate to the forum a system of law\textsuperscript{843} to be applied to the case at hand—a system which may or may not be that of the forum. The former merely determines whether a particular rule of a particular domestic legal system is intended to apply to the type of case which has arisen.

The \textit{Mount Albert} case suggests the correct treatment of localizing choice of law rules. In \textit{Mount Albert}, Lord Wright clearly treated the localizing rule in question as part of the domestic law of Victoria, to be applied as part of that domestic law should the relevant choice of law

\begin{footnotes}
\item [837] 22 Geo. 5, No. 3961 (Vict.).
\item [838] \textit{Id.} s. 19(1).
\item [839] \textit{Id.} s. 14(1).
\item [840] [1938] A.C. at 239, [1937] 4 All E.R. at 218-14.
\item [841] [1938] A.C. at 241, [1937] 4 All E.R. at 215. The decision itself was not based upon his argument, however.
\item [842] \textit{Id.} at 243, [1937] 4 All E.R. at 215.
\item [843] The vocabulary of the jurisdiction-selecting theory, rather than that of interest analysis, is used advisedly. \textit{Cf.} notes 849-51 and accompanying text \textit{infra}.
\end{footnotes}
rule in fact point to Victoria. In other words, His Lordship treated this rule as if it were not part of the Victorian conflict of laws.

Mount Albert is, however, a deceptively simple case. Not only was the Victorian Act implicitly inapplicable to the facts of the case, but the correct choice of law rule did not refer to Victoria at all. But if the normal choice of law rule applied in New Zealand courts had been to the effect that rate of interest is governed by the law of the place of payment, in a case like Mount Albert the New Zealand courts would face the question of whether to take cognizance of Victoria’s localizing rules.

That the answer is less clear than Lord Wright assumed is demonstrated by reference to Duskin v. Pennsylvania-Central Airlines Corp. There the choice of law rule applied by the court was that the contract should be governed by the law specified by the parties. They chose Pennsylvania law. It makes little sense to say, as the court said, that they thereby chose not only the domestic law that a Pennsylvania court would apply to a purely Pennsylvania case with similar facts, but also the self-limiting rules of that Pennsylvania law.

This problem of localizing rules has had little recent treatment in American writing, but it has begun to generate some interest in England. In the United States, the problem has been overtaken by events—namely, the victory of interest analysis. The decision maker who is an interest analyst assesses the choice of law rules of another jurisdiction to determine whether they expressly or impliedly assert any relevant state interest or policy of that jurisdiction. To such a judge, a localizing rule which is attached to a statute may well be more informative than an ordinary, two-sided choice of law rule, particularly if the latter is part of a jurisdiction-selecting legal system.

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844 His Lordship’s advice was, of course, that the choice of law rule pointed not to Victoria but to New Zealand, contrary to the argument of the borough council. See notes 836-42 and accompanying text supra.
845 See notes 809-15 and accompanying text supra.
846 167 F.2d 727 (6th Cir. 1948).
847 See notes 836-42 and accompanying text supra.
848 Cf. note 813 and accompanying text supra.
849 The most recent article appears to be Danson, Territorially Limited Statutes and the Choice-of-Law Process, 1 Harv. J. Legal Stud. 115 (1964).
850 See, e.g., Kelly, supra note 779; Mann, The Doctrine of Jurisdiction in International Law, 111 Recueil des Cours 1, 54-62 (1964); Unger, Use and Abuse of Statutes in the Conflict of Laws, 83 L.Q. Rev. 427 (1967).
851 The localizing rule appears in fact to be tailored expressly for that father of interest analysis, Brainerd Currie:

The rules we have proposed for incorporation into the laws of the respective states are not choice-of-law rules in the traditional sense. They have at least as much precision, but they lack that semblance of universal truth that would facilitate their incorporation into a system aimed at achieving uniformity. They
In England the problem is more intractable. Where a court faced with a case in contract is directed by an ordinary, two-sided choice of law rule to apply the "law" of jurisdiction X, the court knows that "law" does not include the general choice of law rules of X, for it realizes that renvoi, at least as traditionally understood, has no place in this case. But,

[i]f the term "domestic law" indicates the rules of law applicable in a purely internal case, then localising rules of the law indicated by the general choice of law rule must be ignored and the substantive provisions which they qualify must be applied notwithstanding their imposed spatial limitations. If, on the other hand, the term "domestic law" means the whole law of the indicated country minus its general choice of law rules, cases may occur where the substantive provisions must themselves be ignored since localising rules, which qualify them and which require that result, must be applied.

In practice, the answer may be different depending on whether the relevant general choice of law rule points to the domestic law of the forum. Where there is a relevant and applicable localizing rule of the forum, the court will feel bound to give effect to it, as a command of the legislature. This practical reason has served as a doctrinal justification as well. The better view would appear to be that consistent with the evenhanded philosophy of English conflict of laws, an English court should treat localizing rules similarly whether or not they are part of the legal system of the forum. However, the perhaps illogical respect of English courts for statutory choice of law rules will probably mean that an English court will respect such a rule of the forum whenever English domestic law is indicated by a general choice of law rule, no matter how the court regarded the foreign localizing rule.

Consequently, the debatable issue narrows to whether in an
English court, when the law of X is the *lex causae*, the “domestic law” includes localizing choice of law rules of the X legal system.

To this question, the overwhelming answer of the academic community has been “yes.” As Rodolpho De Nova explained:

Applying a foreign “self-limiting” substantive rule on its own terms—namely, only when the case at hand perfectly fits its schema—is not paying obeisance to foreign rules of private international law, which is the essence of renvoi. . . . It is simply a question of finding, within the “competent” foreign law, the correct rules of decision.

But this barren logic assumes a negative answer to the question of whether localizing choice of law rules are rules of the conflict of laws—the very question under discussion. Furthermore, De Nova’s argument is reminiscent of the conclusion of Ernest Lorenzen and Raymond Heilman that logically even traditional renvoi should be regarded as a part of the vested rights doctrine. The distinction De Nova draws between general rules of the conflict of laws and localizing rules is untenable. Each type of rule has, as part of its function, the task of determining whether certain rules of domestic law apply to the case at hand. General choice of law rules not only choose law, but also may localize the law of the *lex causae*. It is scarcely reasonable to stigmatize the application of foreign general choice of law rules as renvoi—to which there must not be resort in contract cases—and at the same time to say that applying foreign localizing choice of law rules is “simply a question of finding, within the ‘competent’ foreign law, the correct rules of decision.” Moreover, De Nova’s position should be criticized not merely on the theoretical ground that these different treatments of the two types of choice of law rules are incompatible. From a practical viewpoint, his argument cannot readily be sustained.

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860 A more precise formulation of the issue might be whether localizing choice of law rules should be treated as if they were part of the conflict of laws.


863 The very use of the word “competent” is reminiscent of vested rights thinking. De Nova obscures the similarity of function of the two types of choice of law rules by failing adequately to distinguish between a rule of substantive law and its ancillary localizing rule. This failure, in turn, virtually denies the existence of localizing rules, assimilating them into De Nova’s “foreign ‘self-limiting’ substantive rule.” And, of course, denying the existence of a thing is a convenient method of solving any problems allegedly connected with it.
The chief practical difficulty arises when a court, referred by its conflict of laws rules to the law of X, takes cognizance of an X localizing rule under which an otherwise relevant X domestic rule would not apply to the case at bar. The forum court, finding no applicable law at all, must necessarily fill the void by reference to some catchall doctrine or choice of law rule. The results, as seen in Duskin, are likely to be unsatisfactory.

It is submitted, therefore, that the scholarly view that localizing rules of foreign law should not be treated as conflict of laws rules cannot be sustained. But what of the authorities? First, against the opinion of Lord Wright in the Privy Council decision in Mount Albert, can be weighed two Australian judgments of Lord Justice Evatt. Second, although technically the advice of the Privy Council in Mount Albert, a New Zealand appeal, is not binding on English courts, the opinions of the Privy Council have a strong influence on English conflicts law.

Rather than filling a suspected void, the forum could also be mistakenly treating as a localizing rule a general rule of the conflict of laws of the foreign state which has simply been enacted into legislation. This result can ensue from excessive deference to statutory choice of law rules.

It is not impossible for a localising rule, which is perfectly consistent with the existing choice of law rules, to be inserted in a statute ex abundante cautela. Can it seriously be suggested that such a localising rule in a foreign law must be applied as part of the domestic law, yet the localising rule contained in the foreign choice of law rule be ignored, especially when the latter would probably have been used to imply an identical localising rule into the statute had one not been expressly therein?

Kelly, supra note 779, at 270; cf. Leefar, supra note 720, at 272-79. Leefar condemns spatially limiting provisions in statutes on the grounds that they are often ambiguous and may encourage forum shopping. Such provisions are often found in legislation relating to insurance. See C. Carnahan, supra note 703, at 124-27. See also Zogg v. Penn Mut. Life Ins. Co., 276 F.2d 861 (2d Cir. 1960); Danson, supra note 849, at 120-22.

Duskin v. Pennsylvania-Central Airlines Corp., 167 F.2d 727 (6th Cir. 1948); see notes 847-48 and accompanying text supra.


See Prebble, Part I, n.6.

Again, although the council's opinion on the effect of the law of Victoria was not critical to its decision, undoubtedly Lord Wright's treatment of the Victorian law formed, in his opinion, the rationale of the case. See [1938] A.C. at 242, [1937] 4 All E.R. at 214. Lord Wright's opinion dealt with the relevant issues in reverse order. He first considered the choice of law rule, and then the content of the Victorian domestic law, which is the logical order of reasoning. But His Lordship's reference to the choice of law rule was merely to dismiss that issue as nonessential. His principal concern was with Victorian domestic law, which, had he considered primarily the New Zealand choice of law rule, he would have realized was not relevant to the case.

Learned opinion in England has become increasingly accustomed to dismissing some
The scale may be tipped against Mount Albert by a more recent case dealing with a similar issue. Adamastos Shipping Co., Ltd. v. Anglo-Saxon Petroleum Co., Ltd.\textsuperscript{870} concerned law that had been incorporated into a contract. The contract, a charterparty, the proper law of which appears to have been English, expressly incorporated the United States Carriage of Goods by Sea Act (COGSA).\textsuperscript{871} A dispute arose between the charterers and the owners. The owners relied upon certain provisions of COGSA. The charterers replied that the Act did not apply since it is expressly limited to carriage starting or terminating at American ports,\textsuperscript{872} which was not the case here. The House of Lords rejected the charterers' argument, holding that

\[\text{[v]ery good reasons can be seen for the United States legislature limiting its Act to goods carried under a bill of lading to or from United States ports. [Those limitations] seem quite inapposite when the Act is introduced contractually into a charterparty covering a very wide range of ports outside the United States.}^{873}\]

The opinion continued:

\[\text{[O]nce one has come to the conclusion that the “Act” is being incorporated in a contract to which it does not as an Act apply, one prima facie rejects the limitations which are imposed in these various Acts necessitated by the limits of the legislative jurisdiction of the country concerned. One takes the geographical limits from the contract.}^{874}\]

\textit{Adamastos Shipping}, although not directly in point, may still be strong authority. If parties expressly incorporating a statute into their contract do not necessarily also incorporate the self-limiting rules of that statute, a fortiori they should not be assumed to have included in a choice of law clause the localizing rules of the law they chose to govern the contract. Consequently, one may predict with not unfounded optimism that English courts will, in cases where this problem arises, adopt what has been presented here as the better view. That is, in contract cases, and indeed in any

areas where \textit{renvoi} is excluded . . . reference to a foreign law is to be taken as indicating the \textit{domestic} law of the chosen country,

\textsuperscript{872} Id. § 1312.
\textsuperscript{874} Id. at 185, [1958] 1 All E.R. at 752 (Lord Somervell).
[and] localising rules of the foreign lex causae must be ignored and the otherwise relevant substantive provisions which they qualify must be applied in the courts of the forum.875

VII

A COMPARATIVE VIEW OF THE ENGLISH AND AMERICAN RULES

It should by now be evident that the theoretical basis of the choice of law process used by the majority of American courts is entirely different from that used in England. Three general questions present themselves. Why is it that the theories of interest analysis have taken root and grown in the United States but not in England? Second, are the choice of law rules derived from interest analysis superior to the jurisdiction-selecting rules of England? Finally, in the area of contract law, do the different approaches found in England and America cause significant differences in the results of actual cases, and, if so, should such differences influence plaintiffs in choosing between available fora?

A. The Development of Interest Analysis in the United States

The first of these questions is perhaps the most difficult to answer because it involves trying to discern general features of the American legal system that are both different from the English system, and different in such a way as to account for the growth of interest analysis only in America. While such features may sometimes be tentatively identified, it is often difficult to link them directly to the effects which they are suspected to cause. Furthermore, it is not to be expected that the new reasoning will remain excluded from English courts indefinitely.876 Thus, the following suggestions are made somewhat hesitantly.

1. Academic Influence

Academics are more influential in America than in England. The fundamental reason for this deviation from the familiar common law tradition seems to lie in the federal system. In England, the Court of Appeal and the House of Lords are unique and authoritative. They each have a status and prestige unmatched in the United States except at the level of the Supreme Court itself.877 There are in America fifty jurisdictions, each with its own court of last resort, to say nothing of

875 Kelly, supra note 779, at 270 (emphasis in original) (footnote omitted).
876 Recent developments in the torts field suggest the opposite. See notes 895-911 and accompanying text infra.
877 This may be of little import, however, since the Supreme Court does not often concern itself with choice of law rules.
the federal courts, each free within the wide limits of the Constitution to decide what its own choice of law rules will be.\textsuperscript{878}

Of course, American courts are aware of the need for harmony in the interstate legal system, and there is consequently a large measure of uniformity of choice of law rules across the United States. Nonetheless, this uniformity is not so great that a decision of a particular court can be accepted as finally establishing the law with the certainty of a decision of the House of Lords or the Court of Appeal. Thus, as compared with the situation in England, one finds in America a sort of vacuum when it comes to deciding who will determine what choice of law rules are to prevail. Into this space have moved the American scholars, who are able to speak with more authority than English academicians, for they know that even if their proposals are directly contrary to the views accepted by the majority of jurisdictions, there is a good chance that some court, somewhere, will be impressed by, and adopt, their arguments.

It is instructive in this respect to compare the role currently played by American scholars with that assumed by scholars in civil law jurisdictions.\textsuperscript{879} In France, for example, there was no French national law before codification. Different districts had their own laws. French scholars, in their attempts to rationalize the law, were thus able to exert great influence upon the courts, an influence which was strengthened by academic contacts between France and other European countries, where similar processes were taking place. Since the development of national laws in Europe, the original cause of the ascendancy of the academics has faded, but through tradition and habit their importance remains largely unimpaired. In England, on the other hand, the King's courts have since the Middle Ages ensured that a single common law is applied throughout the country, leaving little scope for scholarly development of new rules of law.

In spite of the virtual nonexistence of a truly "common" law in the United States, academics in America have generally been relegated to the place customarily allotted to scholars in a common law system. Apart from tradition, the fact that American scholars have only recently begun to realize their potential under the federal system may also be attributed to a rather uneven level of academic achievement until comparatively modern times.\textsuperscript{880}


\textsuperscript{880} It may not be entirely coincidental that, except for the work of Beale, the bulk of
There is much evidence that American scholars over the last two generations have had significant influence upon the development of American law. Interchange and contact between scholars and judges is much more pervasive in America than in England. In fact, numerous leading American scholars have become judges and seized the opportunity to put their theories on conflict of laws into practice while on the bench. 881

The relationship between American judges and scholars is most apparent in the American Law Institute. The Institute's ex officio members include all the judges of the Supreme Court, the chief justice of the highest court in each state and of each United States Court of Appeals, and the deans of member institutions of the Association of American Law Schools. Additionally, there are up to 1,500 elected members, a large proportion of whom are scholars. The Institute's Restatements of the Law have become particularly influential in America. Even the first Restatement of Conflict of Laws, 882 now almost universally condemned for its fundamentally erroneous approach to the whole choice of law process, was found persuasive by many jurisdictions at one time.

While the Restatements primarily attempt to explain what the law is, their authors do not hesitate to endeavor to point the courts in the direction they believe to be appropriate. Nowhere has this edu-

the developments in choice of law that can be traced to academic prompting have occurred since the establishment of the Erie-Klaxon rule.

881 Justice Story of the Supreme Court furnishes an isolated example from the nineteenth century. More recently, there have been Chief Justice Stone, elevated from the Deanship of Columbia Law School to the Supreme Court (see Cheatham, Stone on Conflict of Laws, 46 COLUM. L. REV. 719 (1946); Freund, Chief Justice Stone and the Conflict of Laws, 59 HARV. L. REV. 1210 (1946)), and Judge Goodrich, who moved from the University of Pennsylvania Law School to a United States Court of Appeals judgeship, finally to become Director of the American Law Institute. Professor Leflar switched from academic life to the Arkansas Supreme Court, and back again, although he maintained a strong connection with his brother judges through his position as Director of the New York University Law School's Appellate Judges Seminar. See Kenison, The Continuing Contribution of Robert A. Leflar to the Judicial Education of Appellate Judges, 25 ARK. L. REV. 95 (1971). Justice Halpern, a former Dean of Buffalo Law School, was able from the position of Associate Justice of the Appellate Division of the New York Supreme Court to influence strongly the development of interest analysis in that state in a number of leading cases. See Lenhoff, Justice Halpern's Contribution to Conflict of Laws, 13 BUFFALO L. REV. 317 (1964). The most notable among these cases was Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). Finally, Professor Traynor, former Chief Justice of the California Supreme Court, has been personally responsible for the judicial development of many of the theories and techniques of interest analysis. See Currie, Justice Traynor and the Conflict of Laws, 13 STAN. L. REV. 719 (1961); Ratner, Reflections of a Traynor Law Clerk—With Some Emphasis on Conflict of Laws, 44 SO. CAL. L. REV. 876A (1971).

882 RESTATEMENT OF CONFLICT OF LAWS (1934).
cative function of the Restatements been more evident than in the field of choice of law. This is partly because uncertainty as to what the law actually is has resulted in less scope for pure "restatement," and more opportunity for education, and partly because conflicts is a popular field among academics. These reasons, together with dissatisfaction with the first Restatement of Conflict of Laws, are undoubtedly also responsible for the fact that the conflict of laws was one of the first titles to which a second Restatement has been devoted.

In addition to influencing judge-made law, American academics have played a considerable part in the development of statutory choice of law rules. In England, the choice of law field is almost entirely composed of common law rules. This is not the case in America. Section 1-105 of the Uniform Commercial Code is of course a rule of supreme importance, both for its own sake and for its influence upon the changes that are occurring in other areas of the law. That section, like all of the Code, is largely the work of academics. Their influence may be expected to grow in this respect, as the Uniform Commercial Code's follower, the Uniform Consumer Credit Code, is enacted by more legislatures.

The proponents of interest analysis, which itself is almost wholly the product of academic theorizing, have thus found that their lines of communication to courts were open. American academics, in contrast to their English counterparts, are in a position to propose fundamental and sweeping changes in the law, and at the same time to entertain realistic hopes that their proposals will not go unheeded.

2. Influence of European Thinking on England's Choice of Law Rules

The second distinction between England and America which may partly account for the lack of progress made by interest analysis theories in England is the influence of Europe. In Western Europe, choice of law rules, while not quite Bealean in character, are by and large rather conservative. Younger academics are aware of the American develop-

883 In both England and America, one has the impression that the discipline of the conflict of laws is overpopulated by academics in relation to its importance vis-à-vis other areas of the law.
884 This in itself has increased the potential for academic influence upon the development of choice of law rules.
885 See Prebble, Part I, text accompanying note 462.
886 The general choice of law provision of the Uniform Consumer Credit Code is § 1.201. To date, the Code has been adopted by Colorado, Idaho, Indiana, Oklahoma, Utah, and Wyoming.
887 See R. Schlesinger, supra note 879, at 600-09.
ments, but until now the modern American theories have had little influence on European treatises and textbooks, and even less effect on the decisions of continental courts.

English law is of course not generally influenced to any large degree by continental law. However, English courts have always desired that choice of law rules should be as uniform as possible among different jurisdictions. Also, a large proportion of English conflicts cases concerns the applicability of the law of European countries. Consequently, the reluctance among English judges to depart from the mainstream of European thought as applied to private international law is not surprising. American courts, on the other hand, are not particularly concerned with the choice of law rules used by Europeans.

3. International Scope of English Conflicts of Law

Most English conflicts cases involve international disputes, while most American ones concern interstate disputes. This distinction does not mandate any fundamentally different approach to the choice of law processes adopted in the two countries, nor does it cause any generally perceptible difference in the results obtained in English or American litigation. However, any suggestion that English courts adopt interest analysis runs into the following problem. Interest analysis rests upon the assumption that courts will be able to deduce from the laws of other jurisdictions the policies which those laws are calculated to promote. This process of deduction is proving difficult enough in American interstate cases. To try to discover the policies behind the laws of some totally alien system—for example, of some Asian country, or even of a non-English speaking country of Western Europe—would be that much more difficult.

4. English Rules of Statutory Interpretation

Interest analysis depends upon seeking the policy behind rules of law, foreign and domestic. Where these rules are statutory, an American court can simply follow a procedure similar to that which it would generally use in interpreting its own statutes, such as referring to legislative debates or reports of investigative committees. Should the English courts adopt interest analysis, there is little to stop them from making a similar investigation. But practically speaking, this

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888 Udny v. Udny, L.R. 1 Sc. & Div. App. 441, 452 (1869).
889 The entrance of the United Kingdom into the European Economic Community may well increase this reluctance.
890 See Prebble, Part I, notes 238-39 and accompanying text.
891 See id.
operation would be quite out of character. English courts are generally unwilling to involve themselves with questions of governmental policy. This reluctance is exemplified by rules relating to statutory interpretation. With few exceptions, English courts may not go outside the words of an Act in attempting to construe it. Interest analysis would compel consideration of both English and foreign extra-statutory material—a process which English courts would view with dismay.

5. Binding Nature of Precedent in England

The English concept of the binding nature of precedent is far stronger than the American one. This difference is probably another result of the lack in the United States of any strictly "common" law, or of any highly prestigious court to enforce that law. Thus, any movement so radical as a proposal to change the fundamentals of the choice of law process would have to anticipate a slow rate of response from the English courts.

Over the next few years, moves by counsel to introduce interest analysis into English judicial reasoning will inevitably occur. Thus far, the modernists have not been notably successful. In *Boys v. Chaplin*, Lord Denning tried to introduce a significant contacts test for torts cases, but he was in a minority of one in this respect. On appeal, two members of the House of Lords showed some sympathy for Lord Denning’s approach, referring extensively to American authority, even though all agreed that the strict English rule should remain for “normal” cases because of its virtues of predictability and certainty. For exceptional cases, where the strict rule does not sufficiently allow the court “to take account of the varying interests and considerations of policy which may arise when one or more foreign elements are present,” Lord Wilberforce thought

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892 See id., notes 117-33 and accompanying text.
894 Consider, for example, the reluctance of the House of Lords in Compagnie Tuni-
[1970] 3 All E.R. 71 (1970), to overrule directly N.V. Kwik Hoo Tong Handel Maatschappij
Tort*, 64 Harv. L. Rev. 881 (1951).
897 [1971] 1 A.C. at 380, [1969] 2 All E.R. at 1094 (Lord Hodson); id. at 390-92, [1969] 2
All E.R. at 1103 (Lord Wilberforce).
898 Id. at 391, [1969] 2 All E.R. at 1103.
899 Id.
that the necessary flexibility can be obtained from that principle which represents at least a common denominator of the United States decisions, namely, through segregation of the relevant issue and consideration whether, in relation to that issue, the relevant foreign rule ought, as a matter of policy ... to be applied. For this purpose it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet.  

Although these words could have come directly from a judge in a modern American court, the other Lordships were unwilling to go as far as Lord Wilberforce. Lord Hodson was somewhat sympathetic to the American approach but Lords Guest and Donovan came down strongly against any notion of the proper law of the tort. Lord Donovan even seeming to think that the whole idea was a little unpatriotic. Lord Pearson was somewhat equivocal, but definitely did not express approval for the new ideas. Two leading English scholars concluded, based upon a similar head-count, that "it is now beyond controversy that [the most significant contacts theory as applied to tort cases] can have no place in English legal thinking." Certainly, by traditional English principles of stare decisis, this assessment must be correct. Nevertheless, in Sayers v. International Drilling Co. N.V., Lord Denning held:

The issue raises an important question of private international law. ... [T]he claim by the plaintiff is a claim founded on tort. In considering that claim, we must apply the proper law of tort, that is, the law of the country with which the parties and the acts done have the most significant connection. That is how I put it in Boys v. Chaplin .... I think it is confirmed by what Lord Wilberforce said ... in the House of Lords [in the same case] ....

Too much should not be made of this passage. The majority of the Court of Appeal in Sayers characterized the issue as contractual,

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901 Id. at 380, [1969] 2 All E.R. at 1094.
902 Id. at 381, [1969] 2 All E.R. at 1095.
903 Id. at 383, [1969] 2 All E.R. at 1097.
904 "There is no need here for such a doctrine—at least while we remain a United Kingdom." Id. But perhaps Lord Donovan was scoring an innocent point off the legal system of the United States.
905 Id. at 405-06, [1969] 2 All E.R. at 1115-16.
908 Id. at 1180, [1971] 3 All E.R. at 166.
and therefore simply applied the proper law of the contract. Furthermore, regarding Lord Wilberforce's support of a significant contacts test in *Boys v. Chaplin*, His Lordship was in the minority on this issue, and he certainly was far from saying that the proper law approach should be adopted as a general rule.

Perhaps the most that can be confidently predicted is that unless Lord Denning is personally reprimanded by the House of Lords in a future case, His Lordship will continue to apply his version of the significant contacts test in tort cases whenever the opportunity presents itself.

6. **Lack of Vested Rights Influence in England**

The final influence that militates against adoption of interest analysis in England is that English choice of law rules were never quite so divorced from reality as those touted during the American vested rights era. In the United States, the serious inadequacies of Bealism provoked an extreme response. But English rules, especially in the contracts area, are generally at least practical, and in many instances quite estimable. Consequently, one cannot expect the same vehement reaction in England against the traditional rules as has occurred in America.

B. **The Superiority of Interest Analysis**

The fundamental reason for favoring the current American approach is that rule selection recognizes the reality that by making
choices of law courts are in effect deciding at least some of the substantive issues in the cases before them. The jurisdiction-selecting form in which English choice of law rules are cast permits Cheshire to claim 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." In any particular case, if the choice of law question is not material to the parties, why do they bother to go to the expense of arguing it? Why not simply agree beforehand what law the court is to apply? The reason is obvious: party A will benefit from law X, party B from law Y. If, therefore, it is true that courts engaged in the choice of law process are making substantive decisions, they should be aware of the effect those decisions will have upon the parties. Choice of law by jurisdiction selection is quite contrary to this policy. Furthermore, rule selection is a valuable concomitant of the issue-by-issue approach because it enables the courts to determine a case upon the factual and legal issues actually relevant, rather than by reference to general rules which attempt to govern large areas of the law, but which meet with only mixed success.

While rule selection and the issue-by-issue approach, perhaps the most important features of the doctrine of interest analysis, are valuable developments, other features of the modern American rules do not appear to be so clearly advantageous. For example, the "better rule of law" principle may lead to unjustifiable forum favoring. Also, the true/false conflicts method of analysis raises problems. The identification of cases as genuine false conflicts—where the rules of both possibly applicable laws would lead to the same conclusion—could certainly be profitable, but the pitfalls for the unwary in attempting to use this sophisticated technique appear so serious as to cast doubt upon the practical value of false conflicts reasoning. The interest approach does run the risk that undue weight may be attached to what a court considers to be the policies and interests of the forum state. The *raison d'être* of conflict rules is to indicate to courts when they should employ the laws of other jurisdictions. Considerations of public policy may occasionally suggest to a court that it apply its own laws. But in the contracts area, where jurisdictional rules are fairly loose and state policies are often of comparatively minor importance, it should usually be possible for courts to consider applying foreign law without worry-

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913 G. CHESHIRE & P. NORTH, supra note 482, at 9.

914 Reference here is of course chiefly to contract and tort cases. In matrimonial cases, for example, the parties would seldom have the opportunity to stipulate which law the court is to apply.
ing unduly about forum policy. The continued focus on policy considerations, which seems inherent in most versions of interest analysis, works against this desirable result.

Since interest analysis is believed to furnish a superior approach to the choice of law process than jurisdiction selection, modern American choice of law rules would seem preferable to those of England. But in the area of contract law this generalization breaks down because of the unusual nature of the English choice of law rule for contract cases. The doctrine of the proper law is flexible enough to be as responsive to the varying fact situations that may arise in different contract cases as would be a choice of law approach based on interest analysis. Moreover, the rules for finding a contract's proper law are of proven practical value, while the significant contacts rule is a recent arrival in American courts. Consequently, the latter is vulnerable to the well-meaning ministrations of scholars who would seek to deprive it of its flexibility by refining the significant contacts test into a collection of particular rules covering relatively narrow types of fact situations. Such a development would be retrogressive. The theoretical basis of the English rule does not run the risk now facing the infant significant contacts test in America—the risk of being forced back into a straitjacket of conceptualism, albeit a conceptualism that would show a considerable improvement over the discredited notion of the protection of vested rights.

C. The Practical Impact of the Differing Approaches

Granted that the choice of law processes used by English and American courts involve different fundamental philosophies, need this essentially theoretical matter concern us from a practical point of view? Are the differences between English and American choice of law rules for contract cases sufficient to cause particular cases to be decided differently depending upon which country the plaintiff resolves to choose as his forum?

For the bulk of cases, the answer to this question appears to be "no." First, disregarding Bealean jurisdictions, courts of both countries accept the autonomy principle. There are many serious exceptions to the doctrine, but these are exceptions; fundamentally, the autonomy rule is similar in England and America. Second, where there is no express choice of law, English and American courts both apply the significant contacts test, and, generally speaking, apply it in approximately the same manner. In many of the more complex cases, however, there will be found important and often predictable differences between the
likely results of a choice of law decision taken by an English or by an American court. These differences may be grouped roughly into two categories: those caused by clear distinctions between the rules as formulated by the courts of the two countries, and those which result from merely a difference of emphasis between the rules, caused, for example, by a larger or smaller area being governed by an exception common to the rules of both countries.

Two areas where the rules clearly differ are capacity to contract and the question of renvoi. It may be said without excessive oversimplification that in America the issue of capacity is usually governed by the domiciliary law of the party whose capacity is in question. But in England, capacity is referred to the system of law with which the particular transaction, and the parties to it, are most significantly connected. Plainly, these rules could easily produce different results in the same case, depending on where the action was commenced.

With regard to renvoi, one may draw some conclusions which highlight important distinctions between English and American law as far as their respective fundamental approaches to the choice of law problem are concerned. First, although traditional renvoi appears to have no place in the Anglo-American conflict of laws in contract cases, there is one exception which touches American jurisdictions only. That is, renvoi may perhaps find a role as a transitional tool in jurisdictions changing from vested rights reasoning to interest analysis. Second, because of interest analysis, what has been termed section 8k renvoi will find increasing use in American contract cases; this technique is clearly incompatible with the English approach to the conflict of laws. Finally, when in a contract case an English court is referred by a general choice of law rule to a particular foreign lex causae, it will probably ignore localizing rules of that law. Modern American courts, however, will not ignore these rules, but will usually involve them in the choice of law process by means of section 8k renvoi.

Such sharp distinctions as those seen in the areas of capacity to contract and the use of renvoi are relatively rare. More common are slight variances in choice of law rules which, in acute cases, may tip the scale one way or the other, depending on whether an English or an American forum is chosen. Three examples will suffice. In each case it is assumed that courts in both England and America are open to the

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915 See notes 655-56, 664-69 and accompanying text supra.
916 See notes 662-54, 658-63 and accompanying text supra.
917 See notes 792-93 and accompanying text supra.
918 See notes 825-27 and accompanying text supra.
919 See note 851 and accompanying text supra.
parties from a jurisdictional point of view, and that the relevant American fora have adopted interest analysis.920

One example involves a contract that appears to be most significantly connected to jurisdiction X. The contract contains no express choice of law clause, but it is arguable that its terms raise a reasonable inference that the parties intended the law of Y to govern. Party A believes that the law of X favors him, while party B wants Y law to be applied. Other factors being equal, A should try to have the case heard before an American court, B before one in England.921

The second example involves an action on a contract containing an express choice of law clause. Party A intends to rely upon a certain clause in the contract, valid under the chosen law, X, but ineffective under the law of Y for reasons of public policy. In the absence of the choice of law clause, Y law would clearly be applicable. Here, A should favor an English court, his opponent an American forum.922 This is merely a particular example of the general observation that American courts are more willing to listen to arguments based on public or state policy than their English counterparts.923

Third, the contract and all the issues under it that are liable to be disputed are substantially related to jurisdictions X and Y (thus plainly raising a conflicts problem), although clearly most significantly connected with X. However, the contract contains an express stipulation that the law of Z should apply. Apart from this clause, the links with Z are at best tenuous. Party A desires to sue party B for damages for non-performance. B is expected to plead failure of a condition precedent, in the circumstances a defense under X but not under Z law. On these facts, A should sue in England, for an English court would be less disturbed by the slender connection between the transaction and Z law.924 On the other hand, if B’s defense will be his lack of capacity under X law (with Z law again favoring A), A should choose a forum in the United States. On the issue of capacity, an English court would ignore the stipulation for Z law, while it is possible than an American court would respect the parties’ choice.925

920 Naturally, different considerations apply when the choice is between English law and that of an American vested rights state.
921 See notes 501-02 and accompanying text supra.
922 See Frebble, Part I, notes 575-81. However, it should be recalled that the willingness of the Restatement (Second) to consider the public policy of non-forum states is criticized at those pages.
923 See Frebble, Part I, notes 104-39 and accompanying text.
924 See id., notes 320-47 and accompanying text.
925 See notes 652-57 and accompanying text supra. It certainly would respect such a choice if A sued in Z, Z being both B’s domicile and an American state.
A comparative study of English and American choice of law rules for contract cases is not merely of theoretical interest. Where cases have interstate or international contacts, legal advisers should be as aware of differences between rules of the conflict of laws as they are of rules of substantive law. With increasing interchange between the United States and England, private international law cases involving these two countries must proliferate, and it may be expected that progressively more defendants will become amenable to suit in both countries. In these circumstances, an astute counsel may often be able to enhance the prospects of his client's cause by an informed choice of forum.