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EFFECTS OF THE AUTONOMY OF THE PARTIES ON
CONFLICT OF LAWS CONTRACTS

Louis C. James

I. REASON AND PRINCIPLE

The thesis of this article is that the law expressly stipulated
by the parties should, on reason and principle, with one
exception1 govern the validity of the contract in conflict of laws.
This thesis does not relate to the incorporation of a foreign law
as part of the terms of a contract, for if that is the desire of the
parties they may adopt any law in the world.2 The concern here
is only with that which has been called a reference of the contract
to a foreign law for its governance.3 Nevertheless, in a considera-
tion of the several problems and solutions relating to the central
core of this discussion, it is necessary to talk about more than
just the central thesis.

A. THEORIES ON CONFLICTS CONTRACT GOVERNANCE

There have been several methods used in the past to arrive
at the law which is to govern the contract. Among them may be
listed such things as (1) the place of making; (2) the place of
performance; (3) the principle of validating the contract if
possible; (4) the intention of the parties; and (5) the most vital
and substantial contact theory.4 This article, it is believed, will

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1 The one exception is that designated as public policy. Nussbaum, "Conflict
Theories of Contracts: Cases Versus Restatement," 51 Yale L. J. 893 (1942),
brings out this exception in a very informative manner.
33-4, states: "In other words, the choice of foreign law may take two forms. The
parties may subject the contract as a whole to a foreign law, or they may merely
select certain provisions of a foreign law to regulate their rights and obligations.
The first is in the true sense the choice of a proper law. It has been described as
a 'reference to a foreign law.' The second is not the choice of a proper law, but
merely the incorporation in the contract of certain parts of a foreign law."
3 Cheshire, op. cit., p. 33.
4 Rabel, The Conflict of Laws: A Comparative Study (Callaghan & Co., Chicago,
1947), Vol. 2, pp. 357, 393, and 402-8, lists these several theories in some detail.
indicate that the intention of the parties has often been referred to by the courts as of significant effect in choosing the law to govern the contract. Of course, the intention-of-the-parties theory may, in turn, be subdivided into a theory based on the presumed intent of the parties and another resting on an expressly stipulated intent.

Before proceeding, it could be observed that while there are three classes of intent, only two of them will be considered significant here. First, there is the presumed intent of the parties which is literally "presumed," or more nearly "assumed," by a court in order to arrive at a decision which is proper in the eyes of the court but where the parties, from anything they have said or done, may not have had any intent at all. In many cases of this character, the court "manufactures" or "makes" an intent for the parties in order to arrive at what the court thinks is

5 It appears that some vestiges of the intent theory may be found as early as the medieval "Statutists." In its application to contracts, it seems that it was first elaborated by the French jurist Molinaeus (1500-66), while Lord Mansfield introduced it into the common law. At an early date in American history it was recognized by Story and Chancellor Kent; it became familiar to American high courts through Chief Justice Marshall. Professor Nussbaum, in 51 Yale L. J. 893 (1942), notes 12-21, lists several authorities, including Robinson v. Bland, 2 Burr, 1077, 97 Eng. Rep. 717 (1760), Thompson v. Ketcham, 8 Johns, 146 (N. Y., 1811), and Wayman v. Southard, 23 U. S. (10 Wheat.) 1 (1825). See also Boseman v. Conn. Gen. Life Ins. Co., 301 U. S. 196, 57 S. Ct. 686, 81 L. Ed. 1036 (1937). Decisions of the state courts are listed in Beale, Conflict of Laws (Baker, Voorhis & Co., New York, 1935), Vol. 2, pp. 1118-74. Among the American cases which illustrate the use of a stipulation clause disclosing the intent of the parties as to the governing law are the holdings in The Kensington, 183 U. S. 265, 22 S. Ct. 125, 46 L. Ed. 129 (1901), in E. Gerlie & Co. v. Cunard S. S. Co., 48 F. (2d) 115 (1931), and in Oceanic Steam Nav. Co. v. Corcoran, 9 F. (2d) 724 (1925). An annotation in 112 A. L. R. 124 gives both the insurance case listings and the cases as to money-lender contracts. In the cases of Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 24 S. Ct. 538, 48 L. Ed. 788 (1904), and of Mutual Life Ins. Co. v. Cohen, 179 U. S. 262, 21 S. Ct. 106, 45 L. Ed. 181 (1900), the United States Supreme Court recognized the presence of expressed stipulations but considered the same to be ineffective because contra to the public policy of the forum. See also, Knott v. Botany Mills, 179 U. S. 69, 21 S. Ct. 30, 45 L. Ed. 90 (1900), and New York Life Ins. Co. v. Cravens, 178 U. S. 389, 20 S. Ct. 962, 44 L. Ed. 1116 (1900), where the clauses were ineffective because they would have made the contracts illegal under the laws of the place of making. Consider also the holding in United Divers Supply Co. v. Commercial Credit Co., 289 F. 316 (1923).

6 It would appear that the limitations on the use of the intent theory, whether that theory is expressed in terms of presumed or expressed intent, are more or less the same. Compare the English cases of Vita Food Products, Inc. v. Unns Shipping Company, Ltd. [1939], A. C. 277, and Rex v. International Trustee for, etc. Bondholders A. G. [1937], A. C. 500, 529, plus the American holding in William Whitman Co. v. Universal Oil Products Co., 125 F. Supp. 137 (1954), with the holdings in Seemen v. Philadelphia Warehouse Co., 274 U. S. 408, 47 S. Ct. 626, 71 L. Ed. 1123 (1927), and in Green v. Northwestern Trust Co., 128 Minn. 30, 150 N. W. 229 (1914), for verification of this point.
reasonable. This paper expresses no interest in this type of "presumed" intent, so when that expression is used herein it does not embrace this "court-made" intent. Second, there is the normal intent of the parties flowing from what the parties have done or said, which indicates to any rational person what they actually intended even though they did not by an expressed statement in the contract indicate the law which they desired to govern their agreement. Here, they had an intent; it is evidenced from what they did and said; it is not a "court-made" intent, but a "party-made" intent. And third, there is the expressed intent of the parties to have a certain law of some reasonable place to govern their contractual relations. It is only with the last two of these three types of intent that interest is here expressed and it is believed that what follows will indicate that the expressly stipulated intent\(^7\) of the parties is to be preferred to that of their presumed intent,\(^8\) as well as to the other means enumerated above. Of course, if the parties have not expressly stipulated the law to govern their contract, then the courts of the forum must endeavor to arrive at a choice of law by other means. The attention of this article, therefore, will be focused upon the effects of the autonomy theory\(^9\) on the validity\(^10\) of conflict-of-laws contracts.\(^11\)


\(^8\) Cheshire, op. cit., 7-90, not only discusses the several means adopted by courts and writers in the determination of the choice of law to govern the contract but also indicates many of the reasons why so many of these means are highly artificial and illogical. The late Professor Cook apparently demolished much of the reasoning behind the "place of making" theory in his article entitled "'Contracts' and the 'Conflict of Laws'," 31 Ill. L. Rev. 143 (1936). Two years later, he summed up by saying: "The conclusions reached were that the theory, as formulated... (1) cannot be derived from a logical application of its alleged 'territorial basis'... (3) is not, if literally applied, in accord with the actual phenomena of judicial decisions (the conduct of counsel and judges);... (5) does not offer as great a degree of 'certainty' as at first sight may seem to be the case; and (6) leads to artificial and arbitrary results which take insufficient account of the needs of the community." He also found that the "presumed intention" theory seemed, on the whole, to be a "somewhat cumbersome and misleading way of expressing a rule that the 'law' to be applied is that of the state with which the transaction on the whole has the most substantial or vital connection." Cook, "'Contracts' and the Conflict of Laws: 'Intention' of the Parties," 32 Ill. L. Rev. 599 (1938), at 599 and 629.

\(^9\) There has been some interesting foreign writing on the "intent theory" in general. See Batiffol, Les Conflits de Lois en Matière de Contrats (1938); Handek, Die Bedeutung des Parteiwiliens in Int. Privatrecht (1931); Caleb, Essai sur le
B. PROBLEMS AND SOLUTIONS

1. Incorporating Foreign Laws Into the Contract

It is desirable to note, at the outset, that Judge Learned Hand once observed that people cannot

by agreement substitute the law of another place; they may, of course, incorporate any provisions they wish into their agreements—a statute like anything else—and when they do, courts will try to make sense out of the whole, so far as they can. But an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one's bootstraps. Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than whether their acts are torts or crimes.  

Nevertheless, it is quite obvious that the right of incorporation may be freely exercised by the parties to a contract.  

No one would doubt that the parties to an English contract of sale, for instance, may adopt the provisions of the German code dealing with the effects of such a contract, provided these provisions are not contrary to some compulsory rule of the English law. The parties may do so either by a verbatim transcription of the pertinent provisions, or by a general statement that their rights and duties in this matter

10 It is believed that there is more difficulty experienced in this area of the several elements of a contract than in any of the others. See Goodrich, Handbook of the Conflict of Laws (West Publishing Co., St. Paul, 1949), 3d Ed., 312-34, as well as the numerous other authorities cited by him in the several notes thereto.  
11 Only the so-called commercial contracts are considered herein. Rabel, op. cit., Vol. 2, 357, provides a breakdown of the several types of conflict-of-laws contracts.  
12 See the opinion in the case of E. Gerlie & Co. v. Cunard S. S. Co., 48 F. (2d) 115 (1931), at p. 117. Professor Nussbaum regarded the statement of Judge Hand to the effect that people cannot "by agreement substitute the law of another place" to be an "isolated" one: Nussbaum, "Conflict Theories of Contracts: Cases Versus Restatement," 51 Yale L. J. 898 (1942), at p. 897, note 2.  
shall be subject to German law. In the latter event, the pertinent provisions of the German code are deemed as written out at length in the agreement. In either case, the foreign provisions become English terms, and will be considered as such. Also, they remain constant in the sense that these provisions are unaffected by a change in German law occurring after the date of the contract. This is not true when the foreign law is chosen as a whole to govern a contract; and in such an event, the reference is to a living and constantly evolving body of law.\textsuperscript{14} In this event, it is said that there is no factual connection of the contract at all with the foreign law and, therefore, the referral is logically inappropriate.\textsuperscript{15}

\textbf{a. Imperative Rules}

The aforementioned statement by Judge Hand leads into another problem. Many scholars believe that a contract is born into a certain law, the imperative rules of which it finds itself incapable of escaping.\textsuperscript{16} This is to say that any rule of law which the parties to a contract cannot modify in its purely local setting, they cannot avoid by an expressed stipulation that another law shall govern it.\textsuperscript{17}

It may be admitted that if both parties are domiciled in State X and they evade the usury laws of that state by mak-

\textsuperscript{14} Cheshire, op. cit., p. 34. But see Morris, "The Eclipse of the Lex Loci Solutionis—A Fallacy Exploded," 6 Vanderbilt L. Rev. 505 (1953), at p. 507.

\textsuperscript{15} Cheshire, op. cit., pp. 34-44. The indication that contracts must have a connection with a foreign law for that law to govern a contract seems somewhat illogical. It is as illogical to say this as to say that if two men from "outer space," who had made a contract in "outer space," came to the Earth and became naturalized citizens of the United States that because their contract had no contacts or connections (or any of the other means now used by the courts, such as the place of making theory) with the Earth, they would be unable to find any court on the Earth to adjudge their legal relations evolving from their contract. To assume this is to assume the irrational in law.

\textsuperscript{16} Rabel, op. cit., Vol. 2, p. 394, states: "... in the majority opinion of the scholars, every contract is born into a certain law, the 'imperative rules' of which it cannot escape. That is, any rules of this law which parties cannot modify by contracting in a purely domestic sphere they do not avoid by an agreement that another law should govern."

ing a contract to be governed by the law of another state, which will permit their proposed higher rate of interest on a loan, that possibly the public policy considerations of State X would be sufficient ground to deny them this foreign-law referral.\(^ {18}\) Even here, it would seem that in order to deny them the use of a foreign law, that law must be shown to be against the public policy of the law of a place having the most natural or vital connection with some essential element of the transaction as viewed by the forum,\(^ {19}\) or against a strong public policy of the forum. However, in case of usury the policy of the same state of both parties, and in which state the contract is actually made and to be performed, could more easily say that this is a local contract and one involving usury in which the local law has a particular interest,\(^ {20}\) than if it were a conflict-of-laws contract involving, let us say, parties from several states.\(^ {21}\) The subject matter might be so obnoxious to the laws of the state of domicile, which is also the state of making and performance, that to permit the contract to be

\(^{18}\) Stumberg, Principles of Conflict of Laws (Foundation Press, Brooklyn, 1951), 2d Ed., pp. 239-40, indicates that, in usury cases, the courts seem to lean toward concessions that should be made in trade and commerce. He then asks, "If such concessions are desirable here, why not in all cases?" He proceeds: "Then, too, to quote again the words of the Iowa court" [in Arnold v. Potter, 22 Iowa 194 (1897)], "men are not presumed by the law to act in folly or in dishonesty, but rather that they intended in good faith that their acts shall be valid and what they purport to be." He further states: "To apply the law which will uphold the contract, if the contract has some bona fide substantial connection with the place of that law, would, it is believed, 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." At page 240, note 60, Stumberg cites several authorities. See also, Grotius, De Jure Belli ac Pacis, II, 11, 5(2) (1625); Ceretti, Le Obbligazioni nel Diritto Int. Privato 36 (1925); Story, Commentaries on Conflict of Laws (Bigelow ed., 1883), § 261. Judicial comments may be found in Allen v. Alleghany Co., 196 U. S. 458, 25 S. Ct. 311, 49 L. Ed. 551 (1904); Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 24 S. Ct. 538, 48 L. Ed. 788 (1904); Equitable Life Assur. Soc. v. Clements, 140 U. S. 226, 11 S. Ct. 822, 35 L. Ed. 497 (1891). But see Cook, "‘Contracts’ and the ‘Conflict of Laws,’" 31 Ill. L. Rev. 143 (1936), and note Restatement, Conflict of Laws (1934), § 333.


governed by any foreign law that would validate it would be considered a *coup de force* against the very framework of the domiciliary state’s social structure.

What, however, are these imperative rules which are inescapable? When this question is asked the scholars differ in the determination of what rules are imperative. Shall we reduce these so-called imperative rules to a limited number? For instance, shall we reduce them to problems of public policy? If we did, we would have such examples as wagering, usury, smuggling and possibly social protection. The last mentioned might, for instance, take into its scope all of the contracts relating to life insurance or fire insurance. Certainly no one would say that insurance does not fit into the concept of social protection. If we were to enlarge the scope of imperative rules where would we be able to stop? Can we say that they should include the formation and validity of contracts, the freedom to contract, the change of conditions (*rebus sic
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stantibus), recission on the ground of non-performance, the effect of agreements on third persons, assignments, and other legal consequences flowing from contractual relations? If we should enlarge the imperative norms to such proportions, very little would be left for the principle of party autonomy. It seems, then, in brief, that no one appears able to demark the boundaries of the imperative norms.

b. Application of Imperative Norms

Conceding that certain imperative norms do exist, the question is then one as to how these imperative norms are to be applied to ascertain the validity of the contract. For this purpose, it is necessary to discuss them in detail.

Capacity of the parties to a contract involves, first, the problem of protecting contractual relations of parties of immature thought. Infants, married women, insane persons and the like must receive reasonable protection from some law in order that their incapacity may not be imposed upon by those of mature thought. It has been stated that the law governing the capacity of parties to a mercantile contract "is a matter of speculation so far as the English authorities are concerned." Perhaps few people would disagree with this statement if it were also applied to the American scene. One English


28 Maine, Ancient Law (3d Am. ed. from 5th London ed., 1883), at p. 164, says: "The child before years of discretion, the orphan under guardianship, the adjudged lunatic, have all their capacities and incapacities regulated by the Law of Persons. But why? The reason is differently expressed in the conventional language of different systems, but in substance it is stated to the same effect by all. The great majority of Jurists are constant to the principle that the classes of persons just mentioned are subject to extrinsic control on the single ground that they do not possess the faculty of forming a judgment on their own interests; in other words, that they are wanting in the first essential of an engagement by Contract."

29 Cheshire, op. cit., p. 45.
authority did indicate that the choice lies "between the lex domicilii, the lex loci contractus and the proper law of the obligations." The latter, in his opinion, is that law with which the contract has the most vital and substantial contacts. The difficulty here involves several factors. If we use the law of the domicile, how far afield shall we extend the scope of the domicile? If we choose the law of the place of making, is this not too rigid? Often parties make contracts while on a vacation or on a business trip. Is "law by chance" to govern their capacity? It might be equally as difficult to arrive at the most vital and substantial contact of the contract. How are we to evaluate the most vital and substantial contact? Also, can we say that any one state is the sole depositary of just laws which regulate conflict-of-laws contracting? By what means do we ascertain what is just? Once we stipulate that it is extremely difficult to as-

30 Ibid.
31 Cheshire, op. cit., at p. 46, states: "... it is no doubt true that a person who is subject to a disability by his lex domicilii cannot in general confer capacity upon himself by choosing a more favorable law. Yet it is neither heretical nor inconsistent to say that the disability may be disregarded if he makes a contract that has no factual connection with the country of his domicile. This disregard is not necessarily an evasion of the lex domicilii, since it does not follow that an incapacity imposed by that law is intended to affect transactions of a substantially foreign character."
32 I have used the expression "law by chance" to indicate the application of some foreign law to contract governance by virtue of a contract being made by two groups of parties who by chance meet in a foreign land, on possibly a vacation or a business trip, and there make a contract. Should this chance meeting allow the law of that place to govern the contract when the contract has no relation to the place other than that it was made there?
35 Professor Patterson finds that justice and social welfare are at best vague terms about which judges will differ, as will other men: Patterson, Jurisprudence: Men and Ideas of the Law (Foundation Press, Brooklyn, 1953), 1st printed ed., p. 533.
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certain the law to govern capacity of the parties by the methods used,\textsuperscript{36} would it not be more acceptable to permit the parties to choose their own law to govern their contract? In the mid-twentieth century is not one state as much interested as another in protecting parties of immature minds from being imposed upon, or, for that matter, in shielding parties of unequal economic status from being imposed upon?\textsuperscript{37} "Fair play" or "rough play" in the application of legal concepts is not confined to any one nation, as history so well illustrates.\textsuperscript{38}

Formal validity\textsuperscript{39} involves the following problems: first, are the formal requirements of the place of making sufficient elsewhere; second, are the formal requirements of the place of making compulsory;\textsuperscript{40} and, third, may the parties be permitted expressly to stipulate the law to govern the formal validity of their contract? On reason and principle, the local law where a contract is made should be sufficient to meet the formal requirements of a contract. If the contract meets the formal requirements at the place of making, its formalities should be sufficient at any other place. But should the local law requirements where the parties may be merely by chance, as on a trip during a vacation for instance, be compulsory for the formal validity of the contract? The answer seems to be no.\textsuperscript{41}

\textsuperscript{36}These methods include the place of making, the place of performance, the validating of the contract if at all possible, the presumed intent of the parties, and the most vital and substantial contact.

\textsuperscript{37}Would any one deny that we are in the midst of a world movement toward parental government? It is not the question whether this revolution in our world social structure is good or bad; it is a fact that most nations of the world today seem to believe that the individual lives the "good life" better under the ever-supervising wing of state paternalism than by any other means. Therefore, the individual's interests seem as safe in one state as in another. The movement toward world socialism is a fact that few dispute.

\textsuperscript{38}See materials cited in note 34, ante.

\textsuperscript{39}See Restatement, Conflict of Laws (1934), § 334, for the inflexible rule there expounded. This rule is not in accord with the authorities for, as viewed by them, the rule seems to lie only with the convenience of the parties: Von Bar, Theory and Practice of Private International Law (Gillespie's trans., 1892), § 123; Batiffol, op. cit., 364; Cheshire, op. cit., 243; Introductory Law to the German Civil Code, Art. 11(1) (1). See also Ross v. Ross, 25 Can. Sup. Ct. 307 (1894); Hall v. Cordell, 142 U. S. 116, 12 S. Ct. 154, 35 L. Ed. 956 (1891); Morson v. Second Nat. Bank, 306 Mass. 588, 29 N. E. (2d) 19 (1940); Harwood v. Security Mut. Life Ins. Co., 263 Mass. 341, 161 N. E. 589 (1928); D. Canale & Co. v. Pauly & Pauly Cheese Co., 155 Wls. 541, 145 N. W. 372 (1914); the cases set forth in Goodrich, op. cit., pp. 272-3, note 35; and the note in 54 Harv. L. Rev. 331.

\textsuperscript{40}Cheshire, op. cit., pp. 60-3.

\textsuperscript{41}Ibid., p. 60.
An example will illustrate this point. Two parties on a train which is traveling from Paris to Istanbul get together and arrange a contract while the train is passing through Vienna. Should the mere fact that they are passing through Vienna at the time they complete the contract require them to govern the formal requirements of their contract by Austrian law? If Austrian law is to govern here and Austrian law merely requires that a revenue stamp be affixed to the contract to make it formally valid, then this contract without the stamp would be formally invalid. But what reasonable man would maintain such a principle to be rational?

Suppose the parties in the above example were Englishmen. What would be improper in their using English formal requirements to validate the contract? They would be familiar, most likely, with their home law. If they were permitted to stipulate expressly their choice of law to govern the formal validity of their contract, it would save them much uncertainty as well as the inconvenience of obtaining Austrian legal advice.

It is maintained by some writers that essential validity must be governed by a law arrived at by other means than by the expressed stipulations of the parties. Professor Goodrich, however, once used two noteworthy illustrations in order to pose a vital question. He wrote:

A New York man may mail a forgotten letter of acceptance at a mail box at his New Jersey golf club, and all the preliminary transactions and the thing stipulated for may be centered in New York. Two Chicago businessmen on a train from Chicago to New York may effect several agreements on their journey, one in each of the states through which the train passes. Not one of these agreements may concern

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42 See Beale, "What Law Governs the Validity of a Contract?" 23 Harv. L. Rev. 1 (1909-10), at pp. 79, 194 and 200; Lorenzen, "Validity and Effects of Contracts in the Conflict of Laws," 80 Yale L. J. 565 (1921), at 655, and in 31 Yale L. J. 53 (1921); Beale, op. cit., Vol. 2, §§ 311.1-375.2 and 1173; Goodrich, op. cit., p. 326; Cheshire, op. cit., pp. 15-44. Other authors might be cited but it is thought that this list is sufficient. Those interested in a further listing of persons opposed to the autonomy theory are referred to the various notes of the authors cited herein at the sections and pages noted.
things in Indiana, Ohio, or Pennsylvania in any way. Why, then, it is asked, should the respective laws of these states govern the transactions?43

Using the examples given, we might well ask why imperative norms in conflict-of-laws contracts should be applied when the application thereof benefits no one44 and, actually, such norms could operate to restrict the reasonable expectations of the parties45 or at least serve to promote uncertainty and unpredictability?46 Even if it is admitted that every contract must be born into some law,47 the questions remain—what law?

Where, for example, were the contracts born48 in the illustrations quoted above? When parties, by mere chance, complete a contract in some place where they do not know the legal effects of their acts, is birth in contract law to be governed by

43 Goodrich, op. cit., p. 323.

44 Predictability of law, certainty in law, and uniformity in law will, of course, benefit international and interstate contract transactions. It is contended that these may be attained by the use of the autonomy theory; that the present means in use lead to uncertainty, unpredictability and non-uniformity in legal norms. No one, not even the states of the parties, will be benefited by the stagnation of international contractual transactions or the impeding of them by the present methods in use.

45 The "actual" reasonable expectations of the immediate parties to the contract can be more adequately fulfilled if the parties themselves, who know what they want from their contract, are permitted to choose the law that will give them what they want.

46 In addition to the points made in notes 44 and 45, ante, it could be suggested that "law by chance" does not seem promotive of the interests of any one. See also note 32, ante.

47 Note 16, ante. Professor Nussbaum, "Conflict Theories of Contracts: Cases Versus Restatement," 51 Yale L. J. 893 (1942), at pp. 908-9, says: "As regards intrinsic validity, the law of the place of contracting has the power to destroy the contract (or a stipulation thereof), by making it illegal. There is some truth in the centuries-old doctrine that parties contracting in a given territory must not disobey its prohibitions set up by the law of that territory. Invalidity attached there to contracts violative of local prohibitions should ordinarily, at least, be recognized by foreign courts just as legal effects of torts originating in the lex delicti communis are so recognized. Though not a pre-existing obligation imposed on courts, it is well-settled law and the writer believes, sound policy for the local courts ordinarily to hold a contract invalid where it is invalidated because illegal by the lex loci contractus. To this extent no objection is raised against the place-of-contracting rule, barring, of course, the 'mailbox' theory of the Restatement... While invalidity under the lex loci contractus means ordinarily invalidity everywhere, a corresponding rule does not follow in the case of validity."

48 Taking a rather absurd case to explain the rather absurd theories now in use, suppose two people placed their signatures to an agreement when the train they were using was exactly over the center of the line dividing two states. Which system of state law would govern the contract if the "place of making" theory was utilized?
chance? Is mathematical rigidity to be permitted to supplant the highly necessary flexibility of law to meet the demands of the parties and of society of which they are a part? What "crime" would be committed if the parties were permitted to eliminate this chaos by expressly stipulating the law to govern their contract? Why not, then, let the contract be born in the law of the place expressly stipulated by the parties?

If it be assumed that the parties to the contract are legislating when they expressly stipulate a foreign law to govern their contract, for whom are they legislating other than themselves? If they are legislating in this instance, are there not other similar examples of such legislation?

Would the presumed intention of the parties, as previously defined, prove a more feasible means in arriving at the choice of law to govern contracts? Why may the parties be permitted to accomplish by their acts and words what they cannot do directly by an expressed statement of intent as to the governing

49 See note 32, ante.

50 The late Professor Walter Wheeler Cook, in his treatise entitled The Logical and Legal Bases of the Conflict of Laws (Harvard University Press, 1949), at p. 432, stated: "What is needed is not a completely static system—even if such a system were possible—but a set of guiding principles which make provision for as much certainty as may reasonably be hoped for in a changing world, at the same time providing for not only needed flexibility but also continuity of growth."

51 Cook, op. cit., p. 393, wrote: "... the first thing to be noted is that if the parties 'legislate,' they do so only for themselves; they are seeking to determine primarily what rights each shall have as against the other, and are not seeking to 'make law' for other persons... To sustain the argument of Professors Lorenzen, Beale, and Goodrich, it is therefore necessary to show that this kind of 'legislation'—if one calls it that—is never permitted under our legal system, for if it is permitted in other fields it may well be that the same thing is true in the field we are considering. It requires only slight observation to discover that the assertion that such 'legislation' is not permitted is quite contrary to the facts: many agreements which purport to do this are given effect, others are held ineffective. No universal rule... can be formulated... This being so, this question... must be answered by the court in each 'new' case that is presented for adjudication before we can know whether or not the parties have been successful in their attempt."

52 While Professor Cook, without making an exhaustive survey, found eleven instances of party legislation, only two are here noted. He wrote, op. cit., pp. 393-4, that he had observed that: "(1) In the case of an ordinary bailment, contract provisions altering what would otherwise be the relative rights and duties of bailor and bailee are, within certain limits, valid... (2) It is generally recognized that even common carriers can by agreement with passengers alter what would otherwise be their duties... These limitations must be 'just and reasonable' and in most states may not, where the passenger pays his way, wholly exempt the carrier from liability for negligence. For the purpose of the present discussion it is not material how far limitations of this kind may go. What is of importance is that the parties can to a greater or lesser degree alter what would otherwise be the legal consequences of their transactions."
law of their contract. Would the use of the theory of the place of performance help solve the problem of choice of law to govern the contract? If the contract were one to be performed in several states, what one state law would the forum choose as the law to govern the contract? Seeing the impossibility of the situation, the forum might be forced to use its own law or be driven back to find the place of contracting.

If we should use the most vital and substantial contact theory in arriving at the law to govern the contract, what means can be adopted to evaluate these contacts? Under this theory, it may be possible for an arbitrary judge to adjudge some minor connection of a contract with the judge's home state as being the "most vital" one, for home law may be the "best" law to some judges. If logic is used to arrive at the "most vital contact," is it not possible to obtain different conclusions on the same factual matter by choosing improper major or minor premises? Better still, is not the answer to the question to be found in the answer to the query as to whether or not the life of the law is to be found in logic or in experience?

53 Ibid., at pp. 414-8; Goodrich, op. cit., pp. 326-7.
54 Is not the place of performance, as well as the place of making, a spatial contact of the contract?
56 Cheshire, op. cit., pp. 45-90; Garveson, "The Proper Law of Commercial Contracts as Developed in the English Legal System," in Lectures on the Conflict of Laws and International Contracts (1951), pp. 1-33. It would seem that Professor Cheshire, by attempting to avoid the autonomy theory, has let himself in for some criticism over his methods for the localization of any given contract. To him, localization means that the parties "declare that they regard the relationship which they create by their agreement as situate in" some specified country. Professor Martin Wolff, writing under the title of "Problems of Public and Private International Law," in the Grotius Society Transactions for 1949, Vol. 35, at pp. 143-4, doubts whether this formula is helpful. He says it represents "a retrogressive step from Westlake back to Savigny. According to Savigny it was the seat of the legal relationship that had to be found. He chose a geographical image. Westlake's admirable instinct caused him to say that we ought to find the legal system with which the given relationship has the most real connection, and not this, that or the other country. True, most legal systems are in force within a certain country, and the localization of a contract in such country means in most cases the subjection of the contract to the legal system which is in force there. But not always. That is manifest in the case of a change of sovereignties as a consequence of cession of territory." Professor Wolff illustrates this point by citing several examples of cases in which a change in sovereignty did come about between the time of making and the final resolution of the contracts involved.
57 Garveson, op. cit., at pp. 6-12.
58 Cook op. cit., pp. 347-70.
59 See the quotation from the works of the late Mr. Justice Holmes in Patterson, op. cit., p. 5.
2. Testing For Legality

Passing to the next problem the question is one as to which law should govern for the purpose of determining the legality of the contract. Suppose a contract is illegal by the law of the place of making, the law of the place of performance, or of the law of the "most vital and substantial contacts," should the parties be able by an expressed stipulation to choose the law of the contract in order to make it legal? Dicey has indicated that a contract unlawful by the law of the place of making is invalid elsewhere. Possibly, the origin of this rule is based upon strong moral connotation; possibly, it is assumed that no civilized nation would enforce an illegal contact because it would be immoral. Several questions may evolve from this intricate web. For example: what nations are civilized; how does one arrive at standards of civilization; are all legal contracts based upon moral concepts; how does one separate morals from law

60 In general, see Stumberg, op. cit., pp. 266-70, and Goodrich, op. cit., pp. 304-8. Wolff, op. cit., pp. 145-9, provides an able discussion of the case of Vita Food Products, Inc. v. Unus Shipping Company, Ltd., [1939] A. C. 277, and particularly with respect to the ambiguous meanings of the words "bona fide" and "legal" as used therein by Lord Wright. It could be said that all the interpretations of these two concepts provided by Lord Wright are but guesses unless and until the same are defined with some degree of adequacy. See further, note 47, ante, and the opinions in Allen v. Alleghany Co., 196 U. S. 455, 25 S. Ct. 311, 49 L. Ed. 551 (1904); Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 24 S. Ct. 538, 48 L. Ed. 788 (1904); Equitable Life Assur. Soc. v. Clements, 140 U. S. 226, 11 S. Ct. 522, 35 L. Ed. 497 (1891).


62 Holdsworth, Hist. Eng. Law, Vol. 8, Ch. 4, § 1; Friedmann, Legal Theory (3d Ed., 1933), pp. 77-81; Lorenzen, "Cause and Consideration in the Law of Contracts," 28 Yale L. J. 621 (1919); Pound, "Liberty of Contract," 18 Yale L. J. 454 (1909); Cohen, "The Basis of Contract," 46 Harv. L. Rev. 553 (1933). Another element, today, would enter into the reason why "legal" contracts should be enforced and "illegal" ones not enforced, namely, the preservation of the social order through valid commercial transactions. But this same reason why contracts should be enforced if legal may be supplemented by the equally necessary rule that undue hindrances of contract relations may stifle commercial transactions the world over. The smugness of local moral policies must not be permitted to interfere with normal commercial transactions. We should be careful before we declare a contract is illegal by any law; we must weigh all of the social values involved—those of the individual, those of the states of the parties, and those of the world order. See Kessler, "Contract as a Principle of Order," quoted in Kessler and Sharp, Cases on Contracts (Rev. Ed., 1950), pp. iii-xvi; Llewellyn, "What Price Contract?—An Essay in Perspective," 40 Yale L. J. 704 (1931); Williston, "Freedom of Contract," 6 Cornell L. Q. 365 (1921).

63 It is as impossible to answer this question as it is to count the falling autumnal leaves. Any answer would depend on the standard of measurement. Should it be bathtubs, radios, cars, or what?

in the first instance; should one, for this purpose, rely upon positivism?

Other questions may arise at this point. Assuming it to be possible to arrive at an accurate listing of the civilized nations, could one then ascertain the morals of this world society? Morals, being based upon concepts of what is just, are at best essentially pragmatic norms and at worst ephemeral will-o’-the-wisp. It might be extremely difficult to define what is or is not just. It seems improbable that any two men, however rational they may be, would be likely to agree completely on what is or is not just in any given factual situation. This is true within the local community of any nation whose individuals may be drawn together by the “bonds of race, language, culture, common historical experiences, common economic interests, or similar institutions.” It is not too difficult then to perceive the additional difficulties one might find present in searching for a definition in a world community composed of many cultures, races, historical backgrounds, languages, and so forth.

Since many judges may not be philosophically inclined, we may be forced to concede that if the law of the place of making and the like should declare, in unequivocable terms, that the

65 Discussing some distinctions between law and ethics, Sir Frederick Pollock had this to say: “In assuming a scientific character, law becomes, and must needs become, a distinct science. The division of science or philosophy which comes nearest to it in respect to the subject-matter dealt with is Ethics. But, though much ground is common to both, the subject-matter of Law and of Ethics is not the same. The field of legal rules of conduct does not coincide with that of moral rules, and is not included in it; and the purposes for which they exist are distinct. Law does not aim at perfecting the individual character of men, but at regulating the relations of citizens to the commonwealth and to one another. And, inasmuch as human beings can communicate with one another only by words and acts, the office of law does not extend to that which lies in the thought and conscience of the individual.” See Pollock, A First Book of Jurisprudence (Macmillan & Company, London, 1896), p. 44. See also MacIver, The Web of Government (The Macmillan Company, New York, 1947), pp. 3-38 and 193; Patterson, op. cit., pp. 30, 230-40, and 364.


68 Two or more people watching an accident involving the collision of two cars will arrive at different conclusions of fact. Carry this concept further and watch juries in action in any case at law and the truth of this statement is self-evident.

69 Willoughby, op. cit., p. 59.

70 Judges are often so pressed for time in making their decisions that possibly philosophy is seldom used, at least not consciously.
contract is illegal, the forum probably will consider it likewise illegal. We may also concede that the court of the forum normally, in such instances, considering itself to be the best judge as to the legality or illegality of the contract, would be prone to follow its own policy determinants. It would seem logical to assume that unless the parties evade a dominant policy of a place having the most vital or natural connection with an essential element of the transaction as viewed by the forum, or unless some strong policy determinant of the forum interposes, there may be no reason why the parties should not feel free to choose a reasonable foreign law to govern their contract. In either case, public policy is the basis of the exception to our contention.

3. Applying Public Policy

Before it would be possible to apply public policy to contract situations, it would be necessary to know what is public policy and what standards are to be used to ascertain what would be a proper application of that public policy. Public policy, for all practical purposes, is no more and no less than what the forum considers is "justice." It is based upon the forum's concepts of balance in social and economic bargaining, being circumscribed by what the positive law of the state says is "just" or "legal."

71 This result may arise from several factors: (1) judges, similar to other men, often tend to follow the line of least resistance; (2) persuasive authority from foreign sources often influence the judge in his decision in a more positive manner than one would ordinarily think of judicial use of persuasive authority; (3) judges of the forum may often think that the place where the contract is made should determine the choice of law for its governance because that place is (as they may reason) its birthplace, or possibly the courts and legislatures of the place of making knew some of the peculiar facts of the matter not presently known to the court of the forum.


73 For a general discussion of this phase of the subject, see the illuminating articles by Professor Cook entitled "The 'Validity' of 'Contracts'," 31 Ill. L. Rev. 143 (1936), and "The 'Validity' of 'Contracts': The 'Intention' of the Parties," 32 Ill. L. Rev. 899 (1938), and 34 Ill. L. Rev. 425 (1939).
However, whether a law governing a contract is "moral" or "immoral," "legal" or "illegal," it must always "run the gauntlet" of the public policy of the forum. There are writers who believe that it may also include the public policy of the place of making, or of other spatial contacts of the contract. Here, we are concerned primarily with how far the public policy of the forum may be permitted to affect the law of a conflict-of-laws contract. To say the least, the scope of the forum's public policy is contentious. And it may be assumed that even though the forum may look to the public policy of the place of, what it considers, the most vital or natural connection of an essential element of the transaction to see if the law chosen by the par-

74 Lorenzen, "Territoriality, Public Policy and The Conflict of Laws," 33 Yale L. J. 736 (1924), discussing public policy, comments to the effect that: "The correct mode of approach to this subject would strip it of all fictions and deal with all phenomena a posteriori. Thus viewed, we find that each sovereign state can determine the rules of the Conflict of Laws in accordance with its own notions of what is just and proper, and so far as the individual states of this country are not bound by some constitutional provision, they have the same power . . . In dealing with cases involving foreign elements the court will take into consideration the needs of international trade and the requirements of an increasing intercourse between states and nations. In certain cases, where the operative facts connect the case with some foreign state or country, it will conclude that the promotion of the above ends requires the application of 'foreign' law. In other cases, in which the 'foreign' law is so far opposed to the local law as to shock the conscience of the court, it will determine the case with reference to the local rule . . . If the situation is one admitting of the application of 'foreign' law, the choice of the rule to be applied will be determined again in many instances by general social and economic considerations. For example, if the question relates to capacity, a state may conclude that the principal interest involved is the protection of its citizens or of persons domiciled within its territory, wherever they may be . . . On the other hand, it may conclude that its principal interest in the matter is the security of local transactions . . . Whatever the point or points of contact chosen by the lex fori, special situations may require the application of the local rule . . . Anglo-American courts, it is submitted, have developed the rules of the Conflict of Laws in the main, though not always consciously, in the manner just outlined."

75 See Rabel, op. cit., Vol. 2, pp. 556-7, where the author, citing from Nussbaum, "Rise and Decline of the Law of Nations Doctrine in the Conflict of Laws," 42 Col. L. Rev. 189 (1942), at p. 198, states: "Nussbaum encourages the courts to a more uninhibited use of the public policy doctrine on the ground of local conceptions of the conflict of laws. In his opinion, the tendencies against public policy were caused by 'liberal' and international-minded illusions and still more by 'dogmatic' preferences." Rabel himself, op. cit., Vol. 2, pp. 558-9, defines the problem of public policy as follows: "The familiar formulas, declaring the priority of 'public policy law of the state and morality' or reservations of 'imperative laws and good morals' are too vague and comprehensive. Others, more modestly referring to public order and good morals, are exploited far beyond their liberal meaning. If you establish a conflicts rule on the premise that a certain situation of living should be governed by a certain foreign law and at the same time declare that this same situation under unspecified conditions may require resort to the law of the forum, you have indeed deprived the conflicts rule of its legal character and reverted to the fabulous 'comites gentium,' which negatived legal rules of international behavior and left every decision to uncontrollable courtesy."
ties is in conflict with it, yet, in so doing, the forum is not actually applying a foreign public policy, but is applying that which it has adopted from the foreign jurisdiction into its own norm. Normally, the forum’s public policy may be presumed to apply only to domestic contracts unless it is clear and convincing that the law of the forum has a broader scope. Since it is to be assumed that societal interests in the world at large are to be benefited, rather than retarded by upholding the validity of contracts, the burden of proof should be upon those who allege that the forum’s law is broad enough in scope to impede conflict-of-laws contracts. Philosophically, it seems a mystery why the laws of one state, here the state of the forum, should be permitted to govern the legal consequences flowing from a contract made primarily for the benefit of the immediate parties unless those parties have expressly stipulated for that law. It may be repeated that “just laws” do not repose in any one nation of the world.

The laws of the forum, however, may refuse the enforcement of contractual obligations when the obligations are obnoxious to the forum’s sense of “fair play” or “morals.” Particularly is this the case when it is remembered that the court of the forum, as is true in any state, must enforce the laws of its own jurisdiction. But the question remains, how is the court of the forum to determine the extent of the obnoxiousness in the enforcement of its own public policy on conflict-of-laws contracts? What norms or standards are to be used? Unless there is some certainty in these norms, if they do exist, we are likely to find one court in a state finding enforcement of a conflict-of-laws contract impossible and another court within the same state viewing it differently. In any event, the forum’s policy determinants should not be used as a screen for arbitrary judges. Law must be as certain as it is humanly possible to make it

76 See ante, note 34.
77 See ante, note 74.
78 Ibid. Of course, as heretofore mentioned, the action of the forum is subject, in the United States, to constitutional provisions of due process and full faith and credit.
certain in order that parties to conflict-of-laws contracts may be able, with some degree of predictability, to know what the law is before the court renders its decision.

4. The Problem Of Fraudulent Evasion

In any consideration of the central problem, one will come in contact with several expressions used on occasion by courts as well as by authors. Such expressions as “good faith,” “legal,” “illegal,” “moral,” “immoral,” “fraudulent evasion,” “bona fide,” and “non-bona fide” have no intrinsic meaning of their own. In order to have a meaning they must be qualified or defined in their context so that one can ascertain in what sense they are being used. To use them otherwise is to adopt weasel words that have no meaning. And yet some of the courts and writers use these terms without giving them a proper perspective. It would appear, therefore, that one must always ask the question, is not the court, or the writer, using such terms as an “escape clause” for what is actually meant? Is not the meaning this: has the law chosen by the parties the most natural or vital connection with some essential element of the transaction as viewed by the forum? In asking this question the court, or the writer, is looking for a policy determinant of the most vital contact element to see if it is in conflict with the law as chosen by the parties. For the forum, in the name of “justice” as it sees the meaning of “justice” is more or less at liberty to find this or that place the “most vital contact” of the contract so as to fit its decision with what it deems “just.”

So, if there is conflict between the law chosen by the parties and what the forum views as the law of the most vital contact of an essential contract element, then the forum may strike down the agreement. Its reasons for so doing may be legion. It may view the parties as economically upon an unequal plane so that there is no freedom of contract in the first instance. It may view the agreement as “immoral” and contrary to a strong policy determinant of the forum or of the law of a place, as viewed by the forum, having the most natural or vital connection with the
agreement. Public policy concepts are so broad that they may be made by the forum to cover a "multitude of sins" that "flesh is heir to."

In any event, we may begin the discussion of fraudulent evasion with the premise that "any law" of "any state" which is compulsory on the parties must be obeyed by both the parties and the courts of the state administering that law. The question remains, what is, and when is there, fraudulent evasion of the laws of the states by the parties? Another question of like import is what laws are compulsory on the parties to conflict-of-laws contracts? Certainly, not all of the laws of the parties' states are compulsory in conflict-of-laws contracts.

What standards are to be used in determining this so-called fraudulent evasion? Likewise, what standards are to be used to determine that a state's laws are compulsory on the parties? If the evasion is not against some policy determinant of the law of a place having the most vital or natural connection with some essential element of the transaction there can be little dispute as to the answer to the first question. Such evasions are not deemed fraudulent unless there is also a strong public policy of the forum violated by the chosen law. In such a case, the forum may possibly find some pretext to void the agreement. State laws, however, should not generally be invoked to impede conflict-of-laws contracts. But by what means does the forum

79 At best, it would appear that the expression "fraudulent evasion" is but an "escape clause" used by the forum to fit its decision to its definition of what is "just." It may be assumed that when the parties choose the law of another state to govern their contractual relations that they do so intentionally to evade laws which they do not wish to govern their agreement. The question is not so much whether they have intentionally evaded the laws of a state having the most vital contacts with an essential element of the transaction, as the forum views it, but whether it is improper for them to do it. If there is duress, coercion, fraud, mistake, unequal bargaining opportunity, economic oppression, or any number of other reasons why the contract should not be upheld, what is to stop the forum from using more direct corrective measures to see that there is actual freedom of contract? If, on the other hand, there is freedom of contract, what is improper in the parties choosing the law they think more nearly meets their requirements in the agreement?

80 See ante, at note 73.

determine what is the most vital or natural connection of a contract? Can all forums agree on what are the essential elements of a contract? As to the second question, it would seem that in regard to conflict-of-laws contracts, the proof should be clear and convincing that the state’s laws are compulsory, for again state laws pertaining to local contracts generally should not apply to conflict-of-laws transactions.\textsuperscript{82}

In any event, the burden of proof should remain upon those who seek to impede conflict-of-laws contracts since those contracts have more than local connections and serve more than local interests. A balance must always be maintained among the interests to be served by a conflict-of-laws contract.\textsuperscript{83} There are the interests of the immediate parties which are of primary concern to all. In addition, there are the interests of the state’s own community and that of the world community. All should be interested in conflict-of-laws contract norms of certainty, predictability, and uniformity. International transactions must not be unduly impeded by local state laws out of proportion to the interests involved.

Since the parties will normally obtain their actual reasonable expectations by their own chosen law of referral and, further, since it is to be presumed that reasonable men will not select some foreign law of referral without a justifiable reason, and in no case an unreasonable foreign law, it may be assumed that the law expressly stipulated by the parties should be permitted in the interest of all.\textsuperscript{84}

5. Unreasonableness of Burden on Forum

It has been said that the expressly stipulated law chosen by the parties to govern their contracts may add an undue burden on the forum to ascertain and apply the law of the parties.\textsuperscript{85} It would seem possible that if any of the other means used by

\textsuperscript{82} See ante, at note 73.

\textsuperscript{83} See ante, at notes 73-4.

\textsuperscript{84} Ibid.

\textsuperscript{85} Cook, op. cit., p. 412 et seq.
the courts, such as the place of making, were rigidly applied, it might be at least as likely, if not more so, that the law of the place governing the contract might be that of Nepal or some other inaccessible place as it would be if the parties were left to choose their own law. Parties to contracts being reasonable men, is it likely that they would seek out an unreasonable or an inaccessible foreign law to govern their contract?

In addition, if the law chosen should superficially seem remote, is it likely, in the mid-twentieth century, that the job of ascertaining and applying the law of any reasonable reference so chosen by the parties would entail undue strain on the court of the forum? Adequate foreign-law reference libraries are now to be found in many areas and, where these may be lacking, the deficiency can be made up by resort to the library loan services existing in many institutions of higher learning.

6. Use of an Expressly Stipulated Intent

Little space will be devoted here to a discussion of the problems, if any, to be generated under the autonomy theory, one that allows parties to make use of an expressly stipulated intention as to the law which they wish applied to their agreements, for the point has been covered in detail in the other sections of this paper. It does seem essential, however, to summarize the advantages of the autonomy theory in order to give weight to what follows, particularly so since the autonomy theory is conducive to certain results.

86 As the other sections of this paper indicate the arguments for and against the autonomy theory, all that is needed here is a summary thereof.

87 The late Professor Cook, in his article entitled "'Contracts' and the 'Conflict of Laws': 'Intention' of Parties," 32 Ill. L. Rev. 899 (1938), at pp. 919-20, could see no "theoretical or practical objections to giving effect to the 'intention' of the parties when: (a) that 'intention' is expressed in words; (b) the choice of law is limited to the 'law' (domestic rule) of some state with which the transaction has a substantial connection; and (c) there is no reason of public policy which indicates a contrary decision." I have shown why, in my opinion, the "most vital and substantial contact" theory itself is rather mathematical in its rigidity. It is also illogical in relation to its evaluative process of what is the most vital and substantial contact. Reasonable men seldom see the same set of facts in an identical manner.
First, the theory provides, in general, for the fulfilment of the "actual"\textsuperscript{88} reasonable expectations of the parties to the contract.\textsuperscript{89} Second, the courts of the forum are likely to be less burdened in the ascertainment and application of the specific law chosen by the parties than in the use of some more rigid mathematical formula, such as, for instance, the place of making theory. Third, it is unlikely that business men would often evade the laws of their own states by the choice of a foreign reference law. Fourth, any and all objections that may be weighed against the autonomy theory must be weighed in the scales of social values. These values relate to the immediate parties, the state or states of the parties in the local state community, and the world societal interests. Since upholding the validity of contracts seems to be conducive to these three interests, it is felt that any state by impeding conflict-of-laws norms of certainty, predictability, and uniformity in interstate and international transactions should pause to see if its own local interests outweigh the other values.

In addition to the foregoing, the autonomy theory would be conducive to other results. Thus, fifth, policy determinants of the

\textsuperscript{88} Llewellyn, "What Price Contract?—An Essay in Perspective," 40 Yale L. J. 704 (1931), at pp. 709-10, says: "The other end of the development lies in a credit economy in which bargains and promises are so much the normal course of dealing that reliance on them is a matter of tacit presupposition; to which is to be added: in a society in which intervention of legal officials when called upon is rather expected than otherwise. The legal approach then is, fundamentally: a bargain or promise is enforceable unless reason appears to the contrary." Austin, Lectures on Jurisprudence (John Murray, London, 1873), 4th Ed., Vol. 2, p. 939, declares: "A promise is binding because of or account of the expectations excited in the promisee." Holland, The Elements of Jurisprudence (Clarendon Press, Oxford, 1906), 10th Ed., p. 253, also concludes that, when the law enforces a contract, it does so "to prevent disappointment of well-founded expectations." Notice, however, that Holland does not here indicate the state whose law is so invoked in the enforcement process.

\textsuperscript{89} Pound, An Introduction to the Philosophy of Law (Yale University Press, New Haven, 1922), pp. 236-7, also provides much information on the reasons why, in human society as a whole, and not as confined to any one state, promises should be kept. He there states, in part: "Wealth, in a commercial age, is made up largely of promises. An important part of everyone's substance consists of advantages which others have promised to provide for or to render to him; of demands to have the advantages promised which he may assert not against the world at large but against particular individuals . . . If this is not secured, friction and waste obviously result, and unless some countervailing interest must come into account which would be sacrificed in the process, it would seem that the individual interest in promised advantages should be secured to the full extent of what has been assured to him . . . Hence, in a commercial and industrial society, a claim or want or demand of society that promises be kept and that undertakings be carried out in good faith, a social interest in stability of promises as a social and economic institution, becomes of the first importance."
forum should be strictly interpreted in the light of the advancement of international contractual transactions through the validating of contracts. Sixth, the simplicity in the handling of conflict-of-laws contracts by means of the autonomy theory, which fixes some definite law or laws as the governing law of the contract, is much to be desired over the inflexible and often highly illogical and artificial means used at present by many courts. Seventh, it is highly unlikely in the mid-twentieth century that any one state is the sole depositary of just laws. When the argument is advanced that the law of the domicil or the laws of some other state are more interested in seeing that justice is done than the law of the place chosen by the parties, we may place the burden of proof on those who so allege it. The law chosen by the parties may on occasions be more sensitive to fair dealings and moral concepts than even that of the domicil of the parties. Eighth, the "newness" of legal theories and the failure to use them because they are new, should not be permitted to retard the advancement of any form of science or of life itself.

It may be doubted that a Beale would have made a "good" Columbus in the matter of either discovering or using new methods in this area of law. It is also true that the autonomy theory still bears the mark of "newness" in the United States. But that fact is no indication that the theory is not worthy of at least a trial. Under it, the law chosen by the parties, not being a law of chance dependent on either judicial decision or party location at the time the contract is made, is both flexible and ready to meet the changing needs of the social structure. On

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90 A further answer to the "evasion" argument is provided by Professor Wolff in his article entitled "Problems of Public and Private International Law," Grotius Society Transactions for the Year 1949, Vol. 35, p. 143. He notes, at pp. 148-9, that the connection "of a single contact with the chosen foreign legal system often remains invisible if we look only to the single contact; but it becomes manifest if we study the universal economic development of a country of which the single contact forms only a tiny part." He also suggests that if the parties litigate in an English court it is always possible for English law to be applied under the procedural rule which treats foreign law as a matter of fact open to stipulation as any other fact. In a case where the foreign law is stipulated as being identical with English law, the English judge is bound thereby. If such "innocent" subterfuge may be used to permit autonomy, why is it improper when frank, honest and direct means are used? Are we not, then, building mountains out of mole hills by suggesting that an autonomous resort to the law of one state could ever be a fraud upon the legal system of some other state?
principle, then, but subject to reasonable impediments of the laws of the states of the parties in interest and the policy determinants of the law of the forum, there would seem to be no impelling reason why contracting parties should not be permitted reasonably to choose the law they desire to govern their agreements, provided they suitably express their stipulated intent.

(To be continued)