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THE CONNECTING AGREEMENT

A Study In Comparative Conflict Law

S. A. BAYTCH*

INTRODUCTION

I

Parties entering into legal transactions usually are not concerned with the question of what law will be applied, or of what law they prefer to apply. However, there are numerous instances, especially those involving international transactions, where parties do not feel reasonably sure whether domestic or foreign law will be applied by courts should litigation arise. To prevent such uncertainty, parties resort to self-help and, by mutual consent, add a clause to their main arrangement (*basic transaction*) which establishes a contact (*connecting agreement*) with the legal system they want to apply (*lex voluntatis*). This occurs most frequently in standardized contracts¹ relating to transportation,² banking,³ marketing⁴ and many others.

In all fairness such undertakings by parties must be understood as an eloquent indication of deficiencies of the present legal systems to cope satisfactorily with problems arising out of the ever growing intercourse between nations.⁵ In view of this state of affairs it seems to be a fair guess that the parties' choice of law is here to stay as a rational and uniform device to solve conflict problems in this important segment of the conflict law.

The problem of the connecting agreement is as old as the conflict law itself.⁶ It is therefore not surprising to find that the questions involved

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1. 2 RABEL, *THE CONFLICT OF LAWS, A COMPARATIVE STUDY* 376 (1947).

2. E.g., the United States Lines Co. passenger ticket contains the following clause: "All questions arising under this contract shall be decided according to the laws of the United States."

3. See *Rex v. International Trustee for the Protection of Bondholders* [1937] A.C. 500.

4. "All questions arising under this agreement on the credit issued in connection herewith shall be determined according to the law of the State of New York," *Charavay & Bodwin v. York Silk Mfr. Co.*, 170 Fed. 819 (1909). A direct (car) dealer agreement quoted in *Cane v. Chrysler Corp.*, 80 F. Supp. 360 (1948), reads that it "shall be interpreted and construed according to the laws of the State of Michigan."

5. Note, *Commercial Security and Uniformity Through Express Stipulation in Contracts as to Governing Law*, 62 HARV. L. REV. 647 (1949).

6. For history consult LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAWS* 269 (1947); 1 LAINÉ, *INTRODUCTION AU DROIT INTERNATIONAL PRIVÉ, CONTENANT UNE*

have been profusely discussed by writers,⁷ jurists and legislators. Nevertheless, there still seems to be a need for additional research. First of all, an isolation of the phenomenon involved promises to shed new light on many aspects now obscured by confusion. On the other hand, a consistent separation of the effects of such an agreement on the conflict level from those on the level of the application of the law so chosen seems more desirable than ever.⁸

II

Before entering into a discussion of the connecting agreement, it seems appropriate to clear the field of some phenomena which are similar in their effects, but which should not be confused with the object of this study. This need will be evident the moment it is realized that the underlying aim, viz., the choice by parties of the legal system applicable to a transaction may be achieved in different ways. Not only is there the direct agreement between parties expressly naming the law they want to apply, the connecting agreement. There are other indirect methods as well, such as (a) creation of other suitable contacts, (b) incorporation of selected legal rules into the transaction and (c) submission of the transaction to an otherwise incompetent court.

Parties to a transaction may influence or even decide the question of the law that will apply. This may be done by adroitly manipulating those factual circumstances of a transaction which are decisive *contacts*, according to the controlling conflict law, in such a way as to make them point toward the desired legal system.⁹ For example, parties will enter into their contract within a country, the law of which they want to apply. This is done in the expectation that the court will apply the rule of the

ETUDE HISTORIQUE. . . (1888); 2 NEUMEYER, *DIE GEMEINRECHTLICHE ENTWICKLUNG DES INTERNATIONALEN PRIVAT-UND STRAFRECHTS BIS BARTOLUS* (1916); MEIJERS, *L'HISTOIRE DES PRINCIPES FONDAMENTAUX DU DROIT INTERNATIONAL PRIVÉ* . . . , 49 *RECUEIL DE COURS* 548 (1934); and MOSER, *VERTRAGSABSCHLUSS, VERTRAGSGÜLTIGKEIT UND PARTEIWILLE IM INTERNATIONALEN OBLIGATIONENRECHT* 129 (1948).

7. A list of significant contributions should include: CALEB, *ESSAI SUR LE PRINCIPE DE L'AUTONOMIE DE LA VOLONTÉ EN DROIT INTERNATIONAL PRIVÉ* (1927); HAUDECK, *DIE BEDEUTUNG DES PARTEIWILLENS IM INTERNATIONALEN PRIVATRECHT* (1931); Wigny, *La règle de conflit applicable aux contrats, une solution transactionnelle*, 73 *REVUE DROIT INTERN. LÉGISL. COMP.* 677 (1933); NEUMER, *Die Anknüpfung im Internationalen Privatrecht*, 8 *RABELS ZTSCHR.* 81 (1934); BATIFFOL, *LES CONFLITS DE LOIS EN MATIÈRE DE CONTRATS* (1938); COOK, "Contracts" and the Conflict of Laws: "Intention" of the Parties, 32 *ILL. L. REV.* 899 (1938), and *An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws*, 37 *ILL. L. REV.* 418 (1943); MOSER, *op. cit. supra* note 6, and recently Yntema, "Autonomy" in Choice of Law, 1 *AM. J. COMP. L.* 341 (1952).

8. Documentation is available in MAKAROW, *DAS INTERNATIONALE PRIVATRECHT DER EUROPÄISCHEN UND AUSSEREURPÄISCHEN STAATEN* (1929); MEIJERS, *RECUEIL DE LOIS MODERNES CONCERNANT LE DROIT INTERNATIONAL PRIVÉ* (1947) and in Yntema's recent article, 345-348. Comparative law data are best collected in 2 *RABEL, op. cit. supra* note 1, at 357.

9. "Unechte Verweisung" according to WIDMER, *DIE BEDEUTUNG DES MASSGEBLICHEN RECHTS IM INTERNATIONALEN VERTRAGSRECHT* (1944). Westlake's designation of such maneuver as "to fix the situs of the contract, at a certain place" was adopted in *Seeman v. Philadelphia Warehouse*, 274 U.S. 403 (1927).

place of conclusion and will hold the law of that place controlling. Such adaptation of contacts, staged with the intent to mold them in a manner which will make the chosen law applicable, are usually discussed by courts where these manipulations indicate a fraudulent intent (*e.g.*, evasion of usury statutes).¹⁰

In many cases parties dispense with such actions and state in their contract simply that it "shall be held and considered at all times and places to have been made in the city of . . ."¹¹ Such an agreement on a fictitious contact—in this case the place of conclusion—may be dealt with by courts in different ways. One approach is to accept the fictitious contact at its face value and, by disregarding the parties' probable intent hidden behind such language, give it only such effect as it is due according to the applicable conflict law. That means that in case the court should adhere to the rule of the place of performance, a fictitious place-of-conclusion contact would be disregarded. The second solution is to dismiss fictitious contacts entirely and determine the law applicable by using contacts as they really exist (the law of the place where the contract was in fact concluded). A third possibility remains—to interpret the language of the contract creating the fictitious contact as indicating the parties' intent to make the law of such place applicable. This result was reached in the case just cited.¹²

There is still another way to make an otherwise inapplicable law operative in a given transaction. This may be done by simply including the text of such law as a part of the very contents of the transaction, like any other contractual provision. Such *incorporation*¹³ of otherwise inapplicable legal rules does not decide the conflict question, *i.e.*, what legal system will control the transaction as a whole.¹⁴ This law is to be determined according to the conflict law applicable and, as a rule, is not decided by the mere insertion of legal rules into the transaction, in favor of the respective legal system. An exception exists where the court finds such incorporation to be a sufficient indication of the parties' intent¹⁵ to subject their transaction to the legal system from which they borrowed the rules.

10. See 2 RABEL, *op. cit. supra* note 1, at 408.

11. *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551, 556 (1904).

12. *Ibid.*

13. This phenomenon is termed "transformation de dispositions légales en dispositions conventionnelles" (LEWALD, *RÈGLES GÉNÉRALES DES CONFLITS DE LOIS* 116 [1941]) and "Übernahme des Inhaltes der abstrakten ausländischen Norm in den konkreten inländischen Vertrag" (LEWALD, *DAS DEUTSCHE INTERNATIONALE PRIVATRECHT* 518 [1928], "recezione negoziale delle norme" MORELLI, *ELEMENTI DI DIRITTO INTERNAZIONALE PRIVATO* 43 [1946] and also Perassi (20 *REVISTA DIR. INTERN.* 519 [1928]); "internrechtliche Vertragsausfüllung" (NUSSBAUM, *DEUTSCHES INTERNATIONALES PRIVATRECHT* 247 [1932]), "materiellrechtliche Verweisung" (WIDMER, *op. cit. supra* note 9, at 60).

14. See DICEY, *CONFLICT OF LAWS* 587 (1949) and cases cited. Contra 2 RABEL, *op. cit. supra* note 1, at 392, because of allegedly undesirable results.

15. In *Foubert v. Turst*, 1 Brown Parl. Cas. 129 (1703), the court upheld a connecting agreement referring to the Custom of Paris, by interpreting it as an incorporation

Such interpretation, however, disregards the fact that parties abstained from entering into a full-fledged connecting agreement.¹⁶

It seems appropriate to add that, in situations of a mere insertion of otherwise inapplicable rules, significant changes occur with respect to such rules. First, by being transplanted into a transaction where they otherwise would not apply, such legal rules shake off their varying degrees of effectiveness. Imperative rules become pliable.¹⁷ Second, subsequent changes in the legal system after which such contractual dispositions have been patterned do not affect the corresponding contract provisions, except in cases of an express or implied agreement by parties to that effect. Finally, such incorporated rules will be given effect only to the extent that they are consistent with the imperative rules of the law controlling according to the conflict law applicable.¹⁸ In the light of this analysis it appears untenable to identify the mere insertion of specifically stated rules borrowed from a legal system otherwise inapplicable, with the parties' choice of law, i.e., the connecting agreement, the latter being a complete substitute for a contact designating the controlling legal system. Nevertheless, it is still customary with many courts and writers to speak of every law applicable—

in the sense that it means "as much as if the Custom had been recited at large" which "by no means involved an attempt to introduce foreign laws."

16. From the insertion of imperative rules, a connecting agreement in favor of that legal system must not be inferred, German Reichsgericht, April 11, 1933 (8 RABEL'S ZTSCHR., 1934, Söndh. 42).

The difference between a mere insertion of rules and the connecting agreement is well established in some foreign jurisdictions. The French Code Civil, art. 1390 (1804), for example, disallows a general reference ("stipuler d'une manière générale") in marriage settlements to previous statutes, etc., leaving it open to parties to incorporate such provisions by way of a complete insertion. The Italian Codice Civile, Art. 1381 (1865), and the new, Art. 161 (1942), likewise prohibiting a connecting agreement in favor of some otherwise inapplicable law ("patuire in modo generico"), permit parties, nevertheless, "enunciare in modo concreto il contenuto dei patti", i.e., to incorporate any provisions of otherwise inapplicable rules. It is interesting to note that such restriction was felt to be unreasonable since the Corte di Cassazione, June 15, 1940, 8 GIURISPRUDENZA COMPARATA DIRITTO INTERN. PRIVATO 216 (1942) characterized the underlying marriage settlement as an obligation in order to make applicable Art. 6 of the Preliminary Dispositions (1865) giving connecting contract full effect. See Morelli, *Legge regolatrice del contratto di matrimonio e volontà delle parti*, *id.* at 219, and Perassi, *Rapporti patrimoniali fra coniugi e volontà delle parti*, 34 RIVISTA DIR. INTERN. 111 (1942).

It is interesting to note the recent French draft on conflict law (1951), see 1 AM. J. COMP. L. 422 (1952), according the connecting agreement full effect with respect to marriage settlements by providing that "The provisions of the marriage settlement relative to property are governed by the law chosen by the contracting parties" (Art. 38), without referring to limitations expressly stated for contracts in general (Art. 57, see *infra*, note 45).

17. On that important distinction between *ius cogens* (imperative, rigid, compulsory law) and the *ius dispositivum* (pliable, facultative, subsidiary, stop-gap law), no more unknown to our statutory law, see Rheinstein, Book Review, 37 COL. L. REV. 327, 329 (1937) and 10 U. OF CHI. L. REV. 466, 470, note (1943), and Lenhoff, *Optional Terms (ius dispositivum) and Required Terms (ius cogens) in the Law of Contracts*, 45 MICH. L. REV. 39 (1946).

Exceptionally the effect described is advocated with respect to the *lex voluntatis*, e.g., Cour de Cassation, May 15, 1935, 2 REV. CRIT. 463 (1936), with annotations by Niboyet, where the court held that the imperative rules of the German law applicable according to a connecting agreement became pliable (see also note 91).

18. Accord, Corte di Cassazione, Jan. 21, 1928, 20 RIVISTA DIR. INTERN., 514 (1928)

on whatever ground—as being incorporated into the contents of the respective transaction.¹⁹

Finally, parties may express their choice of law by agreeing to submit their transaction to a judicial jurisdiction chosen with a view to its conflict law, and through it to the substantive law so designated.²⁰ Such *submission to jurisdiction* (prorogation), once established within the jurisdictional rules of the court, makes applicable not only procedural rules of such court, but also the court's conflict law. In that manner parties may choose the substantive law applicable insofar as the choice coincides with the alternatives contained in the conflict law of the *forum prorogatum*.²¹ Not only do conflict rules vary from jurisdiction to jurisdiction, offering parties a rather limited leeway for their choice of the intended substantive law, but also there are jurisdictions holding that a prorogation of a jurisdiction implies a submission to its substantive law as well.²² It is interesting to note that

recognizing the effect of inserted otherwise non-applicable rules "provided they are, regardless of the fact that they correspond to a foreign law or custom, not contrary to public policy and, more general, to some imperative provision of the Italian law."

19. Writers even now consider the connecting agreement to be but an insertion of intended rules contained in the *lex voluntatis* (e.g., "The reference to the selected law is merely a shorthand way of incorporating statutes and decisions which would clearly control if written verbatim into the contract", 62 HARV. L. REV. 649 [1949]). Many courts still use that language to designate a connecting agreement, e.g., "incorporating the provisions of any foreign law within their contract" (Jacobs, *Marcus Co. v. Crédit Lyonnais*, 12 Q.B.D. 589 [1884]), or "les parties se sont ainsi appropriées des dispositions desdites lois en les incorporant aux stipulations intervenues entre elles" (Belgian Cour de Cassation, Feb. 4, 1936, 3 NOUVELLE REVUE 158 [1936]). The same goes for our courts, e.g., "The law we are in search . . . is that which the parties have . . . incorporated into their contracts as constituting its obligation". *Pritchard v. Norton*, 106 U.S. 124 (1882), or, ". . . parties . . . may by agreement incorporate into the contract the laws of that State and make its provisions controlling upon both parties . . .", *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551, 554 (1904). That language was adopted in rather rare cases by the Reichsgericht, as e.g., in its decision Feb. 20, 1913, J.W. 553 (1913) where the court held that a connecting agreement has "basically no other meaning than that parties instead of inserting all additional rules intended to be applicable, into their contract, make them a part of their contractual arrangement by a reference relating to the law applicable."

It is to be noted that the doctrine of incorporation is resorted to by the adversaries of the connecting agreement, e.g., "It is quite true that civilized law will generally make part of their obligations whatever the parties choose to incorporate into their promises, foreign law like anything else. . . . The parties cannot select the law which shall control, except as it becomes a term in the agreement, like the by-laws of a private corporation." *Louis Dreyfus v. Patterson Steamship Co.*, 43 F.2d 824, 827 (1930). This doctrine was repeated of course in *Gerli & Co. v. Cunard S.S. Ltd.* 48 F.2d 115, 117 (1931), saying 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."

20. Syke, *Agreement in Advance Conferring Exclusive Jurisdiction on Foreign Courts*, 10 LA. R. REV. 293 (1950); RIETZLER, *INTERNATIONALES ZIVILPROZESSRECHT* 293 (1949); NEUNER, *INTERNATIONALE ZUSTÄNDIGKEIT* 17 (1929); REU, *DIE STAATLICHE ZUSTÄNDIGKEIT IM INTERNATIONALEN PRIVATRECHT* (1939); BERLINER, *VEREINBARUNGEN ÜBER DEN GERICHTSSTAND IM INTERNATIONALEN RECHTSVERKEHR* (1936).

21. NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 202 (1943); Nolde, *Anwendbares Recht und Gerichtsstand im Internationalen Privatrecht*, ZTSCHR. VERGL. RW 292 (1941).

22. E.g., English law. Cf. *N.V. Kwik Hoo Tong Handel Maatsch. v. James Finley* [1927] A.C. 604; *Ocean Steamship Co. v. Queensland* [1941] 1 K.B. 402. *Contra*: Reichsgericht, 6 GIURISPRUDENZA COMPARATA DIR. INT. PRIV. 174 (1940); Eckstein,

this jockeying to achieve the applicability of a particular law is expressly prevented by the Convention on International Air Transportation (Warsaw, 1929) since Article 32 provides: "Any clause contained in the contract and all special agreements entered into before the damage occurred, by which the parties purport to infringe the rules laid down by this Convention . . . by altering the rules as to jurisdiction, shall be null and void."²³

THE CONNECTING AGREEMENT

III

One of the foregoing sections of this study contented itself with merely indicating the dualism between the basic transaction and the connecting agreement. There are involved, in like manner, two legal systems competing for control. Let us start our analysis with the latter aspect.

The legal system chosen by the parties' agreement may or may not coincide with the law that would apply according to the controlling conflict law in absence of such an agreement. Accordingly, in situations of the latter kind there will always be two legal systems in the running. One will be chosen by parties' agreement; and the other will be ready to be applied where there is no such parties' agreement, the *otherwise applicable law*.²⁴ So in a jurisdiction where the usual conflict rule provides that the law of the place where the contract is made shall apply, "unless the contracting parties clearly appear to have some other law in view,"²⁵ the law otherwise applicable will be the law of the place of contracting. The otherwise applicable law is by no means one and the same throughout the legal world however. There is no general conflict rule relating to contracts and supported by one or another pet contact, as for example Beale's place of contracting or Zitelmann's nationality of the debtor. On the contrary, every jurisdiction applies its own conflict law and will determine the otherwise applicable law according to such rules. Consequently, with regard to one and the same transaction there will be, in principle, as many otherwise applicable laws both domestic and foreign, as there are different conflict law systems in force.

Zuständigkeit und Gerichtsbarkeit, die Prorogation ausländischer Gerichte, id. at 176.

The fact that foreign law is made applicable does not deprive Italian courts of their jurisdiction, Corte di Cassazione, July 19, 1940, 8 GIURISPRUDENZA COMPARATA DIR. INT. PRIV. 232 (1942).

23. 49 STAT. 3000. (1935).

24. That legal system is termed "predetermined law", 2 RABEL, *op. cit. supra* note 1, at 394, "controlling" or "indicated law", Yntema, *supra* note 7, "an sich massgebendes Recht", MELCHIOR, "DIE GRUNDLAGEN DES DEUTSCHEN INTERNATIONALEN PRIVATRECHTS" (1932), "das an sich anwendbare Recht", LEWALD, *op. cit. supra* note 11, "la loi normale compétente" (Swiss representative at the Hague Conference, see ACTES, 278).

The very existence of such law is denied by some writers, e.g., NUSSBAUM, DEUTSCHES INTERNATIONALES PRIVATRECHT 244 (1932) ("Aber ein solches dem Parteiwillen präexistentes Vertragsstatut gibt es nicht"); likewise MOSER, *op. cit. supra* note 7, at 179. In the affirmative Kayser, *L'autonomie de la volonté en droit international privé* . . ., 58 CLUNET 39 (1931).

25. *Liverpool & Great Western Steam Co. v. Phoenix Ins. Co.*, 129 U.S. 463, 490 (1889).

One of the main problems involved in the discussion of the parties' choice of law concerns the relation between the otherwise applicable law on the one hand, and the *lex voluntatis* at the stage of the latter's application on the other. To sketch the problem only briefly, reserving a comprehensive discussion for later (*infra* XI), the otherwise applicable law performs a two-fold function. Not only does it serve as a stopgap law whenever parties do not designate the applicable law, but also the same law is made paramount to the *lex voluntatis* in many jurisdictions. The idea of a paramount omnipresence of the otherwise applicable law dominates the reasoning of those courts and writers who are unwilling to recognize any additional conflict effects of the connecting agreement over and above the limits set by the otherwise applicable law, *i.e.*, of a mere incorporation.

The second problem, the *symbiosis* of both the connecting agreement and the basic transaction, proves no less significant. It seems to be a fair statement that the connecting agreement is similar to an agreement of prorogation or arbitration. The prorogation is intended to establish the jurisdiction of an otherwise incompetent court, and the arbitration clause serves to create a basis for an otherwise unauthorized private adjudication. The connecting agreement operates in a similar function in the area of the conflict law, *i.e.*, to make an otherwise inapplicable legal system apply by force of a parties' agreement. In both situations the main object of the agreement lies outside of the immediate substantive settlement of the basic transaction and concerns itself with jurisdictional or conflict law effects, both operating on different levels. It seems therefore appropriate to accord the connecting agreement, in a similar way, an *independent existence*²⁶ to the degree necessary to guarantee such parties' agreement effects consistent with the applicable conflict law. This degree of independence will be worked out later when specific problems are discussed (*infra* V).

IV

At this stage of discussion it seems appropriate to discuss the *nature* of the connecting agreement.²⁷ In the main, three theories have been advanced.

First, there are authors who suggest that the connecting agreement is

26. *E.g.*, Wigny, *supra* note 7, at 687; JEANPRETRE, *LES CONFLITS DE LOIS EN MATIERE D'OBLIGATIONS CONTRACTUELLES, SELON LA JURISPRUDENCE ET LA DOCTRINE AUX ETATS-UNIS* 151 (1936); HAUDECK, *op. cit. supra* note 7, at 88, and MOSER, *op. cit. supra* note 7, at 236. *Contra*: BATIFFOL, *op. cit. supra* note 7, Neuner, *supra* note 7, at 103, and Rheinstein, 16 *LAW & CONTEMP. PROB.* 136 (1951).

27. It is interesting to check the terminology used. Savigny coined the term "freiwillige Unterwerfung unter ein örtliches Recht", 8 *HEUTIGES ROMISCHES RECHT* 110 (1848); JEANPRETRE, *op. cit. supra* note 23, uses "accord sur la loi applicable", Wigny, *supra* note 7, "clause de la compétence légale"; the Swiss Bundesgericht speaks of a "Rechtsanwendungsklausel." *Dessauer v. Schweiz. Lebensversicherungs- und Rentenanstalt*, 71 *BGE* II 67 (1945). Neuner *supra* note 7, uses "kollisionsrechtliche Rechtskürung" and "Verweisungsvertrag"; GUTZWILLER, *INTERNATIONALPRIVATRECHT* (1929) "Verweisungsklausel" and WIDMER, *op. cit. supra* note 9, "kollisionsrechtliche Verweisung."

Professio iuris (Jeanpretre, Yntema) may not be correct since the term denotes a declaration by a party in an early medieval court disclosing his nationality in order to

a *conflict rule*.²⁸ That position is not believed well founded, since a conflict rule is a rule of law. The connecting agreement, containing the parties' private choice of law applicable, is no more than a parties' transaction based upon a permissive conflict rule.

Next, it is submitted that the connecting agreement is but a *localization*²⁹ of the basic transaction involved. It seems obvious, however, that one must not speak of territorial contacts where parties pointed out the law to be applied by expressly naming that country, unless one adheres to an exclusively territorialistic idea of law—and even so, nothing may be gained by emphasizing that view. It remains only to say that the effect to be given such choice depends entirely upon the controlling conflict law. Comparative data indicate that pooling different types of contacts, including the connecting agreement, does not correspond to any existing or past legal system.

The third position advanced is that the connecting agreement is a party-created *contact*³⁰ of a special transactional type, recognized by the conflict law in all situations where it applies. It is true that some striking differences are noticeable between the connecting agreement which creates a contact with a legal system to be applied, and other contacts of a territorial (*e.g.*, place of conclusion, place of tort, place where a thing is located, etc.), personal (nationality), or mixed nature (domicile). First of all, in many jurisdictions there are limitations imposed upon the contacts to be established through the connecting agreement. Only a limited number of otherwise inapplicable legal systems may be made applicable in this way (*infra* VII). These limitations obviously do not apply where other contacts operate, since they point but one way. Moreover, they are considered to be "natural" as they arise out of "unadulterated" facts of life. They do not owe their existence to parties' conflict law speculations and, consequently, cannot go astray. It is significant that while other contacts operate single-handedly, in principle, the connecting agreement as a contact appears on the scene regularly doubled with another contact—a subsidiary or even a superior one.

In the light of the foregoing discussion the following observation may be made. The connecting agreement creating a contact with the law

enable the court to apply his national law. Such declaration did not include any choice of law by the party (except in its degenerated form) nor represented a parties' agreement as to the law to be applied. Cf. 1 NEUMEYER, *op. cit. supra* note 6, at 147, and MEIJERS, *op. cit. supra* note 6, at 548. *Stipulatio iuris* (Rheinstein, *supra* note 26, at 134) sounds better.

28. Cf. NUSSBAUM, *DEUTSCHES INTERNATIONALES PRIVATRECHT* 247 (1932); Mayer, *Zur Parteiautonomie als Kollisionsnorm*, NIEM. ZTSCHR. INT. RECHT 103 (1931).

29. So BATIFFOL, *op. cit. supra* note 7, at 38, writing that "nous pensons que les parties ne choisissent pas formellement la loi applicable, elles localisent leur contrat, et le juge en déduit la loi applicable." For additional criticism, see MOSER, *op. cit. supra* note 6, at 244.

30. 1 ARMINJON, *PRÉCIS DE DROIT INTERNATIONAL PRIVÉ* 194 (1947); WOLFF, *PRIVATE INTERNATIONAL LAW* 100 (2d ed. 1950).

chosen by the parties has but one source from which it may draw its effects. This is the *controlling conflict law*, which alone will decide whether or not such an agreement will be given effect, and if so, under what conditions and to what extent. Consequently, there is no reason to hold that the parties' choice of applicable law is an *a priori* determination of the law applicable and contrary to legal logics.

V

Considered from the point of view of a given forum, its conflict law and the otherwise applicable law designated by it, the connecting agreement displays certain *dynamics* of which three types will be discussed.

A connecting agreement which, according to the applicable conflict rule, takes the basic transaction out from the domain of otherwise applicable foreign law and brings it into the realm of the forum's own substantive law falls into the group of *adhesive connecting agreements*. An example of this type would be a contract concluded abroad, and an action upon it brought in a court adhering to the place-of-contracting rule. This court would apply foreign law, but for the connecting agreement, thus making the substantive law of the forum applicable.

That type of connecting agreement is apparently favored by courts as they "will be only too glad if the parties . . . agreed that the law of that court should apply," such attitude being based on the "natural inclination of every judge to apply the law of his country."³¹ In such a situation no restrictions are imposed nor safety measures applied to preserve the eliminated but otherwise applicable foreign law. At least this is true of English law.³² In other countries³³ such agreements will have to pass the test of reasonable connection (*infra* VII). Failing to pass, they will be exposed to one kind of restrictions or another in favor of the otherwise applicable law. They may even be controlled to some specific law declared paramount to the *lex voluntatis* as well (*infra* XI). Some jurisdictions consider certain of their conflict rules to be imperative, i. e., not to be changed by parties' agreement, and will accordingly decline to relax that rigidity even in the case of adhesive connecting agreements.³⁴

The opposite result is intended in cases of *privative* connecting agree-

31. Wolff, *op. cit. supra* note 30, 422.

32. Nordenfelt v. Maxim Nordenfelt Guns Co., [1894] A.C. 535.

33. Cf. NEW YORK PERSONAL PROPERTY ACT, § 12(a) recognizing an adhesive connecting agreement concerning trusts, provided the personal property involved is situated within the state. See Cavers, *Trust Inter Vivos and the Conflict of Laws*, 44 HARV. LAW REV. 161 (1930) and LAND, TRUSTS IN THE CONFLICT OF LAWS (1940). For a similar provision relating to wills, see NEW YORK DECEDENTS' ESTATES LAW, § 47.

34. The German Kammergericht, Nov. 8, 1935, J.W. 52 (1936), declined to give effect to a connecting agreement in an adoption contract, declaring German law applicable instead of the otherwise applicable Soviet law, saying, "Even if there are foreign nationals or stateless persons involved, no reason whatsoever exists for Germany to recognize a private agreement departing from the legal rules mentioned" (i.e., from conflict law rules contained in Art. 22 and 29 of the Introductory Law to the Civil Code), since an adoption "even if considered by German law a contract, is not a common type of a contract created only by parties' expression of intentions. . . ."

ments.³⁵ The otherwise applicable law would have been, according to the conflict law of the forum, its own substantive law but for a parties' agreement making some foreign legal system applicable. In such a situation it is only natural that a much stronger opposition by the forum is to be expected.³⁶ In many jurisdictions that adversity is shown by even more penetrating controls retained in favor of the otherwise applicable domestic law.

Finally, a third situation may develop where one foreign law, applicable according to the controlling conflict law, is substituted for another foreign law by force of a connecting agreement. That type may be termed a *neutral connecting agreement*.

VI

It will be the object of the present section to observe the connecting agreement in operation. Suppose that a court has to try a case involving a sales contract concluded in Brazil, with Mexico as the place of performance, and English law is chosen by the parties.

The first question facing the court will be the determination of what law controls the very *existence* of the connecting agreement. Once the court has found that legal system and decided that a connecting agreement exists according to its substantive law, it will have to move to a second problem. It must decide, according to its own conflict law, what effect, if any, is to be given to the parties' choice of English law, and under what conditions. In case the connecting agreement meets requirements set up by the court's conflict law as to the effect of the choice, *i. e.*, establishes an effective contact with the *lex voluntatis*, that choice will be honored; and English law will be recognized as the controlling legal system. Finally, the court will apply English law according to the rules of the forum which govern the application of foreign law in general, and of foreign law as *lex voluntatis* in particular (*infra* IX).

The first question indicated, namely, according to what law will the court ascertain the existence of the connecting agreement (*e. g.*, its substantive validity, interpretation, form, mistake, fraud), may be answered in three different ways.

One suggestion considers the connecting agreement to be an independent transaction entitled to an *independent* conflict status, separated from the basic transaction. This means the court would determine the

35. GUTZWILLER, *INTERNATIONALPRIVATRECHT* 1606 (1929), calls it "Auslandsverweisung."

In *Cope v. Wheeler*, 41 N.Y. App. 303, 312 (1869), the intended effect is considered to be—importation of foreign law ("... parties ... by a mere mental operation can [not] import the law of another State into this for the purpose of altering. . . .")

Only that type of connecting agreement is adopted by the final draft for a Uniform Commercial Code (1952), see *infra* note 65.

36. Art. 1433 of the German Civil Code contains a straightforward provision denying parties the right to "establish a matrimonial regime by reference . . . to a foreign law", except in a situation to be mentioned later, *infra* note 67.

substantive law controlling the validity of a connecting agreement by following contacts displayed by the agreement (e. g., the place of conclusion of the connecting agreement). Such reasoning would most probably lead the court to apply the law of the place where the basic transaction was concluded. Consequently, it would declare as controlling a law different from that chosen by the parties as *lex voluntatis*. The controlling substantive law, however, would probably coincide with the law otherwise applicable,³⁷ except in jurisdictions adhering to the place-of-performance doctrine. That latter rule would point toward the *lex fori*, provided the court properly dismisses the argument that the place of performance of the connecting agreement is not different from that of the basic transaction.

Another alternative is to apply the law chosen by the parties, the *lex voluntatis*.³⁸ This solution is adopted by the recent Draft Convention on the Law on International Sales of Goods (The Hague, 1951).³⁹ "Conditions affecting the consent of the parties respecting the law declared applicable are determined by such law" (Art. 2, 3). That solution is recommended by pointing out that both the connecting agreement and the basic transaction will be controlled by the same law. This is open to serious objections. These may best be evaluated by considering that the connecting agreement will be given full effect under that supposition, even before establishing the existence of such an agreement, and the effectiveness of the choice of law contained in it, unless the courts are willing to adopt a *prima facie* doctrine and admit the applicability of the *lex voluntatis* on that ground. In addition, there always remains the argument that a connecting agreement is intended to create certain effects at the conflict law level in a given court; and it may achieve them only according to the court's law, including its substantive law.

The better view seems to be that the law of the forum⁴⁰ shall control the substantive requirements of the connecting agreement together with its conflict law effects. The traditional idiosyncrasy displayed by some European writers against that law has no rational grounds here.⁴¹

In passing it shall be added that some jurisdictions require the connecting agreement to be "bona fide"⁴² and legal."⁴³ According to the view

37. In favor of that law 1 RABEL, *op. cit. supra* note 1, at 85, "The prevailing view, however, is that the law governing in the absence of a settlement, controls the permissibility of the settlement, including any agreement respecting the applicable law."

38. In favor of the *lex voluntatis* e.g., Neuner, *supra* note 7 at 103; against, e.g., MOSER, *op. cit. supra* note 6, at 186.

39. For text, see 1 AM. J. COMP. L. 275 (1952).

40. MOSER, *op. cit. supra* note 6, at 189; Yntema, *supra* note 7, at 356.

41. Zitelman, Frankenstein.

42. In Perrot v. Suchard Holding the Swiss Bundesgericht (75 GBE II 57, 1949) applied American law as the *lex voluntatis*, including its provisions concerning limitation although these rules are procedural, according to the *lex voluntatis* but not the *lege fori*.

43. Andrews v. Pond, 13 Pet. 64 (U.S. 1838), etc.

here accepted these requirements must be met by standards set up by the *lex fori*. The same goes for characterization problems involved.⁴⁴

VII

As pointed out above, two stages are to be distinguished in considering the connecting agreement in operation. One is the conflict law stage when the court will have to decide whether or not an effective contact was established by the parties' agreement. The other stage is when the law so chosen is being applied. According to the scheme of this study a discussion will be undertaken now of the first aspect while the other will be postponed until later (*infra* X).

With respect to their handling of the connecting agreement in that first stage, countries will be grouped into three main classes. The first will include jurisdictions which recognize the connecting agreement as an effective contact with the *lex voluntatis*, even if they differ with respect to a more or less limited subsequent application of the *lex voluntatis*. The second group will comprise countries making the conflict law effect of such an agreement depend upon certain specified conditions. The third type will represent countries declining to recognize parties' choice of law.

The list of countries recognizing the connecting agreement contains all of Western Europe (France,⁴⁵ Germany,⁴⁶ Italy,⁴⁷ Switzerland,⁴⁸ Spain,⁴⁹

44. *Vita Food Products Inc. v. Unus Shipping Co.* [1939] A.C. 277. Cf. Cook, 34 *ILL. L. REV.* 423 (1939).

45. For cases, see DONNEDIEU DE VABRES, H., *L'ÉVOLUTION DE LA JURISPRUDENCE FRANÇAISE EN MATIÈRE DE CONFLIT DES LOIS* (1905), and DONNEDIEU DE VABRES, J., *L'ÉVOLUTION DE LA JURISPRUDENCE FRANÇAISE EN MATIÈRE DE CONFLITS DES LOIS DEPUIS LE DÉBUT DU XX^e SIÈCLE* (1937). Cf. also Kayser, *L'autonomie de la volonté en droit international privé dans la jurisprudence française*, 58 *CLUNET* 32 (1931); BATIFFOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT INTERNATIONAL PRIVÉ* 566 (1949); Delaume, *L'autonomie de la volonté en droit international privé*, 17 *REVUE CRITIQUE* 321 (1950) and 5 *NIBOYET, TRAITÉ DE DROIT INTERNATIONAL PRIVÉ FRANÇAIS* 36 (1948).

The draft for a new *CIVIL CODE* (1950) adopts the parties' choice of law in stating that "... contracts are, for their validity (conditions de fond) and their effect (effets obligatoires) controlled by the law chosen by the contracting parties with a legitimate interest in mind" (Art. 57), 1 *AM. J. COMP. L.* 424 (1952). See Houin, *Les travaux de la Commission de réforme du Code Civil*, 49 *REV. TRIM.* 34, 41 (1951). It is rather surprising to read that the draft "expressly rejects the so-called doctrine of the autonomy of the parties", Delaume, *A Codification of French Private International Law*, 39 *CAN. B. REV.* 721, 735 (1951). See also note 16 *supra*.

See the Legal Convention between France and Vietnam (1949) providing that "As regards the validity and the effects of contracts, the applicable law is that to which the parties intended to refer expressly or impliedly" (Art. 54). See Ponsard, *The Conflict of Laws and Jurisdictions in the Recent Franco-Vietnamien Agreements*, 79 *CLUNET*, 374, 447 (1951).

46. The rule of parties' choice of law was developed by courts since the *Civil Code* abstained, with purpose, from settling the problem. NIEMEYER, *ZUR VORGESCHICHTE INTERNATIONALEN PRIVATRECHTS IM DEUTSCHEN BÜRGERLICHEN GESETZBUCH* 329 (1915). E.g., "Es entspricht den für das internationale Privatrecht durch Wissenschaft und Rechtsprechung herausgearbeiteten Regeln, dass bei obligatorischen Rechtsverhältnissen für die Bestimmung des darauf anzuwendenden Rechtes in erster Linie die Einigung der Parteien beim Abschluss des Vertrages entscheidend ist", *Reichsgericht*, Feb. 12, 1936, J.W. 1321, (1926). Cf. Lewald, *Obligations en droit international privé allemand*, in 10 *LAPRADELLE-NIBOYET, REPERTOIRE* . . . 72 (1931); and WOLFF, *DAS INTERNATIONALE PRIVATRECHT DEUTSCHLANDS* 115 (1949).

47. For text, see Yntema, *supra* note 7, at 346, where the crucial part of Art.

Belgium,⁵⁰ the Netherlands,⁵¹ Denmark,⁵² Norway,⁵³ Sweden,⁵⁴ Greece,⁵⁵ and Great Britain⁵⁶ with Canada and Australia). Thailand,⁵⁷ China⁵⁸ and Japan⁵⁹ have express statutory provisions to that effect, as do Morocco⁶⁰ and the Belgian Congo.⁶¹ The United States⁶² belongs to that group though the growing emphasis on the reasonable connection doctrine (*infra a*) indicates a trend toward a qualified acceptance.

25 is omitted, namely "... provided always that there is no different intent of the parties." See McCusker, *The Italian Rules of Conflict of Laws*, 25 *TULANE L. REV.* 70 (1950); Neuhaus, *Das Internationale Privatrecht im Italienischen Zivilgesetzbuch von 1942*, 15 *RABELS ZTSCHR.* 23 (1949). For details, see Balladore Pallieri, *Il Principio dell'Autonomia dei Contratti nella Dottrina e nella Legislazione Italiana*, 1 *RIV. ITAL. DIRITTO INTERN. PRIVATO E PROC.* 148 (1931); PACCHIONI, *DIRITTO INTERNAZIONALE PRIVATO* 323 (1935). Recent cases are discussed by De Nova, *La giurisprudenza Italiana* . . . , 17 *REV. CRIT.* 341, 353 (1950).

The most discussed Art. 58 of the Commercial Code (1882) is no longer in force. For recent developments, see BALLADORE PALLIERI, *DIRITTO INTERNAZIONALE PRIVATO* 227 (1950); and MONACO, *L'EFFICACIA DELLA LEGGE NELLO SPAZIO* 218 (1952). The doctrine of reasonable connection is discussed with respect to Italian law by SETTA, *La designazione della lex contractus* in 3 *COMMUNICAZIONI E STUDI, ISTITUTO DI DIRITTO INTERNAZIONALE E STRANIERO DELLA UNIVERSITA DI MILANO* 177 (1950).

48. MOSER, *op. cit. supra* note 6, at 8 *et seq.*; also Nussbaum, *American-Swiss Private International Law*, 47 *YALE L.J.* 186 (1947). A connecting agreement in favor of American law is discussed in *Perrot v. Suchard Holding*, *op. cit. supra*, note 44.

49. Trias de Bes, *Conception du Droit International Privé* . . . , *RECUEIL DE COURS I*, 651 (1930).

50. 2 *VOS, LE PROBLÈME DES CONFLITS DE LOIS* 541 (1947); Renard, *L'Autonomie de la Volonté dans le Système Belge de Droit International Privé*, 27 *REVUE DROIT INT. LÉC. COMP.* (spec. issue 1950).

51. Offenhaus, *The Private International Law of the Netherlands*, 30 *YALE L.J.*, 109, 121 (1920); Curtius, *La Position Jurisprudentielle Néerlandaise en Matière de Loi Applicable aux Contrats*, 18 *REV. CRITIQUE I* (1951). For a recent case (1947), see 77 *CLUNET* 922 (1950).

52. Günter, *Das Privatrecht in Dänemark*, 14 *RABELS ZTSCHR.* 142 (1940).

53. Høgtun, *Om Partenes Autonomi i den Internasjonale Kontraktret*, 19 *NORDISK TIDSSKRIFT FOR INT. REV.* 139 (1950); GJELSVIK, *DAS INTERNATIONALE PRIVATRECHT IN NORWEGEN* (1935).

54. MICHAELI, *INTERNATIONALES PRIVATRECHT GEMÄSS SCHWEDISCHEM RECHT UND SCHWEDISCHER RECHTSSPRECHUNG* 284 (1947).

55. For text, see Yntema, *supra* note 7, at 346; also, Lambadarios, *Le Principe de l'Autonomie de la Volonté en Droit International Privé Grec*, 3 *REV. HELL. DROIT INT.* 95 (1950); VALINDAS, *LE DROIT INTERNATIONAL PRIVÉ DANS LE CODE CIVIL HELLÉNIQUE* 95 (1949); Nicoletopoulos, *Private International Law in the New Greek Civil Code*, 23 *TULANE L. REV.* 452 (1949); Gogos & Aubin, *Das Internationale Privatrecht in Griechischen Zivilgesetzbuch von 1940*, 15 *RABELS ZTSCHR.* 240 (1949).

56. DICEY, *CONFLICT OF LAWS* 584 (1949), also Graveson, *The Proper Law of Commercial Contracts as Developed in the English Legal System* in *LECTURES ON THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS I* (1951).

57. *ACT ON CONFLICT OF LAWS* (1939), § 13: "The question as to what law is applicable in regard to the essential elements or effects of a contract is determined by the intention of the parties to it. . . ."

58. For text, see Yntema, *supra* note 7, at 346.

59. For text, see Yntema, *supra* note 7, at 347.

60. For text, see Yntema, *supra* note 7, at 346. Cf. RIVIÈRE, *TRAITÉ DE DROIT MAROCAIN* 340 (1948).

61. For text, see Yntema, *supra* note 7, at 346. According to the *SOUTH-AFRICAN NATIVE ADMINISTRATION ACT*, 1927, § 11(2) "Where parties to a suit reside in areas where different Native laws are in operation, the Native law, if any, to be applied by the court shall be that prevailing in the place of residence of the defendant" which rule did not prevent the court in *Thompson v. Zeba* (1930) to find that there is nothing "which would preclude the parties from agreeing that the customs of the tribe of which they

International tribunals recognize the law chosen by parties' agreement as a matter of course.⁶³

A *qualified acceptance* of the connecting agreement in certain countries is based on two factors. One of them refers to the relation between the basic transaction and the *lex voluntatis* (*infra a* and *b*). The other is founded upon a specific conflict law status of the basic transaction (*infra c*).

(a) The first qualification is represented by the requirement that the basic transaction must have a *reasonable connection* with the legal system chosen by the parties. That requirement seems to gain strength in the United States⁶⁴ and is included in the recent Draft for the Uniform Commercial Code (1952).⁶⁵ On the contrary, the doctrine is repudiated in English law.

are members should apply." Later (1943) an amendment was enacted that the above rule shall apply "in the absence of any agreement between them with regard to the particular system of Native law to be applied to such suit or proceedings." Cf. LEWIN, *STUDIES IN AFRICAN NATIVE LAW* 71 (1947), and Lewin, *Conflict of Intertribal Laws*, 61 SO. AFR. L.J. 269 (1944).

62. E.g., *Liverpool & Great Western Steam Co. v. Phoenix Insurance Co.*, 129 U.S. 397 (1889); *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551 (1904). For state law, cf. 12 CORNELL L.Q. 286 (1927); 28 KY. L.J. 70 (1939); 26 VA. L. REV. 969 (1940); 40 ILL. L. REV. 165 (1945); 14 MISS. L.J. 420 (1942); 12 SO. CALIF. L. REV. 335 (1939); also LEFLAR, *A TREATISE ON THE ARKANSAS CONFLICT OF LAWS* (1938) and additional articles in 10 MINN. L. REV. 498 (1929); 17 NEB. L. BULL. 361 (1938) 51 HARV. L. REV. 924 (1932); 10 TEXAS L. REV. 163 (1932); 20 IOWA L. REV. 607 (1935) and State Annotations to the RESTATEMENT. Cf. 112 A.L.R. 124 (1938).

The RESTATEMENT on this point is a mere statement of the doctrine of its author; cf. Nussbaum, *Conflict Theories of Contracts: Cases versus Restatement*, 51 YALE L.J. 893 (1942) and Cook's articles cited *supra* note 7. The doctrine of the RESTATEMENT was rejected in favor of the law as it is, i.e., of the parties' choice of law, *American Machine & Metals, Inc. v. De Bothezat Impeller Co.*, 82 F. Supp. 536 (1949).

63. Cf. *Serbian Loan Case*, July 12, 1929, Publ. de la Cour, Sér. A, Arr. No. 14. As to Mixed Arbitral Tribunals, see *Nigreanu v. Meyers* Recueil des Decisions des Tribunaux Arb. Mix. 211 (1925); Wittenberg, *Les Tribunaux Mixtes et le Droit International Privé*, 59 CLUNET 991 (1931); Lipstein, *Conflict of Laws Before International Tribunals*, 25 TRANSACTIONS GROTIUS SOC. 175 (1941); DROST, *CONTRACTS IN PEACE TREATIES* 177 (1948).

There are instances where a connecting agreement is included in a treaty, e.g., between the Soviet Union and Germany (October 12, 1925), Art. 7, "Legal acts of the Trade Delegation consummated in Germany which are binding on the U.S.S.R., and the economic effect of these acts, shall be subject to German law and German jurisdiction . . ." *Harvard Research in International Law*, 26 AM. J. INT'L L. 562 (1932 Supp.). Similar provisions are included in treaties with Austria (1921), Denmark (1923), Latvia (1927), Norway (1921), Sweden (1924, 1927), etc. Cf. Schöndorf, *Der Rechtsinhalt der Deutsch-Russischen Verträge vom 12. Oktober 1923*, 2 ZTSCHR. OSTEUROP. RECHT 3, 9 (1926).

On the general problem, see PLAISANT, *LES RÈGLES DE CONFLIT DE LOIS DANS LES TRAITÉS* 274 (1946).

64. Nesom, *Intention of Parties—the Requirement of Substantial Connection*, 10 LA. L. REV. 346 (1950).

65. Requiring "reasonable relationship to one or more states or nations in addition to this state" viz., to a state where the Uniform Commercial Code will be in force. It is respectfully submitted that the applicability of the Code does not rest upon the mere existence of a "reasonable relationship" between the transaction and the state where the Code will be in force, but is, on the contrary, conditioned upon the existence of one of the specific contacts as enumerated in previous subsections of the same section (1-105). Consequently, the Code, including its conflict rules, relating to connecting agreements,

(b) The second type limits the parties' choice of law by *listing contacts* in order to designate legal systems available to the parties' choice. An example of this kind is the well known Polish statute⁶⁷ providing, "The parties may submit their contractual relation to the law of their country, to the law of the domicile, to the law of the place where the transaction was made, to the law of the place where the transaction is to be performed, or to the law of the place where the thing is situated" (Art. 7). An additional qualification is added with respect to the application of the law so chosen (Art. 10) and will be discussed later (*infra* XI).

will apply only where the Code applies according to its own specific provisions, not only on the basis of some "reasonable relationship" with that state, or, to use our terminology, where the Code is the otherwise applicable law. Therefore the words "in addition to this state" seem unfortunate and would be better omitted.

Similar doubts arise as to the wisdom of the last sentence of the same subsection (6) providing that "In absence of an agreement which meets the requirements of this subsection, this Act governs." This language is probably intended to say that in situations where there is no connecting agreement making some other law applicable, the basic transaction will remain within the Code's coverage. This seems rather elementary. In case the provision intends to say the court may not apply some other law on the basis of a tacit or presumed "intention" of the parties, it would be preferable to say so.

Since the conflict rules of the Uniform Code are unilateral, in the sense that they determine only the extent of the applicability of the law in question, the provision relating to the connecting agreement is limited to privative connecting agreements (*supra* V) and does not apply in situations where parties intend to enter into an adhesive connecting agreement, *i.e.*, make the Uniform Code applicable where it does not apply according to its own conflict rules.

It is, finally, interesting to note that the 1949 draft required such choice of law to be in writing, but this unique provision has now been omitted (1952).

Cf. Caldwell, *Choice of Law under the Uniform Commercial Code*, 10 LA. L. REV. 278, 290 (1950); Rheinstein, *Conflict of Laws in the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 114 (1951); Goodrich, *Conflict Niceties and Commercial Necessities* [1952] WIS. L. REV. 199, 206; E.M.Z., *Uniform Commercial Code—Conflict of Laws*, 17 ALBANY L. REV. 4, 10 (1953).

The doctrine of "significant connection" is adopted also by the recent Czechoslovak enactment on conflict law (1948), Art. 9, see 31 J. COMP. LEG. & INT'L L. 79 (1949), that requirement being combined with limitations upon the application of the law so chosen (see *infra* XI).

66. *Vita Food Products Inc. v. Unus Shipping Co.* [1939] A.C. 277; but see *Boissevain v. Weil*, [1949] 1 K.B. 482.

67. ALLERHAND, WYBOR PRAWA (1926); SIEDLECKI, ZABOWIAZANIA Z UMOV W POLSKIEM PRAWIE MIEZ. PRYVATNEM (1936); Przybilowski, *Grundprobleme des Internationalen Obligationenrechts*, *Ztschr. Ostrecht* (N.F.), 552 (1938); Babinski, *La Solution des Conflits de Lois en Pologne*, 58 CLUNET 18, 23 (1931).

The Polish rule is patterned after the revised draft for the BELGIAN CIVIL CODE (1884), Art. 7 (3): "La faculté accordée . . . aux parties contractantes ne peut avoir pour objet que la loi nationale d'une d'entre elles au moins, la loi du lieu du contrat ou la loi du lieu où celui-ci doit être exécuté." 18 REV. DROIT INT. LEG. COMP. 472 (1886).

Limitations of a similar kind are adopted in Art. 1433(2) of the GERMAN CIVIL CODE (see *supra* note 36) that "If the husband has his domicile abroad . . . reference to any law relating to matrimonial regimes in force at the place of such domicile is permitted," and in Art. 22(2) of the Swiss Statute on Legal Relations of Settlers and Sojourners (1891) providing that "Succession may be subject to the law of the decedent's home canton by a disposition *mortis causa* or by an inheritance agreement".

A choice in favor of only one law is offered in cases of options, as for example according to a French law (1921), offering an option in favor of the French law where otherwise local, *i.e.* Alsace and Lorraine, law would apply (Art. 10, 11); NIBOYET, *CONFLIT ENTRE LES LOIS FRANCAISES ET LES LOIS LOCALES D'ALSACE ET LORRAINE EN DROIT PRIVE* 234 (1922). See also Camerlynk *L'Option en Faveur de l'Application de la Loi Francaise par les Contractants Annamites*, 1 REV. INDOCHINOISE 100 (1937).

A variation of that type is the recent Benelux Draft for a Uniform Conflict Code⁶⁸ enumerating, like the Polish statute, permissible contacts for the parties' choice of law, but at the same time admitting any other contact justifying the parties' choice, provided that such "other surrounding circumstances" are sufficient to show that the contract "belongs mainly to the legal system of a particular country" (Art. 17).

(c) Some countries authorize parties' choice of law only in situations where international, or *multi-legal transactions* are involved (i.e., transactions showing contacts with more than one legal system). This type of limitation prevails⁶⁹ in Austria,⁷⁰ and apparently in France.⁷¹ Italy so provides in its new Codice di Navigazione (Art. 9).⁷²

In that connection it may be noted that countries with no uniform municipal law (e.g., Poland⁷³ and Switzerland⁷⁴) authorize an unqualified choice of any of their municipal legal systems.

68. For text, see 1 INT'L & COMP. L.Q. 426 (1952).

69. A special qualification was controlling under the former Italian Commercial Code (1882), Art. 58, adopting, in principle, the law of the place-of-making doctrine, but allowing choice of law by parties "subject to the same national law", which provision was widely discussed. Cf. UDINA, ELEMENTI DI DIRITTO INTERNAZIONALE PRIVATO ITALIANO 196 (1933).

70. For text, see Yntema, *supra* note 7, at 345. Cf. WALKER, INTERNATIONALES PRIVATRECHT 351 (1935).

Codes formerly in force in various Swiss cantons, patterned after Art. 36 of the Austrian General Civil Code (1811), belong to this group, e.g., Aargau (Art. 11) Luzern (Art. 27), Solothurn (Art. 6) and Unterwalden (Art. 6). Other cantons, on the contrary, accept parties' choice of law without qualifications, e.g., Graubünden (Art. 1), Schaffhausen (Art. 5), Zug (Art. 4) and Zürich (Art. 6). About Uri, see *infra* note 74.

71. Note the constantly returning proviso "si entre personnes de nationalité différente" contained in some of the leading cases, e.g., Cass. Dec., 5, 1910, 7 REVUE 395 (1911); May 31, 1932, 1 REV. CRIT. 909 (1934), and Dec. 28, 1936, 3 REV. CRIT. 682 (1937). Cf. MOSER, *op. cit. supra* note 6, at 56, 65.

72. "The employment contract of seamen, of persons employed in internal navigation and contracts of the flying personnel are controlled by the national law of the ship or aircraft, except that in cases of a vessel or an aircraft of a foreign nationality there is no different intent of the parties." According to the Report of the Legislative Commission (RELAZIONI 22) personnel employed under Italian flag or on Italian aircraft shall be prevented from choosing any foreign law which choice would be available according to Art. 25 of the Preliminary Dispositions (*supra* note 47). On the contrary, the connecting agreement is authorized with respect to contracts, e.g., lease, of vessels and aircraft regardless of their national law (Art. 10, RELAZIONI 28). Cf. Makarow, *Das Internationale Recht der See-und Luftschifffahrt im Italienischen Schiffahrtsgesetzbuch*, 15 RABELS ZTSCHR. 50, 58 (1949).

The Hague Draft Convention on International Sales (1951, *supra* note 36) applies only to "international sales of good" and a "mere declaration of the parties, relative to the application of the law . . . is not sufficient to confer upon a sale international character" (Art. 1) which means that a sales contract, in order to be covered by the Convention, must be international; however that notion is not defined.

73. For text, see Yntema, *supra* note 7, at 346. Cf. Polish Supreme Court, April 6, 1932, 6 GIURISPRUDENZA COMPARATA DIRITTO INTERNAZIONALE PRIVATO 109 (1940).

74. E.g., the CODE OF CIVIL PROCEDURE OF URI (1928), Art. 99: ". . . Parties' agreement as to the law to be applied does not bind the judge unless it concerns Swiss ('eidgenössisches') law."

The same rule is expressed in *Burcier v. Lanuse*, 3 Mart. o.s. 581, (La. 1815) referring to Art. 2 of Title V, Book III of the Louisiana Digest (1808) providing that "Husband and wife may even stipulate that their matrimonial agreement shall be regulated by the laws . . . of any other state or territory of the union, as they deem proper. . . ." Cf. Parker, *Free Will in Conflict of Laws* . . ., 6 TULANE L. REV. 454 (1932).

It only remains to consider those countries which *decline* to recognize the connecting agreement as a transaction creating conflict law effects. Here, for obvious reasons, we find the Soviet Union⁷⁵ and some of its satellites.⁷⁶ Similarly, but for different reasons, the connecting agreement is repudiated, or at least strongly curtailed, in a considerable number of Latin-American countries⁷⁷ and in international conventions inspired by them, e.g., *Codigo Bustamante*⁷⁸ and the Montevideo Convention.⁷⁹

In a conceptualistic way the different solutions presented above may be rationalized by observing that legal systems which admit parties' choice of law consider their conflict rules, pointing toward the otherwise applicable law, to be pliable in the sense that the effect of these conflict rules may be eliminated by the parties' agreement selecting a different law to control their transaction. In that situation the conflict rule designating contacts to be followed with respect to such a transaction is given a mere stopgap law effect, provided there is "no different intent by the parties" as to the law applicable which would take precedence over the stopgap conflict

75. MAKAROV, PRÉCIS DE DROIT INTERNATIONAL PRIVÉ D'APRÈS LA LÉGISLATION ET LA DOCTRINE RUSSES 278 (1932); LUNC, MEZDUNARODNOE CASTNOE PRAVO (1948).

76. Branding the choice of law by parties as a product of the early liberalistic capitalism, the Yugoslav writer BLACOJEVIC, MEDJUNARODNO PRIVATNO PRAVO (1950) states, after a rather confusing reasoning (pp. 356-357), that the *lex fori* should be "deemed applicable (to contracts) unless it can be established that parties . . . agreed to make another law applicable" (p. 358), all this within limits set by pliable conflict rules (p. 356) relating, e.g., to the subject matter of a contract, to penal clauses, to the place and time and of performance and to the acceptance of such performance, also relating to the rescission of the contract, etc. (p. 356). Such a possibility does not exist where imperative conflict rules apply, as e.g., with regard to the interest rate, reduction of contractual penalties, duress, etc. (p. 357). These rules are, apparently of little practical importance since in Yugoslavia foreign commerce is state monopoly and administrative rules prevail (p. 259).

77. E.g., COCK ARANGO, TRATADO DE DERECHO INTERNACIONAL PRIVADO (Bogota 1952) citing Art. 202 and 205 of the Commercial Code, identical with that of Panama.

The Civil Code of Argentina relies on the place of conclusion (Art. 1205) and that of performance (Art. 1210) exclusively; cf. 4 LLERENA, CODIGO CIVIL ARGENTINO 312 (3d. ed. 1931); also Ruiz Moncada, *Principios de Derecho Civil Internacional Incorporados en el Legislacion Argentina*, . . . 11 BOLETIN INST. DERECHO CIVIL (Cordoba) 172 (1946). For historical background, see Romero del Prado, *Fuentes de las Normas de Derecho Internacional Privado en elCodigo Civil Argentino*, 8 BOLETIN. . . 145, 194 (1943) (viz. Story, and to a much lesser degree, Savigny).

Similar attitude prevails in Colombia (Art. 20 of the Civil Code and Art. 202 of the Commercial Code); cf. CAICEDO CASTILLA, 1 DERECHO INTERNACIONAL PRIVADO 257, 268 (1949); in Chile (Art. 1545 of the Civil Code, except Art. 113 of the Commercial code according to which Chilean law will apply "provided contracting parties did not agree otherwise," but only with respect to contract concluded abroad), 2 ALBONICO, MANUAL DE DERECHO INTERNACIONAL PRIVADO 97, 137 (1957); in Guatemala, cf. MATOS, CORSO DE DERECHO INTERNACIONAL PRIVADO 449, 460 (1941); and in Uruguay (Art. 2399 of the Civil Code as amended in 1941), cf. Gallino, *Las Relaciones Juridicas Internacionales en elCodigo Civil Uruguayo*, 6 REVISTA ARGENT. DERECHO INTERNACIONAL 347 (1943).

On the problem in general, see Bustamante, *The American Systems on the Conflict of Laws and their Reconciliation*, 5 TULANE L. REV. 537, 543 (1931).

78. 2 BUSTAMANTE, DERECHO INTERNACIONAL PRIVADO 194 *et seq.* (1934); also his MANUAL DE DERECHO INTERNACIONAL PRIVADO 267 (1941). Notice, however, Art. 190 of his Code. For text, see Yntema, *supra* note 7, at 347.

79. Treaty on International Civil Law (1940), see 37 AM. J. INT'L L. 141 (1943)

rule. On the contrary, conflict rules are held to be rigid in jurisdictions denying effect to connecting agreements. That is to say, such rules are exempt by operation of law, express or implied, from any possible modification in a specific situation by parties' agreement.⁸⁰

An attempt to discuss that aspect of the problem, inviting as it may be, is most certainly bound to lead us far into still unexplored areas of comparative conflict law. Our discussion shall be limited to an additional observation here. This is that the imperative or pliable nature of a conflict rule is in no way determined by the imperative or pliable nature of the corresponding substantive rule of the same legal system, and even less by the nature of the substantive law to which such conflict rule refers to as being applicable.

THE LEX VOLUNTATIS

IX

In a connecting agreement parties expressly identify the legal system which they intend to make applicable. In jurisdictions recognizing such express intent to be a contact, that choice of law will take the place of some otherwise operative contact; and the law so identified as applicable will be the law to control the respective basic transaction.

In order to be a complete substitute for a contact (*i.e.*, a means to identify the applicable law by following certain features displayed by the transaction involved), the connecting agreement must point toward some *legal* system, like every contact.⁸¹ First, in order to be accorded the full effect of a contact, a connecting agreement must designate a body of rules which is legal according to the constitutional law of the country so designated. Second, there cannot be a complete conflict operation where the parties' choice is directed toward rules not legal in character (*e.g.*, religious rules,⁸² norms established by private associations, etc.).

Supp.). Note Art. 5 of the Additional Protocol (Yntema, *supra* note 7, at 348) and the abstention by Peru from voting on Art. 37-39 of the Treaty relating to contracts, as conflicting with Art. VII of the Preliminary Title of the Civil Code favoring the *lex loci contractus* (*cf.* also Art. XIV).

80. A parallel problem arises in situations where parties intend to confer, by mutual agreement, jurisdiction upon a court otherwise incompetent (prorogation, see *supra* II). Like in regard to the connecting agreement, some jurisdictions allow parties to choose a court otherwise incompetent as they recognize the parties' choice of the law applicable, apparently considering their jurisdictional rules to be pliable, while, on the contrary, a few countries regard their jurisdictional rules as imperative. The first attitude is noticeable in England and in most of the Civil Law countries; the latter position seems to prevail in this country. It may be noticed that, at first glance at least, there is no connection between these two positions.

81. As to a reference to a specific enactment, *e.g.*, "As far as this insurance contract contains no express stipulations, the provisions of the German Law on the insurance contract of May 30, 1908, should apply," see the Swiss case *Dessauer v. Schweiz. Lebensversicherungs-und Rentenanstalt*, 71 BGE II 67 (1945) and 1 SCHWEIZERISCHES JAHRBUCH F. INTERN. RECHT 168 (1944).

82. *Cf.* *Hurwitz v. Hurwitz*, 216 App. Div. 362, 215 N.Y. Supp. 184 (1926), where a marriage settlement (*koshuba*) according to Jewish religious law was agreed upon. The court pointed out that such agreement "is not to be determined by the provisions of the laws of any foreign state" since law may be created only by an independent state (citing

In both situations the question of which legal system is to control the basic transaction still remains to be decided according to the conflict rule applicable.

In addition, other specific questions arise. One of them is whether or not parties may agree upon more than one legal system to control their basic transaction. An answer in the positive⁸³ is not surprising. Quite a few jurisdictions do not hesitate to apply different contacts to different phases of a contractual relation and, consequently, different legal systems (e.g., the law of the place of conclusion to questions of validity, and the law of the place of performance to questions involving performance and breach of contract). For the same reasons, by a connecting agreement parties may choose the law applicable to only *one* legal aspect of the basic transaction, leaving the rest to be controlled by the law otherwise applicable. That possibility is expressly noticed by the Benelux Draft describing the *lex voluntatis* as the law of some other country chosen to control the basic transaction "wholly or in part" (Art. 17).

The problem of the *inter-temporal* law presents some difficulties. They originate from the idea that parties, when choosing the *lex voluntatis*, have before their eyes the law as it stands at that very moment. Such a consideration will certainly lead toward an overemphasized concern for the *lex voluntatis* as it appears at the time it is being referred to. That tendency, however natural, must be disregarded. The contact established through the connecting agreement is a submission of the basic transaction to the *lex voluntatis* as a complete legal system, with its own rules of growth and change. Therefore, the inter-temporal provisions of the *lex voluntatis* apply as in cases where the applicable law is identified by means of other contacts.⁸⁴

A different rule may be advocated only in a situation where parties

Roche v. Washington, 19 Ind. 56, 81 Am. Dec. 376 [1862]). Nevertheless the court gave effect to the intent of the parties considering apparently the respective religious rules to be incorporated into the agreement and not foreign law in the technical sense.

83. Cf. British South Africa Co. v. De Beers Consolidated Mines, [1910] 11 Ch. 354: "Again, different laws may apply to different parts of a contract if the parties so intend"; French Cassation, May 15, 1935, 92 REVUE CRIT. 463 (1935); and German Reichsgericht, Nov. 14, 1929, J. W. 1855 (1930): "Parties may intend the applicability of a determined law with respect to one or another question involved or for all effects of a transaction." Cf. similar language in Hamlyn v. Tallisker Distillery, [1894] A. C. 374.

84. Cf. *In re Chesterman's Trust*, [1923] 2 Ch. 466: "... the German law must be applied as it is from time to time, and the creditors cannot take the law as it exists at the time and claim that their rights must be regulated by its state, however, it may be changed in the future." *Accord*, Belgian case, Feb. 4, 1926, 3 NOUVELLE REVUE 158 (1936): "Attendu que la soumission à un droit déterminé entraîne en principe la soumission, non seulement à la législation existante, mais aussi à toute modification de celle-ci"; German case, Mar. 22, 1927, J.W. 1447 (1928), also Kammergericht, Feb. 20, 1929, 3 REBELS ZTSCHR. 62 (1929 Sondh.); Italian case, Mar. 6, 1940, 33 RIVISTA DIR. INTERNAZ. 166 (1941). See Pau, *Determinazione della legge regolatrice del contratto e mutamenti di legislazione della legge del tempo del contratto*, RIVISTA DIR. PRIVATO 170 (1940). *Contra*: French Cour d'Appel, Paris, Apr. 24, 1940, cited in NI-BOYET, COURS DE DROIT INTERNATIONAL PRIVE 620 (1947), and the German case, Apr. 30, 1931, 6 REBELS ZTSCHR. 63 (1932 Sondh.).

expressly agree that the law as it stands at a certain moment shall apply and, consequently, later amendments will remain inoperative. Shall this specific intent of the parties be given effect? Two avenues of approach are indicated by judicial rulings. One is that parties may not meddle with the *lex voluntatis* and any reservations against later amendments in the *lex voluntatis* should be disregarded completely.⁸⁵ The other view would give more weight to parties' express intent. It will be noticed, according to this latter view, that parties did not unconditionally subject their transaction to the law chosen in the sense that the contact so established may be considered a complete substitute for the necessary identification of the law applicable. By inserting important reservations of this kind, parties, by their own action, annihilate the conflict effect otherwise accorded such parties' choice and reduce their agreement to a mere *incorporation* of the designated law to be applied in its petrified form. Hence, such basically limited application of a law will not fill the place of a full-fledged contact. Instead, the applicable law will still have to be identified, since the parties have left that question unsettled.⁸⁶

The question of whether *renvoi* should be accepted in situations where the law is made applicable by the parties' agreement is answered almost unanimously in the negative.⁸⁷ This solution seems to be justified by the intent of the parties. By means of a connecting agreement parties intend to make the *lex voluntatis* applicable against the stopgap conflict rules otherwise applicable. By so doing they certainly do not expect that their choice of law will depend upon the conflict law contained in the legal system so chosen. Thus, it can safely be stated that the contact established with the *lex voluntatis* under a connecting agreement is intended to be a direct reference to its substantive law. The exception is in situations where the forum's internal conflict rules must be consulted prior to the application of the *lex voluntatis*. Accordingly, in cases where the *lex voluntatis* is the law of a multi-legal country, (i.e., a country with no uniform substantive

85. Accord, German Reichsgericht, May 28, 1936, J.W. 2058 (1936), declaring it to be "Impossible to subject a contract to the law of a certain country and, simultaneously, exclude a specific present or expected future enactment, except such enactment contains only pliable law . . ." all this with respect to our Joint Resolution of 1934.

86. Accord, Belgian case, Feb. 4, 1936, 3 NOUVELLE REVUE 158 (1936): "Considering that the general and express language of the reference to New York law excludes any possibility of a limitation . . . [and] if the contracting parties intended to exclude from coming into operation all limitations of any kind concerning that clause (i.e. gold clause) by virtue of future enactments of this state, such parties could and should have said so." Cf. also MOSER, *op. cit. supra* note 6, at 56, 58 and 150.

87. Cf. DICEY, *op. cit. supra* note 56, at 581. The question is clarified expressly in Art. 2 of the recent Hague Draft Convention on International Sales (*supra* note 36) by stating that "A sale is governed by the internal law of the country designated by the contracting parties."

Renvoi was followed, however, in *Duskin v. Pennsylvania Central Airlines Corp.*, 167 F.2d 727 (6th Cir. 1948), and the *lex loci damni* applied, as determined according to the conflict rules of the *lex voluntatis*, i.e., by the law of Pennsylvania. Cf. Note, *Choice of Law by Contractual Stipulation*, 16 U. OF CHI. L. REV. 157 (1948). Cf. Lipstein, *The Proper Law of the Contract*, 12 ST. JOHN'S L. REV. 242, 255 (1937).

law with respect to the specific matter involved), internal conflict law will be consulted in order to determine, first, whether federal or state law shall apply as the *lex voluntatis*, and second, which of several state laws is applicable according to interstate conflict law.

In concluding this section it will be convenient to notice situations when the effect of a connecting agreement was apparently *frustrated* by basic changes in the *lex voluntatis*, as for example by a revolution. The court was faced with this problem in *Dougherty v. Equitable Life Assurance Society*.⁸⁸ There the parties stipulated Russian law was to control the insurance policies involved. The court considered the subsequent Soviet nationalization decrees to "have the same force and effect as if they had been issued by the Imperial Government." The writer feels that in such situations rules as to frustration of contracts should be considered in regard to the connecting agreement, and that reasonable expectations of the parties as expressed should be given fair consideration.

X

Once the *lex voluntatis* is identified, the process of its *application* starts. In case the *lex voluntatis* happens to be the substantive law of the forum, as a rule no difficulties may be expected. However, in cases where the *lex voluntatis* is foreign law, the process of its application will differ considerably from the routine rules governing the application of foreign law.

It is elementary that a foreign *lex voluntatis* will have to be proved as prescribed by the law of the forum.⁸⁹ Furthermore, such law will be checked against what is called the *public policy* of the forum before being applied.⁹⁰

In principle, the *lex voluntatis* will be applied as a body of legal rules, and various degrees of its effectiveness will be honored according to its own standards. This means that imperative rules will be given strict application, while pliable rules will be handled as mere stopgap provisions; all this according to rules contained in the same *lex voluntatis*. It seems that some French and Belgian cases go the other way. As a matter of principle they consider all rules contained in the *lex voluntatis* to be pliable. They reason that the whole *lex voluntatis* was made applicable by virtue of a contract, and rules referred to in that way must not be given greater effect than plain contractual stipulations.⁹¹

Having thus discussed problems related to the *lex voluntatis* as a body of rules, let us turn now to the problem of what *area* of the basic transaction will be controlled by the *lex voluntatis*. Will it be broader or narrower as compared with the law applicable by operation of some other contact?

88. 266 N. Y. 71, 193 N.E. 897 (1934).

89. Cf. *Horvath v. Cunard Steamship Co.*, 103 F. Supp. 356 (E.D. N.Y. 1952).

90. This proviso is expressly restated in *Vita Food Products v. Unus Shipping*, [1939] A.C. 277.

91. Cf. French Cour de Cassation, May 15, 1935, 3 REVUE CRIT. 463 (1936), and the Belgian case, Feb. 2, 1936, *Sirey* 4.1 (1937). Cf. also Louis-Lucas, *L'autonomie de la volonté en droit privé et droit international privé*, in *ÉTUDES A LA MEMOIRE DE H. CAPITANT* 469 (1937); DONNEDIEU DE VABRES, J., *op. cit. supra* note 45, at 543.

The answer is plain. The *lex voluntatis* will cover the same area of the basic transaction as would be covered by a law made applicable by operation of some other contact. What is meant is this: Where, according to the conflict rule of the forum, the area of the *lex causae* (let us say, of the proper law of the contract) would not control the capacity of the parties and would leave that aspect to a special conflict rule (e.g., the law of the place of the making), then such extent of the *lex causae* will also be followed with regard to the *lex voluntatis*.

As indicative of the standard extent of the *lex causae*, the recent Hague Draft Convention on International Sales may be quoted. It excludes from its operation questions concerning capacity of the parties, the form of the contract, the passing of the title, and the effect of the contract on third parties (Art. 5). These questions are to be decided according to municipal conflict law.

In principle, the basic transaction will be controlled by the *lex voluntatis* to the same extent as any other law would control if declared applicable. This means that the *lex voluntatis* will cover questions concerning the very existence of the basic transaction, as well as questions relating to its effects. The basic transaction will retain its unity. There are, however, a few jurisdictions *limiting the area* of the applicability of the *lex voluntatis* to only one part of the extent otherwise covered by the *lex causae*. In situations where the *lex voluntatis* applies, these jurisdictions split the conflict status of the basic transaction into two parts. One relates to its validity and the other to its effects. With respect to the first component, advocates of the doctrine of splitting refuse to recognize any effect of the *lex voluntatis*. Accordingly, they decline to test the validity of a transaction intended to be governed by the *lex voluntatis* against that law. Instead, they consider the otherwise applicable law in force (e.g., the *lex loci contractus*) in spite of the parties' contrary intent. As a consequence, the extent to which the *lex voluntatis* will control in such jurisdictions is restricted to problems involving the effects of the basic transaction. A typical representative of this doctrine is the Swiss Federal Tribunal.⁹² Moreover, there are similar tendencies in other countries.⁹³ Nevertheless, it may be safely said that the doctrine of splitting the conflict status of the basic transaction remains an exception.

XI

As a rule, the *lex voluntatis* replaces the otherwise applicable law completely, and no traces of the latter remain noticeable. However, it has been

92. For cases, see MOSER, *op. cit. supra* note 6, at 20. For recent criticism, see Knapp, *Vers la fin de la coupure générale des contract dans le droit international suisse des obligations*, 5 ANNUAIRE SUISSE DROIT INTERNATIONAL 83 (1948). *Contra*: German Reichsgericht, Jan. 3, 1911, 3 REBELS ZTSCHR. 778, (1929) and cases in 1 GIURISPRUDENZA COMPARATA DI DIRITTO INTERN. PRIVATO 112 (1932).

93. Compare the language in Connecticut General Life Ins. Co. v. Boseman, 84 F.2d 701 (3d Cir. 1936) and repeated in Palmer v. Chamberlin, 191 F.2d 532 (3d Cir. 1951), that "Parties in contracting may adopt as a part of their contract the laws

indicated in the present study that the application of the *lex voluntatis* is curtailed in a few countries by what we call the paramount omnipresence of the *otherwise applicable law*. Jurisdictions adhering to that principle have developed different techniques of giving effect, in a greater or lesser degree, to that preferred law. They may be placed in three groups. Two of them rely upon the law otherwise applicable, while the third type dispenses with that law and introduces in its place a special legal system.

The most consistent doctrine used to preserve the prestige of the otherwise applicable law in relation to the *lex voluntatis* applies the *lex voluntatis*, subject to *any legal system* that would control as the otherwise applicable law, regardless of whether it is the law of the forum or some foreign law. In practice this means that the *lex voluntatis* will be given effect only insofar as it is compatible with the imperative provisions contained in the otherwise applicable law. That doctrine was clearly formulated by the Austrian Draft (1913) and later included in the Czechoslovakian Draft of the Civil Code (1924).⁹⁴ It permitted the parties to subject a transaction to a legal system "insofar as such submission does not contravene the imperative provisions to which the aforesaid relationship is generally subject by virtue of the provisions contained in this chapter" (Art. 17) (*i.e.*, among its conflict rules). This doctrine was espoused by the recent Czechoslovakian enactment on conflict law (1948) and combined with the reasonable connection rule (Art. 9).⁹⁵ The doctrine of the otherwise applicable law as a control permanently hovering over the *lex voluntatis* is also included in Art. 5 of the Additional Protocol to the Treaty on International Civil law (1940) and followed in the Benelux draft (1951). It states that "such intention (*i.e.*, in a connecting agreement) shall not have the effect of withdrawing the contract from any imperative rules of the legal system with which it is so closely connected as aforesaid" (Art. 17).⁹⁶

of a state other than their own if not contrary to the law or public policy of the state where the contract is made and to be performed." FIELD, OUTLINES OF AN INTERNATIONAL CODE (1876) suggested to limit parties' choice of law to problems of "interpretation," reserving problems of validity for the law of the place of conclusion (Art. 602).

The same rule was included in a few code drafts, *e.g.*, for the Italian Civil Code (1925) (Art. 13), Diena, *Osservazioni sul progetto di riforma del codice*, 6 ANUARIO DIRITTO COMPARATO (1932), also Ago, *Le norme di diritto internazionale nel progetto*, 23 RIVISTA DIRITTO INTERNAZ. 37 (1931); and the Greek draft (1936), Art. 30, but in all instances the rule was later abandoned.

94. DAS BÜRGERLICHE GESETZBUCH FÜR DIE TSCHÉCHOSLOVAKISCHE REPUBLIK, ÜBERSETZUNG DES ENTWURFS DER KOMMISSION . . . (1924).

A similar provision was inserted into the draft for a unified Slavic Code of conflict law, submitted by Lapajne, *Izenaceno Mednarodno Zasebno Pravo za Slovanske Drzave*, ZBORNIK ZNANSTVENIH RAZPRAV 186 (1936), transl. in 2 ZTSCHR. OSTEUROP. RECHT 677 reading as follows: "Contracting parties may subject their legal relationship to an inapplicable legal system. In such cases the imperative rules contained in the law applicable according to this Code must be given effect" (Art. 6). Cf. also 29 REVUE 873 (1935).

Cf. Battifol, *Public Policy and the Autonomy of the Parties: Interrelations between Imperative Legislation and the Doctrine of Parties Autonomy*, in LECTURES ON THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS 68 (1951).

95. See note 65, *supra*.

96. *Contra*: German Reichsgericht, Dec. 19, 1933, 6 GIURISPRUDENZA COMPARATA

The second group is comprised of jurisdictions limiting the control of the otherwise applicable law over the *lex voluntatis* to situations where the otherwise applicable law happens to be the substantive *law of the forum*.⁹⁷ "Within the limits of the *internal* law applicable according to Art. 39, 40 and 41 (of the present Code), the effects of contracts are controlled by the law chosen by the parties . . ." This is a quotation from the Romanian Civil Code (1940, Art. 42) illustrating the control of the *lex voluntatis* by the otherwise applicable law, as declared in Art. 39, 40 and 41 of the Code, provided the law so designated is the internal law of Romania.⁹⁸

Similar effect is accorded provisions of the Warsaw Convention on International Air Transportation (1929). According to Art. 32 any agreement "by which the parties purport to infringe the rules laid down by this Convention . . . by deciding the law to be applied . . . shall be null and void."

Into the third group fall jurisdictions abandoning the law otherwise applicable as a means of disciplining the parties' choice of law at this stage. Instead of the otherwise applicable law they introduce a *special legal system* to take paramount control over the *lex voluntatis*. The Polish statute on private international law (1926) will serve as an example. As was pointed out before (*supra* VII), by a connecting agreement parties may choose one of the legal systems designated through contacts listed in Art. 7, while the otherwise applicable law is indicated in the following article. This law, however, does not control the application of the *lex voluntatis*. Instead, "parties are subject . . . to special legal prohibitions declaring void legal transactions contrary to them, in force at the debtor's domicile and (or?) at the place where the obligation is to be performed" (Art. 10).

It is easy to realize that this refined system of multiple controls designed to curtail the parties' choice of law is more an outgrowth of a theoretical predilection in favor of the otherwise applicable law (and, indirectly, of contacts of a territorial nature) than a legislative measure required by actual needs of international commerce. It is therefore significant that the recent Draft Convention on International Sales (The Hague, 1951), after almost

DIRITTO INTERNAZIONALE PRIVATO 226 (1940), and Eckstein, *Über Parteiautonomie*, *id.* at 226, summarizing German cases in the sense that imperative rules of the *lex voluntatis* control and not the imperative rules of the otherwise applicable law. Cf. also O. L. G. Karlsruhe, Oct. 12, 1933, *id.* at 228.

97. Fritsche, *Die örtliche Rechtsanwendung auf dem Gebiete des Obligationenrechts*, SCHWEIZ, JUR. ZTC., 232a (1925), and Sausser-Hall, *Le droit applicable aux obligations en droit international privé*, *id.* at 271a.

98. Translation in 34 RIVISTA DIRITTO INTERNAZIONALE 147 (1942); cf. also Laday, *Die internationalprivatrechtlichen Bestimmungen im Entwurf eines bürgerlichen Gesetzbuches für Rumänien*, 6 RABELS ZTSCHR. 741 (1932).

a quarter of a century of learned discussions,⁹⁹ eliminated every vestige of such doctrinal niceties. Instead, it adopted a plain and reasonable rule that such contracts are "controlled by the law designated by the contracting parties"—a solution indicative of a trend to follow.¹⁰⁰

99. The Sixth Hague Conference (1928) prepared three different drafts with regard to effects to be accorded the connecting agreement. Without going into details of this interesting discussion, it may suffice to note that Draft I was intended to limit the application of the Convention to matters within the area of the pliable law (*conflits en matiere de regles supplétives*); the Draft II would cover also situations where imperative rules are involved, and Draft III tried to reach a compromise by making the Convention applicable to situations where imperative rules are involved, but refused to permit parties' choice of law in such situations. Cf. MERZ-GUEX-ALEXANDER, *DIE SECHSTE SESSION DER HAAGER KONFERENZ FÜR INTERNATIONALES PRIVATRECHT* 72, 77, 80 (1928).

A similar discussion went on, for quite a long time, within the Institute of International Law. The Florence Session, *ANNUAIRE* 289 (1908), adopted the position that the *lex voluntatis* may apply only within limits of pliable rules of the otherwise applicable law. The Hague Session, *ANNUAIRE* 50 *et seq.* (1925) discussed widely all issues involved, and the following session, 3 *ANNUAIRE* 197 (1927), was able to adopt a proposal based on the doctrine of the prevailing otherwise applicable law, with the *lex voluntatis* to be effective only within limits set by such "loi unique." The 1937 Session of the Institute (Luxembourg) discussed the same problem with respect to contracts of employment. As to their validity the *lex loci contractus* prevails (Art. 2) while the *lex voluntatis* is admitted only within limits of this "loi unique" (Art. 4) stating that "the interpretation of the contract with regard to its effects within the parties' free disposition ("qui dépendente de la volonté des parties") is controlled by the law expressly or impliedly designated by them" (Art. 4, par. 3). See also 2 RABEL, *op. cit. supra* note 1, at 394.

100. Rabel, *International Sales Law*, in *LECTURES ON THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS* 34 (1951); Robinson, *Conflict of Laws in Contracts of Sale*, 16 *Geo. L. J.* 387 (1928).