KURT LIPSTEIN

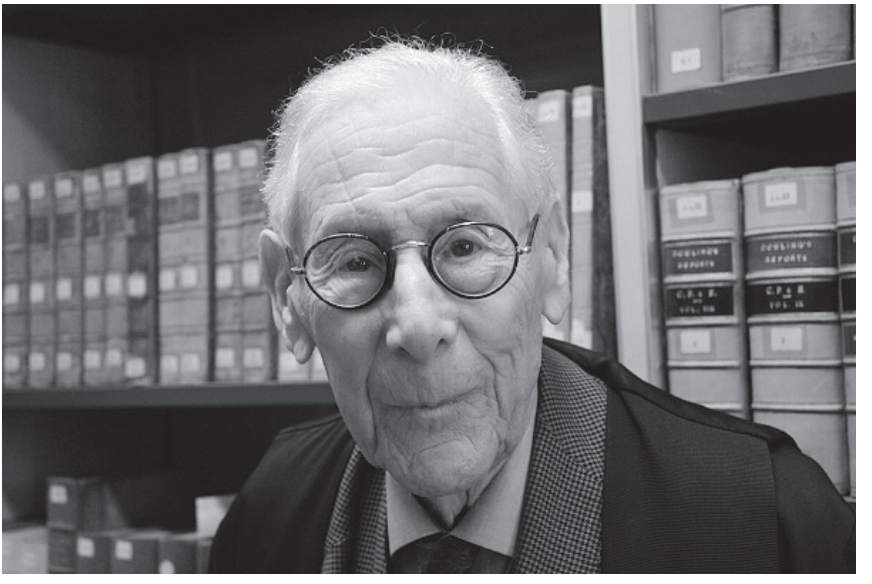
Collection of Essays

Edited by
PETER FEUERSTEIN and
HEINZ-PETER MANSEL

Mohr Siebeck

Kurt Lipstein

Collection of Essays



Kurt Lipstein, Squire Law Library, Cambridge, 2006

Photographer: Matt Martin

Kurt Lipstein

Collection of Essays

Edited by

Peter Feuerstein
Heinz-Peter Mansel

Mohr Siebeck

Peter Feuerstein († 2013) was an International Legal Consultant (USA), Rechtsanwalt (Germany), and student of Kurt Lipstein.

Heinz-Peter Mansel is the director of the Institute of Private International and Foreign Private Law of the University of Cologne.

ISBN 978-3-16-152062-4 / eISBN 978-3-16-162945-7 unchanged eBook edition 2024

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available on the Internet at *http://dnb.d-nb.de*.

The book was typeset by pagina in Tübingen, printed on non-aging paper by Gulde-Druck in Tübingen and bound by Großbuchbinderei Spinner in Ottersweier.

Printed in Germany.

Vorwort

Kurt Lipstein hat durch seine wunderbare Persönlichkeit, sein Lehren und seine Schriften gewirkt. Hier wird eine Auswahl seiner Veröffentlichungen vorgelegt. Die Herausgeber hoffen, durch diesen Band den Zugang seinem Werk und damit zu dem bleibenden wissenschaftlichen Vermächtnis von Kurt Lipstein zu erleichtern.

Peter Feuerstein (1946–2013) nahm meine Würdigung Kurt Lipsteins, die in *Rabels Zeitschrift* veröffentlicht worden war, zum Anlass, an mich mit dem Plan der Herausgabe dieses Werkes heranzutreten. Ich habe das Unternehmen gerne aufgenommen, stehen mir doch die Erinnerungen an eine letzte Begegnung mit Kurt Lipstein in seinem blühenden Garten in Cambridge noch immer klar vor Augen.

Peter Feuerstein hatte bei Kurt Lipstein in Cambridge während eines Forschungsaufenthalts (1972–1974) als Fellow des Claire Colleges im Rahmen seiner Promotion an der Philipps-Universität Marburg studiert; auch danach riss der Kontakt zu seinem verehrten akademischen Lehrer nicht ab. Ihm ist für die Festschrift für Kurt Lipstein aus Anlass seines 70. Geburtstages (Multum non multa, 1980) zu danken, die er zusammen mit Clive Parry herausgab. Ohne ihn wäre auch dieser Band nicht erschienen. Peter Feuerstein lebte seit 1998 als International Legal Consultant in den USA. Bis zu seinem Tode begleitete er die Herausgabe der Gesammelten Schriften, half bei Aufbringung von Druckbeihilfen und Abdruckgenehmigungen.

Die Herausgeber danken der *Universität Würzburg*, der *Bayer Stiftung für Deutsches und Internationales Arbeits- und Wirtschaftsrecht*, Leverkusen, dem *William Senior Fonds*, Cambridge, dem *Max-Planck-Institut für ausländisches und internationales Privatrecht* in Hamburg und der *Gesellschaft für Auslandsrecht e. V.* in Köln für die Aufbringung von Druckbeihilfen, ohne die der Band nicht hätte veröffentlicht werden können.

Sie danken ferner den Verlagen, Institutionen und Rechteinhabern, die mit der Erteilung von Abdruckgenehmigung zu diesem Band beigetragen haben, insbesondere dem *Cambridge Law Journal*, der Haager *Académie de droit international*, *Springer Science+Business Media B.V.* und *Oxford University Press* sowie Herrn Colin Turpin, der die Kosten für einen der Beiträge übernommen hat.

Der herzliche Dank der Herausgeber geht an Herrn Wiss. Mit. Tobias Lutzi (LL.M., Maître en droit), der mit größter Zuverlässigkeit und Sorgfalt die Drucklegung dieses Bandes redaktionell betreute. Dem Verlag *Mohr Siebeck* und insbesondere Herrn Dr. Gillig sind die Herausgeber für die Aufnahme der Gesammelten Schriften in das Verlagsprogramm und die angenehme Zusammenarbeit zu Dank verpflichtet.

Köln, im Frühjahr 2014 Heinz-Peter Mansel

Preface

Kurt Lipstein was a highly influential scholar, whose wonderful personality, teaching, and writing had lasting impact. This is a selection of his publications. The editors hope that it will provide an opportunity for readers to access his oeuvre and gain insight into his academic legacy.

It was Peter Feuerstein (1946–2013) who contacted me, following the publication of my remembrance of Kurt Lipstein in *Rabels Zeitschrift*, to propose that we edit the present collection. I agreed to undertake this project without hesitation, still remembering clearly my last meeting with Kurt Lipstein in his blooming Cambridge garden.

Peter Feuerstein was a student of Kurt Lipstein during his stay in Cambridge as a visiting researcher and fellow of Claire College. Even after his postgraduate studies, which he concluded with a PhD from the Philipps University of Marburg, Peter Feuerstein kept in contact with his admired academic teacher. He deserves credit for the Festschrift for Kurt Lipstein (Multum non multa, 1980), which he edited together with Clive Parry on the occasion of Kurt Lipstein's 70th birthday. If it were not for him, this volume too would not have been published. Since 1998, Peter Feuerstein lived and worked as an international legal consultant in the United States. Until his death, he participated actively in the work on this collection and helped to organise the necessary grants and printing permissions.

The editors would like to thank the *University of Würzburg*, the *Bayer Stiftung für deutsches und internationals Arbeits- und Wirtschaftsrecht*, Leverkusen, the *William Senior Fund*, Cambridge, the *Max Planck Institute for comparative and international Private Law*, Hamburg, and the *Gesellschaft für Auslandsrecht*, Cologne, for the award of the grants that made it possible to publish this volume.

The editors would further like to thank all of the publishers, institutions, and rights holders that contributed to this collection by allowing the reproduction of Kurt Lipstein's essays. In particular, we thank the *Cambridge Law Journal*, the *Hague Academy of International Law*, *Springer Science+-Business Media B.V.*, *Oxford University Press*, and Mr Colin Turpin, Cambridge, who generously underwrote the fees associated with one of the essays.

Finally, the editors wish to express their sincere gratitude to Mr Tobias Lutzi (LL.M., Maître en droit), research assistant in Cologne, who attended to the printing of this volume's publication with the utmost reliability and diligence. We would also like to thank the publishing house *Mohr Siebeck* and in particular Dr Franz-Peter Gillig for including the present volume in their publishing programme and for the pleasant collaboration on this project.

Cologne, spring 2014 Heinz-Peter Mansel

Acknowledgments

The publishers would like to thank all publishing houses, institutions, and right holders that contributed to this collection by allowing the reproduction of Kurt Lipstein's essays. In particular, we thank the Cambridge Law Journal, the Hague Academy of International Law, Springer Science+Business Media B.V., Oxford University Press, and Mr Colin Turpin, who generously paid the fees for one essay.

Table of Contents

Kurt Lipstein (1909–2006)*

Kurt Lipstein was born in Frankfurt am Main, Germany, on 19th March 1909. He died aged 97 on 2nd December 2006, in Cambridge, England. This year marks the 100th anniversary of his birth and provides an occasion to remember Kurt Lipstein, the legal scholar, the man and his work.*

In 1934, at the age of 24, Lipstein left Germany to escape persecution, finding his new home in Cambridge. His academic career evolved from this point on and by the end of his life Lipstein came to be regarded in Cambridge as "one of the greatest academic lawyers of our time."[1] Kurt Lipstein's influence extends well beyond the boundaries of England. He has made lasting

---

[HEINZ-PETER MANSEL, RabelsZ 73 (2009), 441–454 translated to English by Dr. iur. Maya Mandery, LL.M., LL.B. (Hons), University of Auckland]

* The following will be noted in abbreviated form: *Christian v. Bar,* Kurt Lipstein, The Scholar and the Man, in: Jurists Uprooted, German-speaking Emigre Lawyers in Twentieth-century Britain, in *Jack Beatson/Reinhard Zimmermann* (eds.) (2006) 749–760; *Christopher Forsyth,* Kurt Lipstein (*1909): *ibidem* 463–481; *Kurt Lipstein,* Acta et Agenda: Cambrige L.J. 36 (1977) 47–61; *idem.,* Cambridge 1933–2002, in: Jurists Uprooted (above) 761– 770.

Further accounts can be found in *Lipstein ,* Cambridge 1933–2002; *idem.,* Acta et Agenda 47–61; *Lesley Dingle/Daniel Bates,* Conversations with Kurt Lipstein, Emeritus Professor of Comparative Law, Some reminiscences over seventy years of the Squire Law Library and the Faculty of Law, University of Cambridge: Int. J. Leg. Inform. 35 (Spring 2007) 93–133, also available at: www.squire.law.cam.ac.uk/eminent_scholars. This website of the Eminent Scholar Archive of the Squire Law Library of the University of Cambridge also makes the following available: audio files of the mentioned interview, (an incomplete and at times incorrect) bibliography, video file of Kurt Lipstein's last lecture on English Legal Methods (held on 17 July 2006), and additional further information and photocopies on Lipstein. See also, *v. Bar* 749–760; *Peter Feuerstein/Clive Parry,* Foreword by the editors, in: Multum non multa, FS Lipstein (1980) S. VII–X; *Reinhard Zimmermann,* Happy Birthday, Kurt Lipstein!: IPRax 1999, 296–297; *Bob Hepple,* Kurt Lipstein-Teacher, Colleague and Friend: The Claire Association Annual 2006/2007, 18–23; *idem.,* Obituary: Kurt Lipstein, Refugee from the Nazis and pioneer of comparative law: The Guardian from 29.1.2007, p. 33; *Andrew v. Hirsch,* Obituary: Kurt Lipstein: Wolfson College Magazine 31 (2006/2007) 156– 157.

[1] *Gordon Jonson,* From the President: Wolfson College Magazine 31 (2006/2007) 1–3 (3).

contributions within the area of private international law, in particular, within the English conflict of laws. He established the study of European Law as a discipline in England and kept close ties with German law and jurisprudence.

I. Frankfurt – Berlin

His father was born in Königsberg, East Prussia, and was a well-known successful senior physician in Frankfurt am Main. His mother was born into the long-established banking family Sulzbach that had family ties with Max Warburg's family.[2] The Gebrüder Sulzbach[3] private bank was one of the founders of Deutsche Bank AG. Kurt Lipstein learnt the English language from very early on as his grandmother had been raised in England. Together with Sir Otto Kahn-Freund (born 1900), he attended the revered Goethe-Gymnasium, which had been established as a reformed grammar school in his home town. In 1927, he commenced his study of law spending his first semester at the University of Grenoble. That same year, he transferred to the Friedrich Wilhelm University in Berlin.

He attended lectures held by Theodor Kipp, lectures on French Law by Martin Wolff who had immigrated to Oxford in 1938, and attended Roman Law seminars held by Ernst Rabels who had fled to Ann Arbor in the US in 1939. Later on, in his first valedictory lecture, Kurt Lipstein spoke of the profound influence his three Berlin lecturers had on his academic thinking.[4]

In 1932, Lipstein passed his first state examination in law and began his practical legal training as *Referendar* at the district Court of Appeal of Frankfurt. The statute of 7th April 1933, cynically entitled "Gesetz zur Wiederherstellung des Berufsbeamtentums"[5] (Law for the Restoration of the Professional Civil Service), effectively brought his career to an end. He was prevented from entering the courts and was forced to submit an application for leave.[6] He realised that he was no longer safe in Germany.

English relatives provided him with contact to Patrick Duff, at the time a Fellow, and later Professor of Civil Law in Cambridge. Thereupon, Kurt Lipstein travelled to England and on Martin Wolff's recommendation met

---

[2] Max M. Warburg (1867–1946).

[3] On the history of the bank, see *Hans-Dieter Kirchholtes*, Jüdische Privatbanken in Frankfurt am Main (1989) 29 et seq.

[4] *Lipstein,* Acta et Agenda 47.

[5] RGBI. 1933 I 175.

[6] On this, see *Lipstein,* Cambridge 1933–2002, 761; *v. Bar 752.*

with his brother-in-law H.F. Jolowicz in London. He later travelled on to Cambridge. Writing on his visit to Trinity College many decades later, Kurt Lipstein describes: "On a summer evening with the evening sun striking the court, the impression was overwhelming, and my mind was made up: it was to be Cambridge."[7]

II. Cambridge and the World

In 1934, Kurt Lipstein immigrated to England. Up until 1936, he had travelled back to Germany six times, trips which were to still cause him nightmares decades later.[8] The last message he was to receive from his parents came from the concentration camp Theresienstadt.[9]

Lipstein was one of the first doctoral students of the then newly established PhD degree. He obtained a place at Trinity College. Among his colleagues were Rene David and Glanville Williams with whom he was to forge a life-long friendship. His dissertation on Roman Law, supervised by Duff and Jolowicz, was completed in 1936. He obtained a work permit with the help of the influential Harold Cooke Gutteridge,[10] whom Lipstein regarded as his "friend and father". Gutteridge who later held the first chair of Comparative Law at the University of Cambridge appointed Lipstein as his personal assistant from 1937 to 1941.

Following the outbreak of World War II, Lipstein volunteered for British Military Service, but was never required to serve. In May 1940, he was interned as an enemy alien together with several other immigrants to Cambridge, many of whom were later to become part of England's academic elite.[11] At the end of October 1940,[12] he was released from the camp and subsequently employed as Faculty Secretary to the Board of Law.[13]

---

[7] *Lipstein,* Cambridge 1933–2002, 761.

[8] *Lipstein,* Cambridge 1933–2002, 764.

[9] *Hepple,* Orbituary (above n. 1) 33.

[10] See *Kurt Lipstein,* Harold Cooke Gutteridge 1876–1963: RabelsZ 28 (1964) 201–207.

[11] Generally on the contribution of German refugees in England, see *Kurt Lipstein*, The history of the contribution to law by German-speaking Jewish refugees in the United Kingdom, in: Second Chance, Two Centuries of German-speaking jews in the United Kingdom, in: W. E. Mosse et al. (eds.) (1991) 221–227; also, Jurists Uprooted; *Gunther Kuhne*, Entwurzelte Juristen: JZ 2006, 233– 241. A general overview of German lawyers persecuted by the NS-regime and their contribution abroad can be found in *idem.*, Die Erforschung der Juristen-Emigration 1933–1945 und der Beitrag der deutschen Emigranten zur Entwicklung des Rechtswesens in Israel, in: Justo iure, Festgabe Otto Sandrock (1995) 385–400 (385–388).

[12] *Lipstein,* Cambridge 1933–2002, 766: „On the day when the battle of Britain was won."

[13] *Feuerstein/Parry* (above n. 1) S. IX.

His university appointments were not as rapid as the spread of his scholarly influence in Cambridge and beyond. He was appointed university lecturer in 1946, and, later in 1962, he was appointed Reader in Conflict of Laws. It was not until 1972 that he received the Professorship in Comparative Law, formerly held by Harold Gutteridge. At the age of 68, the University of Cambridge awarded him his LL.D. This was in 1977, the year of his formal retirement, but by no means meant an end to his teaching and supervising of students.

He was given membership of Clare College in 1940 and was elected Fellow in 1956. Later he also became a Member of Trinity College and in 1998, was made Honorary Fellow of Wolfson College. His legal training, activities and accolades were: 1938 his enrolment as student of the Middle Temple, 1950 call to the Bar, and 1966 Honorary Master of the Bench of the Middle Temple. In 1998 he was made an Honorary Queen's Council.

The provision of legal services and advice was not the main area of Kurt Lipstein's work. But even within this field of work he left his mark. Perhaps the most significant trial he was involved in was the famous Nottebohm Case, Liechtenstein v Guatemala[14] heard before the International Court of Justice in The Hague. He became one of Liechtenstein's lawyers (alongside Erwin H. Loewenfeld, Georges Sauser-Halland, James E.S. Fawcett), after inheriting the case from Hersch Lauterpacht who had been unable to continue following his appointment as judge at the International Court of Justice. The case was concerned with the question of diplomatic protection of a German born but naturalized citizen of Liechtenstein, against Guatemala and raised fundamental issues of Public International Law. It was later to impact on issues of private international law, despite the decision itself not involving any conflict of laws issues.[15]

Kurt Lipstein's sphere of academic influence steadily spread well beyond England. He was made Director of Research at the International Association of Legal Science from 1954 to 1959 and worked on the reception of western law in Turkey and India.[16] He was Visiting Professor at the University of

[14] [1955] ICJ Reports 4; on this, see *Kurt Lipstein/Erwin H. Loewenfeld,* Liechtenstein gegen Guatemala: Der Nottebohm-Fall, in: Gedächtnisschrift Ludwig Marxer (1963) 275–325; *Lipstein,* Acta et Agenda 55 et seq.

[15] On this see, e.g. *Heinz-Peter Mansel*, Personalstatut, Staatsangehörigkeit und Effektivität (1988) 148–149; *Ralf Michaels*, Public and Private International Law, German Views on Global Issues: J. Priv. Int. L. 4 (2008) 121–138 (125).

[16] *Kurt Lipstein*, The reception of western law in Turkey: Annales Fac. Dr. Istanbul 1956, 11–27, 225–238; *idem*., The reception of western law in Turkey: Social Science Bulletin 1957, 70–95; *idem.*, The reception of western law in countries of a different economic and social background with special regard to problems arising out of industrialisation: Annales Fac. Dr. lstanbul 1961, 3–13 19 et seq.; *idem*., The reception of western law in countries with a different social and economic background: India: Rev. Inst. Der. Comp. 1957/1958, 8–11, 69–81; 213–255; *idem*., The reception of western law in countries with a different social and economic background: India: Indian Yb. Int. L. 6 (1957) 277–293.

Pennsylvania and twice at Northwestern University (Chicago) in 1962, 1966 and 1968. He was Professeur Associé in Paris at the Sorbonne and lectured English Contract Law in 1977. Lipstein was for many decades reporter on English conflict of laws in 'Clunet'.[17]

In 1972, he was invited to lecture[18] at The Hague Academy of International Law. In 1993, he was elected to the world-renowned *Institut de Droit International*,[19] established in 1873. He was one of only 130 members accorded with this honour. His success as rapporteur of the *Institut* will be discussed further below. In an interview given in 2005, he lists the three highlights of his academic career to be: his appointment to Cambridge Faculty, receiving the title of Queen's Council (1998), and becoming a member of the *Institut* de Droit International.[20]

Lipstein also participated in the legislative process with great enthusiasm: "Nothing gives more satisfaction than the knowledge that at the end of one's work the legal system has been added to for the common good."[21] He succeeded Harold Gutteridge in 1952, becoming Member of the United Nations, where he was involved with the draft of the New York Convention on Maintenance Obligations of 20th June 1956.[22] Later, he also participated as Member of the Committee appointed by the Lord Chancellor and the Secretary for Scotland to advise on the conclusion of treaties prepared by The Hague Conference of Private International Law and in the negotiation of several Hague Conventions for the British Government. He was involved in the implementation of Conventions into English laws, specifically The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions,[23] and the 1973 Convention concerning the International Administration of the Estates of Deceased Persons[24]. He paid

---

[17] *Kurt Lipstein*, Chronique de jurisprudence britannique: Clunet 115 (1988) 803–845, 1051–1099.

[18] *Kurt Lipstein,* The general principles of private international law: Rec. des Cours 135 (1972-l) 97–230 (cited: General principles); further published in: Principles of the Conflict of Laws, National and International (1981) XII and 144 S.

[19] On the Institut and Session, in which Kurt Lipstein presented his draft resolution, see *Karl Doehring,* Tagung des Institut de Droit international in Berlin vom 17. bis 25.8.1999: NJW 1999, 3249–3250; *Erik Jayme,* Tagung des lnstitut de Droit international in Berlin: IPRax 2000, 61–62 (cited: Tagung). On the Institute generally, see *Fritz Munch,* Das lnstitut de Droit international: Arch. VolkR 28 (1990) 76–105.

[20] See *Dingle/Bates* (above n. 1) 93– 133.

[21] *Lipstein,* Acta et Agenda 54.

[22] *Kurt Lipstein,* A draft convention on the recovery abroad of claims for maintenance: Int. Comp. L.Q. 3 (1954) 125–134.

[23] Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions of 15 Nov. 1965; on this see *Kurt Lipstein,* The Tenth Session of the Hague Conference: Cambridge L.J. 23 (1965) 224–230; *idem.,* Adoption in private international law: Int.Comp.L.Q.12 (1963) 835–849.

[24] Hague Convention concerning the International Administration of the Estates of

particular attention to the Hague Conventions.[25] Later, he examined and guided the developments in both private international law and the law of procedure.[26] He frequently called for efforts to introduce supranational rules of law, either through the unification of laws or through the development of general principles of law. He sought to free the conflict of laws from its national constraints as much as possible, referring to the difficulties of a uniform application of laws on a supranational level. Consequently, Lipstein initiated the establishment of private law specialised chambers within the European Court of Justice.[27]

It was primarily the last third of his life during which he received the bulk of both his academic and other public acknowledgments. In addition to the above mentioned distinctions, Kurt Lipstein received the research award from the Alexander von Humboldt Foundation and in 1995 an honorary doctorate from the Law Faculty of the University of Würzburg.

Kurt Lipstein was deeply rooted in Cambridge. It was here that he married Gwyneth Herford[28] in 1944, leading a fulfilled married life until her death in 1998. They had two daughters, Eve and Diana, and six grandchildren. Their house, which he had moved into in 1947/1948 near the University, was surrounded by and hidden in greenery. Those that visited him there following the death of his wife would nevertheless notice the strong presence she still had in his life.

Kurt Lipstein was a person with lasting relationships. He clearly had a very strong affiliation with the University of Cambridge, evidenced in an interview that he gave in 2005.[29] A reception was held by the Law Faculty on the 20th November 2006, celebrating the 70th anniversary of his PhD in Cambridge. His Memorial Service was held shortly thereafter.

Deceased Persons of 2. Oct. 1973; on this see *Kurt Lipstein,* Das Haager Abkommen über die internationale Abwicklung von Nachlassen: RabelsZ 38 (1975) 29– 55.

[25] For a specific overview, see *inter alia Kurt Lipstein,* The Hague Convention on private international law, public law and public policy: Int. Comp. L.Q. 8 (1959) 506–522.

[26] On international contract law, see references given below under n. 61; and further, e.g. *Kurt Lipstein,* Chapter 39: The EEC Convention on the jurisdiction and the enforcement of civil and commercial matters of 27 September 1968, in: The Cambridge Lectures 1981, in *N. E. Eastham/B. Krivy* (eds.) (1981) 412–431.

[27] See in particular, the case study in *Kurt Lipstein,* Enforcement of judgments under the jurisdiction and judgments convention: safeguards: Int. Comp. L.Q. 36 (1987) 873–878 (878).

[28] On her life, see the brief description given by *v. Bar* 754. Gwyneth Lipstein was on the board of Cambridge council from 1967 to 1990, as evidenced by other documents.

[29] *Dingle/Bates* (above n. 1) 93–133.

III. Academic Achievements

Kurt Lipstein's scholary estate was made public with the generous donation of academic papers, including letters and manuscripts to Clare College by his heirs. These were then passed on to the Eminent Scholars Archive of the Squire Law Library for curation. It was the Lipstein Estate that gave the impulse to the creation of the Eminent Scholars Archive. The core collection of more than 2000 items occupies the ground floor of the JANUS-Archive established in 2007. The publicly available database has recorded the collection, which includes additional material such as picture, audio and video files.[30] The critical assessment of the whole of Kurt Lipstein's estate was a particularly worthwhile task.

Kurt Lipstein's academic achievements have been presented and analysed many times.[31] His bibliography,[32] not including the numerous and comprehensive book reviews and case comments, comprises well over one hundred autonomous and joint publications, published in several western European languages. The thematic spectrum of his work is impressive, ranging from substantive, comparative and private international law, to European law and public international law. His most important publications, particularly those in private international law, deserve special mention.

The above mentioned unpublished thesis[33] on the *beneficium cedendarum actionum* has been described by Christopher Forsyth, based on the text of an elegy by Thomas Grey, as a "flower born to blush unseen". Namely, that modern standard works would benefit from taking into consideration the work of Kurt Lipstein.[34] Although he lectured in Roman Law for many decades, it was not his main field of publication.

Even before the United Kingdom joined the European Economic Community in 1973, he had an interest in European Law. Following the accession, he published his detailed study on the law of European Community, the first of its kind written in English.[35] It was written from the point of view of a civil lawyer. It was Kurt Lipstein's specific aim to present not only the EC Treaty as primary law, but also to assess the influence of secondary law and the case law of the European Court of Justice on the national laws of the

---

[30] On this see above n. 1.

[31] See Kurt Lipstein's own report on his retirement: *Lipstein,* Acta et Agenda 47–61, covering the period until 1976; see further *v.* Bar 749–760; *Forsyth* 463–481.

[32] Partial bibliographies can be found in: Multum non multa, FS Lipstein (1980) 379–382 (up until the beginning of 1981), as well as (beyond 1981) on the internet, above n. 1.

[33] *Kurt Lipstein,* Critical Studies upon the Beneficium cedendar um actionum and vendito nominis (unpublished Ph.D. thesis, University of Cambridge) (1936) 188 pages.

[34] *Forsyth* 467.

[35] *Kurt Lipstein* , The Law of the European Economic Community (1974); see e.g. the reviews by *Eric Stein,* C.M.L. Rev. 11 (1974) 445–447.

Member States. The interpretation of the specific Treaty provisions is supplemented by the systematic presentation of the corresponding secondary sources of law. With this major work, he was able to establish the study of European Law as a scholarly discipline in England. He later published further works on European law[36] but the focus of his work was private international law: "The conflicts of law, however, attracted me more than any other topic".[37]

Lipstein's first substantial article within the field of private international law was published together with Harold Gutteridge on unjustifiable enrichment in English law.[38] The conclusions of their study were subsequently integrated into the relevant section in *Dicey/Morris*, The Conflict of Laws.[39] This continued to be a main source of reference in English law, until the enactment of the legislative provision in Art. 10 of the Rome II Regulation.[40] Kurt Lipstein was co-author of this major work from the 6th to the 8th edition, published respectively in 1948, 1958 and 1967.[41] The paper also had influence within German conflict of laws[42] and is to this day still referenced in argument.[43] When comparing the 6th edition to the previous edition, it appears that several substantive amendments were made that are attributable to Kurt Lipstein. This is also clearly evidenced in his paper on "Conflict of Laws 1921–1971, the way ahead".[44] The study is in many respects a comprehensive draft of the Hague Lectures which will be discussed further below. The development of the English conflict of laws is masterfully presented and analysed. He draws attention to[45] the omission of the theory of acquired rights, upon which Dicey had justified the application of foreign law, which from the 6th edition onwards (for which Lipstein was

---

[36] *Kurt Lipstein,* Some practical comparative law, The interpretation of multi-lingual treaties with special regard to the EEC-Treaties: Tul. L. Rev. 48 (1974) 907–915; *idem.,* The legal structure of Association Agreements with the EEC: Brit. Yb. Int. L. 49 (1974/75) 201–226; *idem.,* Conflicts of law in matters of social security under the EEC Treaty, in: European Law and the Individual, *F. G. Jacobs* (ed.) (1976) 55–77; *idem*., Un juriste anglais dans la Communauté européenne: Rev. int. dr. comp. 30 (1978) 493–504.

[37] *Lipstein,* Acta et Agenda 48.

[38] *Kurt Lipstein/Harold Cooke Gutteridge,* Conflicts of law in matters of unjustifiable enrichment: Cambridge L.J. 7 (1941) 80–93.

[39] See also *Lipstein,* Acta et Agenda 48; and further *Forsyth* 468.

[40] EG Regulation No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, ABl. EU 2007 L 199/40.

[41] The current version is the 14th edition from 2006.

[42] See *Konrad Zweigert,* Bereicherungsansprüche im internationalen Privatrecht: Süddeutsche Juristenzeitung 2 (1947) 247–253; specifically *v. Bar* 755.

[43] See *Geoffrey* C. *Cheshire/Peter North/James J. Fawcett,* Private International Law[14] (2008) 829.

[44] *Kurt Lipstein,* Conflict of laws 1921–71, The way ahead: Cambridge L.J. 31 (1972) 67–120.

[45] *Lipstein,* Conflict of laws 1921–71 (above) 67 et seq.; see also *idem.,* Acta et Agenda 54.

also responsible) was no longer considered to be a general principle within the conflict of laws. He emphasises the circular nature of the arguments and restrictions of the theory.[46]

Kurt Lipstein published extensively within the conflict of laws. His research ranged from adoption in private international law,[47] issues concerning intellectual property and procedural law,[48] European Community law,[49] to the law concerning international insolvency.[50] But it was the general theory and basic rules and principles within the conflict of laws that fascinated him. This was the area within which Lipstein consistently produced groundbreaking research. The relationship between private international law and public international law, as well as private and public law served as a distinct area of research on which he was able to continuously throw new light through his comparative assessments.[51] A particular interest of Lipstein's was to follow the development of the conflict of laws for and through international (arbitration) tribunals. Given that they do not possess a *lex fori*, international tribunals must either ascertain that a certain system of municipal law applies with the help of its own international rules of the conflict of laws, or develop jurisdiction-selecting rules on a comparative basis if the basic legal order does not identify such.

He discovered, described and analysed this development several times,

---

[46] See the detailed examination in *Lipstein,* Principles of the Conflict of Laws (above n. 19) 23 et seq.

[47] *Kurt Lipstein,* Adoption in private international law: Int. Comp. L.Q. 12 (1963) 835–849.

[48] *Kurt Lipstein,* Intellectual property: jurisdiction or choice of laws: Cambridge L.J. 61 (2002) 295–300; *idem.,* Intellectual property, Parallel choice of law rules: Cambridge L.J. 64 (2005) 593–613; see Forsyth 478.

[49] *Kurt Lipstein,* The law relating to the movement of companies in the European Community, in: FS Erik Jayme (2004) 527–531.

[50] *Kurt Lipstein,* Jurisdiction in bankruptcy: Mod. L. Rev. 12 (1949) 454–476; *idem.,* Jurisdiction to wind-up foreign companies: Cambridge L. J. 11 (1952) 198–208; *idem.,* Early treaties for the recognition and enforcement of foreign bankruptcies, in: Cross Border Insolvency, Comparative Dimensions?, in: Comparative Law XII Chap. 14, in *E. E. Fletcher (ed.)* (1990) 223–236; *idem.,* Bankruptcy and the Hague Conventions, in: FS Hans Hanisch (1994) 149–152.

[51] See in particular *Kurt Lipstein,* General principles (above n. 19) 167 et seq.; and *idem.,* Decisions of English courts during 1948–1949 involving questions of public or private international law: Brit. Yb. Int. L. 26 (1948/49) 469–493; *idem.,* Decisions of English courts during 1949–1950 involving questions of public or private international law: Brit. Yb. Int. L. 27 (1949/50) 466–482; *idem.,* Characterization, in: Int. Enc. Comp. L. III: Private International Law (1999) Chap.5, 65–67. See *idem.,* Conflict of public laws, Visions and realities, in: FS Zajtay (1982) 357–378; *idem.,* Öffentliches Recht und internationales Privatrecht, in: Internationales Privatrecht, internationales Wirtschaftsrecht, in *W. Holl/U. Klinke* (ed.) (1985) 39–54; *idem.,* Conflict of laws and public law, in: United Kingdom law in the 1980s, in *E. K. Banakas* (ed.) (1990) 38–58.

first in his essays completed in 1941 and 1943, then in his Hague lectures of 1972,[52] and finally in his paper of 2001.[53]

A seminal work of Lipstein's, which was based on his many earlier works[54] and was to become an important point of reference, is his lecture[55] at the Hague Academy of International Law in 1972. The lecture was later developed, updated and published in 1981.[56] In particular, the extension of the application of the Hague Convention was recognised and considered. The development of European contract law in the Rome Convention on the law applicable to contractual obligations[57] was not fully considered in the updated version of the Hague lecture. In contrast to earlier published versions he further refined the explanations on the significance of public policy in public international law and the limitation provisions of substantive law. He tackled issues such as the application of methodologically biased connections and overriding mandatory rules (from the *lex fori* or the law of a third state) through the application of the general jurisdiction-selection method in order to implement public policy interests. He re-examined these issues time and time again from differing perspectives.[58]

Kurt Lipstein's renowned Hague lecture[59] presents a concise yet comprehensive philosophical and historical perspective of the development of private international law and its defining principles. His work was largely carried out on a comparative basis. He examined the modern American revolutionary theories that sought to replace the outdated choice-of-law-selection system through value judgment. Lipstein's conclusions on this are conservative, mirroring his careful consideration of the need for the translation of his results into practice. The law must be coherent in practice. This is evidenced by foreseeability and predictability of results and certainty of the law.

---

[52] *Kurt Lipstein,* Conflict of laws before international tribunals I, in: Transactions of the Grotius Society 27 (1941) 142–181 and II: *ibidem*. 29 (1943) 51–83; *idem.,* General principles (above n. 19) 173 et seq.

[53] *Kurt Lipstein,* Conflict of laws before international tribunals sixty years later, in: Aufbruch nach Europa, 75 Jahre Max-Planck-Institut für Privatrecht (2001) 713–723.

[54] It has already been noted that Lipstein's major study Conflict of laws 1921–71, The way ahead (above n. 45) provides a comprehensive draft of his Hague lectures of 1972.

[55] *Lipstein,* General principles (above n. 18) 97–230; on this see also *idem.,* Acta et Agenda 52 et seq.

[56] *Lipstein,* Principles of the Conflict of Laws (above n. 18).

[57] Rome Convention on the law applicable to contractual obligations of 19 June 1980, consolidated version, ABI. EG C 27/34.

[58] Individual studies are e.g. *Kurt Lipstein,* Les normes fixant leur propre domaine d'application; les expériences anglaises et américaines, in: Droit international privé, Travaux du comité français de droit international privé (1977/1979) 187–201 (Centre National de la Recherche Scientifique); *idem.,* Inherent limitations in statutes and the conflict of laws: Int. Comp. L. Q. (1977) 884–902 (see in particular 898 et seq.).

[59] See the comprehensive review in *Forsyth* 470 et seq.

From very early on, Lipstein was not only concerned with European law, but also with the question of whether and how private international law and more specifically international contract law should be unified within the European Community.[60] Again, his forward thinking and practice oriented views become apparent.

It was a particularly auspicious choice when the editors of the *International Encyclopedia of Comparative Law*, appointed Kurt Lipstein as chief editor of the third volume on Private International Law. Once again he adopted a comparativist approach to private international law. Lipstein's work never ignored the link to positive law, nor did it simply provide a mere restatement and discussion of it. His views were in depth and focused on the subject specific field of international conflict of laws.

As editor of the private international law volumes, Lipstein was responsible for their publication and continued with this task until his death. With his meticulous scholarly style, linguistic elegance and extensive knowledge he was able to improve the substantive content of numerous contributions from around the world. He published three of his own, central sections, namely: interpersonal conflict of laws,[61] trusts,[62] and characterization.[63] In the first and particularly in the last contribution, Lipstein was able to build on the fundamental principles he had established in his Hague lectures. Once again, characteristic of these contributions is Lipstein's unique comparativist approach. He reaches the conclusion that characterization is not based on facts, but rather on the underlying legal relationship and that its function and purpose, not its technical connotation, is the object of the inquiry.

Another theoretical problem to which Lipstein has turned his attention on several occasions, is the relationship of foreign characterization and *renvoi*. In his most recent contribution on the issue,[64] he reaches uniquely reasoned and sophisticated conclusions. Lipstein was also drawn to the specific

---

[60] *Kurt Lipstein,* Comments on Art. 1 to 21 of the Draft Convention, in: European Private International Law of Obligations, in *Ole Lando/Bernd v. Hoffmann/Kurt Siehr* (eds.)(1978) 155–164; *idem.,* Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations, in: Harmonisation of Private International Law by the E.E.C., in *Kurt Lipstein* (ed.) (1978) 1–14; *idem.,* Characteristic performance, A new concept in the conflict of laws in matters of contract for the EEC: Northwestern J. Int. L. Bus. 3 (1981) 402–414.

[61] *Kurt Lipstein/I. Szászy,* Interpersonal conflict of laws, in: Int. Enc. Comp.L. III: Private International Law (1985) Chap. 10,3 – 35.

[62] *Kurt Lipstein,* Trusts, in: Int. Enc. Comp. L. III: Private International Law (1994) Chap. 23,3 – 40.

[63] *Lipstein,* Characterization (above n. 52) 3–67.

[64] *Kurt Lipstein,* Unusual bedfellows – renvoi and foreign characterization joined together, Private law in the international arena, Liber amicorum Kurt Siehr (2000) 405–412; see above *idem.,* Two basic problems of private international law revisited: King's College L.J. 10 (1999) 167–176.

issue of the *renvoi* problem and presented his examinations from invariably differing perspectives on numerous occasions. As part of his work at the *Institut de Droit International*, Lipstein was able to focus on the issue extensively. Only a few years following his election to the *Institut*, Lipstein was given the honourable appointment of rapporteur to the 4th Commission. He prepared a resolution[65] on the *renvoi* issue[66], the formulation of which is based on an examination by Wilhelm Wengler.[67] But Lipstein's approach is considerably different to that of Wengler. Lipstein pragmatically refrains from a theoretical overhaul of the *renvoi* problem, instead focusing on the prevalence of *renvoi* in the conflict of law rules in national systems. The quintessence of the resolution is that *renvoi* generally is applicable, and only where there are alternative connections, or where there is a free choice of law, should *renvoi* be excluded. This is in accordance with German private international law, which in Art 4 II, Art 35 I 1 EGBGB treats a choice of law as being a choice of the applicable substantive provisions of law; and, where alternative connections exist, excludes *renvoi*,[68] according to Art 4 I 1 EGBGB on the basis that it is incompatible with the meaning of the referral. The Articles of the Resolution are not presented in the form of binding rules, but instead as recommendations. This approach and the omission of further legal aspects related to the recognition of foreign private international law enabled Kurt Lipstein's largely unchanged draft to be adopted as the resolution. What was not accepted was his recommendation to reject "hidden" *renvoi*.[69] Nevertheless, the adoption of the resolution by the Institute must be considered a great personal triumph of the then 90 year old Kurt Lipstein. He was able to achieve that which had failed on two previous attempts. On those two occasions, in the years between 1896–1900 and 1957–1965, the Commission attempted to reach a majority on the issue of a resolution on the

[65] *Kurt Lipstein,* Taking Foreign Private International Law to Account, Session de Berlin, 1999: Ann. Inst. Dr. int. 68 (1999–11) 89–153; Resolution also given in: IPRax 2000, 51–52; on the resolution, see *Jayme*, Tagung (above n. 20) 61–62.

[66] The preparatory works including the responses by the Commission Members are published in: The taking into consideration of foreign private international law, Travaux préparatoires, 4th Commission, Session de Berlin, 1999 – Première partie: Travaux préparatoires: Ann. Inst. Dr. int. 68 (1999-I) 13–56; on this see *Erik Jayme,* Völkerrecht und Internationales Privatrecht: Interdependenz und Interaktion: IPRax 1998, 139 et seq. (citation: Völkerrecht).

[67] *Wilhelm Wengler,* Die Beachtlichkeit des fremden Kollisionsrechts, Eine Bestandsaufnahme und Besinnung zum Renvoi-Problem: Internationales Recht und Diplomatie 1956, 56–74; referenced in *Jayme,* Völkerrecht (above) 140.

[68] *Heinz Georg Bamberger/Herbert Roth (-Stephan Lorenz),* Kommentar zum BGB[11] (2008) Art. 4 EGBGB marg. no. 8 with further references.

[69] See *Lipstein,* in: The taking into consideration of foreign private international law (above n. 67) 46 et seq.; cf. *Jayme*, Tagung (above n. 20) 62. On hidden renvoi, see critically Münchener Kommentar zum BGB *(-Hans-Jürgen Sonnenberger)* (2006) Art. 4 EGBGB marg. no. 42 et seq. with further references.

issue of *renvoi*.[70] It was Kurt Lipstein's profound comparativist knowledge, his common sense, negotiation skills and his personality, which all contributed to the success of his resolution.

V. Kurt Lipstein, the Teacher

Much can be learnt about Lipstein as a teacher by reading the many comments and condolences dedicated to Kurt Lipstein on the Squire Law Library website. He is honoured and remembered with great fondness by different generations of former students. Kurt Lipstein was a true gentleman who treated everyone that he met with the same respect. To teach was for him to illustrate rather than instruct. Those who spoke with him are just as unlikely to forget his friendly interest and patience, composure and modesty, generosity and warmth, charm and humour, as his intellectual brilliance, the clarity of his reasoning, and wealth of knowledge. His ability to share his love and passion for the law with others earned him the status of a much admired and successful teacher.

From the beginning of his time in Cambridge Kurt Lipstein was a teacher. He began in 1936 with supervisions and continued with these well beyond his retirement. The Lord Justice of Appeal Michael Kerr (1921–2001) expressed his gratitude for his supervisor Kurt Lipstein.[71] He held his last supervisory session just two weeks before his death. He held lectures and seminars on a wide range of subjects from Roman Law – at the beginning of his academic career and to which he later returned to lecture –, European Law, Comparative Law, Private International Law and Public International Law, to Contract, Torts and English Legal Methods. The website of the Eminant Scholar Archive of the Squire Law Library has posted a video of Kurt Lipstein's last lecture in Legal Methods, held on the 17th July 2006.[72]

In addition to lecturing and supervision, Kurt Lipstein also taught in the Squire Law Library, which was only four years older than him, and over the many years worked in all three of the Squire Law Library's homes. For 72 years Kurt Lipstein faithfully followed, influenced and was devoted to the development of this Library. He often vividly described[73] how he helped new (and old) users of the Library to find their way around. Many discussions on substantive issues of law would transpire, from which users would

---

[70] See in-depth assessment in *Forsyth* 476 et seq.*; Jayme,* Tagung (above n. 20) 62.

[71] *Michael Kerr,* As far as I remember (2002) Chap. 30. On the internation of both Michael Kerr and Kurt Lipstein see also *Lipstein,* Cambridge 1933–2002, 765.

[72] At www.squire.law.cam.ac.uk/eminent_scholars.

[73] For specific memories see *Hepple,* Kurt Lipstein (above n. 1) 19, *v. Bar* 749 et seq, and *Zimmermann* (above n. 1) 296–297.

gain inspiration and ideas that were gratefully remembered decades later. This gratitude is documented in the introductory footnotes and forewords of numerous publications. The "Times"[74] obituary notes amongst his pupils in Cambridge six Lords Of Appeal in Ordinary, more Lords Justices of Appeal and "seemingly innumerable High Court Judges". He taught a countless number of non-English lawyers at the very successful courses at the International Summer School in English Legal Methods in Cambridge of which he was a co-founder.[75] It is they who carry on the memory of Kurt Lipstein, a remarkable man, a teacher and his work.

[74] The Times from 18 Jan. 2007.

[75] For an account of a seminar by Kurt Lipstein in the Summer School 1999, see *Thomas Hirschmann:* JuS 1999, Issue 11 (cover pages).

The Proper Law of the Contract*

More than any other branch of the law, the science of Conflict of Laws lends itself to a fruitful study from a comparative point of view.[1] For though its character is that of municipal law, it tends to find the most practical solutions in cases where a clash of two different systems of law seems unavoidable. Rigid national principles are scarce and the science seems altogether unorthodox. Within existing systems of Conflict of Laws, it is the principle of the law governing contracts which is open to the greatest number of diverse

---

[Editorial note: essay by *Kurt Lipstein, Jean S. Brunschig, Fredrick Jerie,* and *Karl M. Rodman*; first published in St John's Law Review 12 (1938), 242–246.]

* This article concerns itself with a comparative study of some aspects of the Continental and Anglo-American Systems.

Note: The authors wish to express their sincere gratitude to Professor H. C. Gutteridge, LL.M., K.C., Fellow of Trinity Hall of the University of Cambridge, under whose guidance this material was gathered during a seminar on the subject Lent Term 1938 at the University of Cambridge.

[1] See Kuhn, Comparative Commentaries on Private International Law; 4 Ficker, Rechtsvergleichendes Handwoerterbuch (1933) 371–390.

It is impossible to enter into the question of the relation between international law and conflict of laws. Reference may be made to the discussion by Arminjon (1928) (I) Rec. des cours 433–509; (1929) Revue de droit international et de legislation comparee 680–98 and a forthcoming article by Dr. Lipstein containing a full bibliography. We regard the attempt to find the basis of a system of conflict of laws in the conception of sovereignty as unfortunate; for either it means nothing more than that every state may introduce such rules of conflict of laws as it thinks fit. Or it may mean that every system of laws has to respect the sovereignty of other systems. Though this may be adequate (but not theoretically sound) in situations wholly connected with one territory, it fails to fulfill its task in cases connected with several systems of law. For what is the meaning of »respecting sovereignty«? Does it mean the universal recognition of the *lex patriae* (so Zitelmann, Frankenstein, Pillet) the *lex domicilii* (so v. Bar), or the *lex loci contractus*?

No answer can be given here; but it may be pointed out that it ends in a dispute upon questions of *a priori*.

solutions. This, because of the fact that contracts, more than any other legal institution, are less static than dynamic. Moreover, they are created by the free will of the parties. Thus, we believe, that a study of the solutions used in a number of European countries might be of use to the legal profession of the United States even though practice and doctrine are far more established there than in Europe.

Conflict of Laws or Private International Law, as it is more commonly called in Europe, has played the part of Cinderella in the codifications of most European systems, and | within the few systems that have attempted a codification of it, the rules governing contracts have often been consciously omitted. Thus we find detailed rules only in the Austrian aGBB[2] and the parts of Czechoslovakia and Yugoslavia which formerly belonged to the old Austrian Empire, in addition to Italy[3] and Poland.[4] In France, Germany and Switzerland the matter has been left to the courts as in the case of England and the United States. But as the role of precedent in Europe is a different one from that in the Common Law of England, case law has not been quite successful in introducing undisputed rules. For precedents are not binding upon any but the highest courts and even these are empowered to overrule their own precedents under certain conditions. This power is, of course, also exercised by Anglo-American courts but so rarely as not to seriously shake the ruling power of case precedents. In practice, however, European case law does establish a certain continuity, if only for the reason that inferior courts are reluctant to contradict cases decided by the supreme courts for fear of being overruled and thus to hamper the chances of promotion of the judges concerned.[5] On the whole we may therefore say that a certain practice has been established, but exceptions exist and there is always a certain chance of being able to criticize, attack and finally bring about a change in this sphere of no man's land.

Writers have been only too willing to accept this task, and during the past forty years an immense literature has sprung up. Of recent text-book writers who have not limited themselves to a descriptive discussion we have to mention Arminjon, Niboyet, Frankenstein, Nolde, Sauser-Hall, Jeanprêtre and Haudek[6] who have brought into bold relief the | problem as it exists on

---

[2] 4, 34–37.

[3] Art. 9, § 2. disp. rel. c.c.; art. 58, c. comm. (1933).

[4] Arts. 7–10, Statute of 2.8.1926.

[5] The career of judges, on the continent of Europe, is distinct from that of other professional lawyers. After having completed their course of education, they have to decide whether they intend to go to the Bar or to the Bench, where they start as Assistant Judges, both in Regional and County Courts.

[6] 2 Arminjon, Precis de droit international prive (2d ed. 1934) 231 sq.; Niboyet, Manuel de droit international prive (2d ed. 1928) 789 sq. no. 681; (1927) (I) Rec. des cours 1–12; 2 Frankenstein, Internationales Privatrecht (1929) 123 sq. no.; Jeanpetre, Les conflits de lois

the Continent. In England the influence of Story, the great American jurist, has, during the last century, largely been replaced by the work of the late Professor Dicey, but of late the writings and teachings of Professor H. C. Gutteridge and Dr. G. C. Cheshire[7] have been well received by scholars and practitioners alike. American legal thought on the subject, initiated by Judge Story, is now best represented by the work of Professors Beale, Lorenzen and Cook.[8] Before expressing the views and tendencies outlined by these writers, it seems advisable to touch on the position of the law as it stands today.

The French Code Civile does not contain any pertinent provisions but the courts have taken a steady course and a well established »jurisprudence« (case law)[9] enables us to draw definite conclusions.[10] The governing principle is that of autonomy of will, *i.e.,* of free choice of law by the parties.[11] However, it happens, and not only occasionally, that the parties have omitted to express their intention. It is then that canons of interpretation come into play. First, the judge is called upon to investigate whether a tacit reference to any system of law places that contract under the rules of that system.[12] Failing this, he has to apply certain tests, whether|as canons of interpretation or as objective tests cannot be stated with any certainty.[13] These tests are as follows: (1) If both parties are of the same nationality then the *lex patria* or the law of their nationality governs. If the parties are domiciled in any other country than that of their nationality then the law of their domicile gov-

---

en matiere d'obligations contractuelles selon la jurisprudence et la doctrine aux Estats-Unis (1936); Haudek, Die Bedeutung des Parteiwillens im Internationalen Privatrecht (1931); Sauser-Hall, Zeitschrift fuer Schweizerisches (1925) 271a–320a; Nolde, *Annuarie de l'Institut de Droit International* (1925) (32) 50–145, 501–508; (1927 (I) *id.* at 937–954; (II) *id.* at 194–225, 336.

[7] Professor H. C. Gutteridge (1936) Cambridge L. J. 19; Dr. G. C. Cheshire, Private International Law (2d ed. 1938) 241 *et seq*.

[8] Beale, A Treatise of the Conflict of Laws (1936); Beale, Cases on Conflict of Laws (1909); Lorenzen, Cases on Conflict of Laws; Lorenzen, A Comparative Study of the Law of Bills and Notes (1919).

[9] Precedent, in continental Europe, as we have stated above, does not carry the same weight as in Anglo-American law. Binding upon the supreme courts, but subject to overruling by a special form of judgment by the full court, it is only of persuasive authority with regard to inferior courts. The latter are not bound by their own previous decisions.

[10] This would not appear so from the attitude taken by text-book writers who attempt to introduce their own solution into the existing law.

[11] Cass. req. 28.12 (1936); (1937) Rev. crit. 684, with note by Battifol; Cass. civ. 31.5 (1932); (1934) Rev. crit. 909, with note by Niboyet; Cass. civ. 12.5 (1930); (1931) Clunet 164; *cf.* (1930) Clunet 417. See also Cass. civ. 5.12 (1910); Sirey (1911) 1, 129, with note by Lyon-Caen; (1911) Rev. Darras 395; Cass. req. 19.5 (1884); Sirey (1885) 1, 113, with note by Lacointa; *cf.* Haudek, *op. cit. supra* note 6, at 59.

[12] Battifol (1935) Rev. crit. 629; Cour d'Appel of Colmar (1934) Clunet 976; Lyon-Caeon, Sirey (1911) 1, 130; Cass. req. 10, 12 (1907); Sirey (1910) 1, 132.

[13] See Niboyet (1936) Rev. crit. 464.

erns.[14] (2) If the parties are of different nationalities then the *lex loci contractus* or the law of the place of contracting governs.[15] (3) If the place of contracting is difficult to ascertain then the law of the place of performance will be applied.[16] (4) Finally, the court will apply that system which would uphold or look with the greatest favor on the contract.[17]

Arminjon suggests a slight change in this order reversing the position of tests numbers two and three. Moreover, he suggests that in the case of test number three the *lex patria* of the debtor should supercede the *lex solutionis,* the law of the place of performance, provided it is a unilateral contract.[18] These contentions, however, have not found much favor in the decided cases.

| In Switzerland the law governing the essential validity of contracts has been summed up in the following words by the Tribunal Federal, the highest court of that country, in a recent case:

»Following a long line of decisions of the Tribunal Federal concerning the essential validity of contracts, we hold that that system of law is applicable which the parties intended submission to when the contract was concluded or lacking an express declaration, that system of law which they would have intended to apply if they had considered this question at all. The system of this presumed intention is the system of that country with which the contract in question has the closest local connection.«[19]

---

[14] *Cf.* Lyon-Caen, note to Sirey (1911) 1, 129, and to (1900) 1, 161, quoting many older cases. See Cass. req. 19.5 (1894); Sirey (1885) 1, 113; Cour d'Appel, Douai 2.11 (1933); Sirey (1934) 2, 109 (2).

[15] Cour d'Appel, Colmar, 162 (1937); (1937) Rev. crit. 687, with note by Battifol; cf. note to Sirey (1913) 4. See Cass. req. 28.12 (1936); (1937) Rev. crit. 684; Cass. civ. 15.5 (1935); (1936) Rev. crit. 464; Battifol (1937) Rev. crit. (1937) 434; Cass. civ. 31.5 (1931); (1934) Rev. crit. 911; Sirey (1933) 1, 17, with note by Niboyet; Cass. civ. 15.12 (1910); Sirey (1911) 1, 129; (1911) Rev. Darras 395; Cass. civ. 6.2 (1900); Sirey (1900) 1, 161; Cour d'Appel, Paris, 25.6 (1931); (1932) Clunet 933 (5); Cour d'Appel, Colmar, 11.3 (1933); (1934) Rev. crit. 138; Cour d'Appel, Douai, 2.11 (1933); Sirey (1934) 2, 109 (regarding it as the presumed intention of the parties, contrary to the well established doctrine of the Cour de Cassation). See also Colmar 17.2 (1937); Battifol (1934) Rev. crit. 639/40.

[16] Decisions favouring the *lex loci solutionis* are gaining ground. Cour d'Appel, Paris, 26.3 (1936); (1936) Rev. crit. 487; Battifol (1937) Rev. crit. 435; Cass. civ. 31.5 (1932); (1934) Rev. crit. 909; Cour d'Appel, Paris, 28.2 (1935); (1935) Rev. crit. 748, with note; Cour d'Appel, Metz, 12.4 (1934); (1935) Clunet 988 (the court purports to interpret the intention of the parties); Cour d'Appel, Colmar (Belfort) 2.5 (1933); (1934) Clunet 424; (1934) Rev. crit. 163; Battifol (1935) Rev. crit. 631. But. cf. Colmar, 30.1 and 13.3 (1933); (1934) Clunet 951; Battifol, *op. supra* note 12, at 630 (where the court was unable to locate the place of execution of the contract).

[17] Weiss, Manuel de droit international prive (9th ed. 1925) 571 sq.; 2 Arminjon, *op. cit: supra* note 6, at 248 sq. No cases can be quoted in favour of this proposition.

[18] 2 Arminjon, *op. cit. supra* note 6, at 250.

[19] Arret du Tribunal Federal, Receuil officiel (A. T. F.) 40-II–391 and 63-II–307. But free choice of law exists only at the time the contract is concluded. It does not go so far as to allow the parties to state, during the litigation, that they intended to apply Swiss law when

The Swiss courts then, we can say, attempt to find the proper law of the contract – that law which is most closely connected with the contract. It is interesting to note that this has usually been held to be the law of the place of performance of the contract.[20] In cases where the places of performance are situated in more than one country, and one of the places happens to be Swiss, then Swiss law will be applied.[21] In the case of a unilateral contract the law governing will be held to be the law of the debtor's domicile. In the same manner when a Swiss firm enters into a type of contract known as a »massenvertraege« or a »contrad' adhesion« [editorial note: contrat d'adhésion] – a standard contract by one debtor with a large number of creditors in various countries, the law of the debtor's domicile is applied, *i.e.,* the Swiss law.[22] In the event the court is unable to find | the »proper law of the contract«, then it will apply the *lex fori* or the law of the forum.[23]

Contracts concluded in Czechoslovakia between nationals and foreigners are governed by Czech law even if the contract is to be performed in a foreign country or the debtor is a foreigner.[24] The same system of law, *i.e.,* the *lex loci contractus,* is applied even though the contract is between foreigners, if the contract has been concluded in Czechoslovakia. However, foreigners have the option of stipulating, in their contract, that another system of law is to apply and this choice is binding on the Czech courts. They are limited in their choice to a system of law which has some connection with the contract.[25] Although on the Continent it is the general rule that the law of a man's nationality follows him wherever he goes, Czech law permits its citizens autonomy of will in making contracts outside of Czechoslovakia. This permission extends not only to a Czech and a foreigner but to two Czechs contracting in a foreign land. However, if the contract is to be performed in Czechoslovakia then Czech law will be applied.[26] Where two foreigners conclude a contract in a foreign land to be performed in Czechoslovakia they are permitted a free choice of the law governing that agreement. These rules apply to Austria as well.[27]

---

the circumstances of the case point to a different system. The declaration by the parties during the case to apply a certain system of law not specified in the contract can serve only as an indication to the judge of what they intended when entering into the contract. But this presumption or guide is in no way binding upon the judge. A. T. F. 63-II–44; A. T. F. 62-II–125; A. T. F. 60-II–300.

[20] A. T. F. 63-II–308.

[21] A. T. F. 57-II–72.

[22] A. T. F. 44-II–432.

[23] A. T. F. 44-II–492.

[24] Obcansky Zakonnik (Czech Code) § 36.

[25] *Ibid.*

[26] *Supra* note 24, § 4.

[27] *Supra* note 24, § 35. Unilateral contracts concluded by foreigners, being the debtors, are governed by Czech law or by the law of the nationality of the foreigners, depending upon which law is more favorable to the contract.

According to Italian law, contracts are governed by the *lex loci contractus* but if the parties are of the same nationality then by their *lex patria*. But it is always open to the parties to prove a different choice of law.[28]

The Polish Statute of 1926 provides an infinite variety of rules. The parties are free to choose for their contract one of the following systems: the *lex patria,* the *lex domicilii,* the *lex loci contractus,* the *lex loci solutionis,* or the *lex res sitae*.[29] Lacking a choice by the parties, the following system | is applicable: in contracts referring to stock exchange and other markets, the law governing the market concerned; as to land, the *lex res sitae;* for retail commerce, the law of the residence of the vendor; all insurance contracts, the law governing the insurance company; professional contracts, the law where the profession is exercised; labor contracts generally, the law of the place where the labor was done.[30] In all other contracts not mentioned above: if the parties are domiciled in the same country, the law of the domicile; if not domiciled in the same country, then the law of the debtor's domicile in the case of unilateral contracts; in the case of bilateral contracts, or if the domicile of the debtor is unknown, the *lex loci contractus*. For the purpose of this statute the *lex loci contractus* is the law of that place where the offeror receives the acceptance.[31]

More general rules, in this respect, are applied in Germany. In the first instance, the principle of free choice of law by the parties is recognized.[32] However, this does not mean that the parties may choose any law they may desire. A decision of the Reichsgericht, the highest court of the country, handed down in 1895, before the introduction of the new code of 1900, but which is still regarded as authority today, held that a marriage brokerage contract between two domiciled Saxons, executed and performed in Saxony, could not be submitted by the parties to the law of Prussia.[33] It is therefore suggested that the parties may choose the system of law they desire only so far as their contract has a certain connection with the system chosen.

In case the court is unable to find an expressed intention in the contract it

---

[28] Art. 9, § 2, disp. prel. c.c.; Art. 58, c. comm. Udina, 6 Repertoire de droit international 510–12.

[29] Art. 7, Statute of 2.8 (1926); cf. Makarov. in Leske-Loewenfeld: 8 Die Rechtsverfolgung im Internationalen Verkehr (1929) 145 sq. no.

[30] *Id.* art. 8.

[31] *Id.* art. 9.

[32] *E.g.,* Gz. 145, 121 (1934); IPR. Rspr. (1934) n. 29; I. W. 3121 (1935) 33; Bull. Inst. Jur. Int. 71, no. 8792; (1935) Rev. crit. 447, with note by Mezger surveying the cases; RGZ. IPR. Rspr. (1934) n. 19; RGZ. 142, 417, 23; (1933) n. 21; (1931) nn. 30–32; (1930) nn. 30–31, 40, 48; (1929) nn. 31, 36, 43. It must suffice to refer to these cases and to Lewald, Das Deutsche Internationale Privatrecht nos. 260–268, 10; Repertoire de droit international 71, n. 5; 73, n.–12; Haudek, *op. cit. supra* note 6, with numerous quotations at 47, n. 2.

[33] RGZ. 44, 300; Lewald, *op. cit. supra,* at 212, n. 269; 10 Rep. 79, n. 39.

has to look for a tacit one. Lacking this, | the court is entitled to find the intention of the parties from the circumstances of the case and what system of law the parties would have chosen if they had ever considered the matter.[34] In addition the court may, in the last instance, apply the test of the *lex loci solutionis* – the law of the place of performance.[35] It is difficult to say when and how the courts apply one or the other of these tests, as it is nearly always possible to construe a fictitious intention and find that intention to be the *lex loci solutionis*.[36] It may be stated with some confidence that they are applied vicariously and that the *lex loci solutionis* is used as the last resort.

It is universally agreed that the English rule with respect to the essential validity of a contract calls for the application of the proper law of the contract. This, according to Professor Dicey's Rule 155, is the rule that governs, and he states it to be: »The proper law [of the contract] is the law by which the parties to a contract intend the contract to be governed, or the law or laws to which the parties intended to submit themselves.«

The English courts have paid, and still continue to pay, great deference to the authority of Dicey, but no case has yet arisen wherein there was an express intention that a specific system of law should apply, with the possible exception of the case of the *Torni*,[37] but this is a doubtful case at best. Inevitably the courts are forced to deduce a presumed intention. This, of course, is really an objective test. Cheshire and Westlake[38] both contend that the courts adopt the objective test in every instance and therefore reject Dicey's theory of the proper law.[39]

In attempting to find this proper law of the contract the courts have availed themselves of a number of rebuttable presumptions. The first of these presumptions is the *lex loci contractus* or the law of the place where the contract was | made. This is always indulged in when the contract is to be performed where it was made or where no place of performance is specified.[40] If, on the other hand, the agreement between the parties is to be performed at a place other than that of the making, the presumption is that the law of the place of performance was intended by the parties.[41] Thirdly,

[34] See *supra* note 32; RGZ. IPR. Rspr. (1930) nn. 32–33, 34; RGZ. 126, 196 (1929) n. 45. Lewald, *op. cit. supra* note 32, at 212, n. 269; 221, n. 276; 10 Rep. 74–75, nn. 14–17 and the cases quoted there.

[35] See *supra* note 32; RGZ. IPR. Rspr. (1932) n. 27; (1930) nn. 30, 31; (1929) nn. 33, 37, 38, 47, 48, 49; Lewald, *op. cit. supra* note 32, at 224, n. 281, with references.

[36] See Lewald, *loc. cit. supra* note 32.

[37] The Torni (1932) Probate 27 at 78.

[38] Cheshire, Private International Law, 249 *et seq.;* Westlake, Private International Law (7th ed. Bentwich) 299 *et seq.*

[39] Dicey, Conflict of Laws (5th ed. Keith) Rule 155 at 647 *et seq.* and 958 *et seq.*

[40] P. & O. v. Shand (1865) 3 Moo P. C. (N. s.) 272.

[41] Chatonay v. Brazilian Submarine Telegraph Co. (1891) 1 Q. B. 79; Benain v. Debono (1924) A. C. 514.

and this is a very rare case, where, in the case of maritime contracts, specific reference is made by the parties to the law of the flag of the ship as the governing rule, a court will adopt that law as conforming with the intent of the contracting parties.[42]

Although throughout the numerous jurisdictions that comprise the United States, support can be found for almost every doctrine concerning the law governing the essential validity of contracts, it seems to be widely held, if in fact it is not the majority rule, as stated by Corpus Juris: »A contract is governed as to its intrinsic validity and effect by the law with reference to which the parties intended, or fairly may have presumed to have intended, to contract, the real place of the contract being a matter of mutual intention except in exceptional circumstances evincing a purpose in making the contract to commit a fraud on the law.«[43] »The intention of the parties may be either expressed or implied from their acts and conduct at the time of making the contract.«[44] However, express provisions as to the law they desire to govern their contract must be made in good faith by the parties or the court will not give effect to them.[45]

When construing this intent, the American courts have usually presumed, when no further statement was made, that the law of the place of contracting was intended by the parties because of the fact that they made their contract in that place, or, as it has been put, the contract is governed by the *lex loci contractus* unless a contrary intent appears to have been in the minds of the parties.

| However, where the contract is made in one country or place, to be performed, wholly or in part, in another place, the proper law, particularly as to performance, may be presumed to be the law of the place of performance.[46]

Neither of these main presumptions is, as to the leading rules, conclusive as to the intention of the parties but they are important indicia of that fact.[47] Professor Beale does not see the intention of the parties as the basis of the law which ought govern contracts. His interpretation of the American cases does not place the intention of the parties as the leading rule. Considerable may be said for that opinion as it is often very difficult to find out,

---

[42] Lloyd v. Gilbert (1865) L. R. 1 Q. B. 115.

[43] 13 C. J. 277, § 19 *et seq.*

[44] Bertonneau v. Southern Pacific Co., 17 Cal. App. 439, 120 Pac. 53 (1911).

[45] 2 Beale, *op. cit. supra* note 8, § 332.23 *et seq.*

[46] Northwestern Mutual Life Ins. Co. v. McCune, 223 U. S. 234, 32 Sup. Ct. 220 (1911); Am. Spirits Mfg. Co. v. Albany, 164 Ill. 186, 45 N. E. 442 (1896); Hall v. Cordell, 142 U. S. 116, 12 Sup. Ct. 154 (1891); Doughery v. Equitable Life Ins. Co., 266 N. Y. 171, 193 N. E. 897 (1891); Old Dominion Copper Mining Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193 (1909).

[47] Mayer v. Rochw., 15 A. 235.

from the mere reading of a case, whether the judge applied the *lex loci contractus* as a rigid rule, or found that rule to have been intended by the parties.[48] It is sufficient to say, however, that rigid rules are applied in some of the states of the Union and the question of whether the rule which seeks to find the intention of the parties or one which lays down an unalterable legal principle is the leading rule is merely an academic quibble. A discussion of the relative merits of the two opposing camps is, however, imperative, and is dealt with in detail below.

Capacity

In French law, capacity to enter into contractual relations is governed by the *lex patria,* or the law of the nationality of the contracting parties, according to the statutory provisions of Article 3, Section 3 of the Code Civile. To this is added the reservation that a foreigner dealing with French citizens in France cannot avail himself of his incapacity if he acted fraudulently and the Frenchman acted in good faith and with due caution.[49]

|Likewise in Swiss Law, the question of contractual capacity is governed by the *lex patria.* But foreigners, capable according to Swiss Law, cannot claim exemption afforded them by their national law.[50] This is also the rule according to the law of Germany.[51]

In accord with the general rule of the Continent as exampled above, the law of Czechoslovakia applies the *lex patria* concerning the question of capacity of foreigners to contract in Czechoslovakia.[52]

Capacity, in Italy, is also governed by the *lex patria* with the reservation that the law of the place of making the contract shall govern commercial contracts.[53] In Poland the *lex patria* is always applied.[54]

The Anglo-American common law here makes a rather sharp break with the Continental tendency and refuses to recognize the doctrine of a personal law following a man wherever he may go. In England, Dicey supported the

---

[48] 2 Beale, *op. cit. supra* note 8, § 332.53 *et seq.*

[49] de Lizardi v. Chaise, Cass. req. 16.1 (1861); Sirey (1861) 1, 305, with note by Massé; Lyon, 30.4 (1907); (1908) Clunet 146; (1908) Rev. Darras 630; Cassin (1930) (IV) Rec. des cours 794, n. 94; Niboyet, *op. cit. supra* note 6, at 712, n. 600.

[50] Code civil suisse, Title Final, art. 59; 12 a 14.

[51] *Id.* art. 7, § 3 EGBGB; Lewald, *op. cit. supra* note 32, at 58, nn. 73–77, with cases.

[52] *Id.* § 36. Where foreigners are incapable according to the law of their nationality although this fact was not known to the other party, the contract cannot be enforced but the innocent party has a claim for damages.

[53] Idina, 6 Rep. de droit international 510, n. 127, quoting App. Milan 1.7 (1914); (1914) Rivista di diritto internazionale 610.

[54] Art. 1, Statute of 2.8 (1926).

view that the law of the domicile of the parties should govern, but made vital exceptions to that rule, particularly in the case of mercantile contracts. In the case of these latter contracts, all agree that the *lex loci contractus* must apply although Dr. Cheshire would apply the proper law of the contract to this phase of its validity as well.[55]

There is little doubt that in the United States the capacity of the parties to make a contract is, as a general rule, to be determined by the law of the place where the contract is entered into.[56] However, the law of the place of making the contract will not be given effect, as regards capacity, if it is contrary to the public policy of the forum.[57]

| Form

In French law formalities are governed by the law of the place where the transaction takes place.[58] This is also the rule in Swiss law.[59]

But in Germany, Poland and Czechoslovakia the law governing form is the proper law of the contract. Both countries, however, will recognize the formal validity of the contract if the *lex loci contractus* has been complied with.[60] In Italy the rule prevailing is the *locus regit actum* – the place where the act occurred – but if the parties are of the same nationality it is sufficient that the *lex patria* of the parties has been complied with.[61]

Dr. Cheshire, in his recent work, appeals for the proper law of the contract as governing with respect to form, but he has no authority for that proposition.[62] It is usually held to be the English rule that the *locus regit actum* governs, although no cases seem to exist on the question of the law governing the formal validity of a contract, outside of marriage and revenue cases.

The American rule follows the general trend as stated above.[63] However, as respects formalities in the nature of the Common Law Statute of Frauds, Professor Williston suggests that such requirements be considered a matter of validity instead of a requirement of procedure or evidence, since the parties to a contract normally observe the formalities required to make it en-

---

[55] Cheshire, *op. cit. supra* note 38, at 205 *et seq.*

[56] Mathews v. Murchison, 17 Fed. 760 (Cir. Ct. N. C. 1883); Union Nat. Bank v. Chapman, 169 N. Y. 538. 162 N. E. 672 (1902).

[57] Geneva First Nat. Bank v. Shan, 90 Tenn. 237, 59 L. R. A. 498.

[58] Cass. req. 19.5 (1884); Sirey (1885) 1, 113, with note (4) by Lacointa, quoting many cases.

[59] A. T. F. 46-II–490.

[60] Art. 11, EGBGB; art. 5, Statute of 2.8 (1926).

[61] Art. 9 (1) disp. prel. c.c.

[62] Cheshire, *op. cit. supra* note 7, at 243.

[63] Roubicek v. Haddad, 5 L. A. 938.

forceable in the place where they are contracting. For if the Statute of Frauds is held to be a procedural matter that is the concern of the *lex fori* and as we have stated it is invariably difficult and often impossible to determine in advance what the forum will be. The cases are, on this point, somewhat divided.[64]

| Reference to Material Parts of Foreign Systems

Not infrequently parties domiciled in the same country and of the same nationality, making a contract to be performed at the domicile, happen to include in their contracts some reference to a foreign system of law. This does not mean that the system is now governed entirely by some foreign system of law wholly unconnected with the contract. In fact it amounts to nothing more than that the parties, instead of inserting as contractual provisions all those rules of that foreign system in question, pertinent to their contract, have taken the shorter course of referring to those rules as such. A recent tendency to introduce such a limited choice of law (liberté des conventions)[65] – limited to a defined set of foreign material rules has, however, been stopped by the Cour de Cassation, the highest French court.[66] Thus it remains open to the court to determine whether such contracts are to be governed by municipal or foreign law.

The reference of the parties to some defined set of rules of foreign law appears to exempt the contract altogether from the sphere of the application of German law owing to the wide discretion left to the parties and owing to the liberal interpretation of the parties' intention to subject the contract to some other system of law. It appears therefore that a *liberté des conventions,* such as proposed by French and German lawyers, and as dismissed by French courts, will only lead to the desired results if the parties refer expressly to that limited part of the foreign system of law they wish to apply as a contractual provision of their contract. They must also express their wish not to take the contract out of the system which would govern it but for the reference to | some rules of foreign law.[67] A slightly less rigid attitude is taken in Switzerland,[68] Austria and Czechoslovakia.[69]

---

[64] 1 Williston, Contracts § 600.

[65] Arminjon, *op. cit. supra* note 6, at 310 sq.; Niboyet (1927) (I) Rec. des cours 57.

[66] Haudek, *op. cit. supra* note 6, at 41, n. 5, quotes; Cour d'Appel, Rennes, 16.7 (1926); (1927) Clunet 659; (1927) Rev. Darras 523; ca. Cass. civ. 19.2 (1930); (1931) Clunet 90; (1930) Rev. Darras 282; Limoges, 12.10 (1928); (1929) Clunet 355; 3 Jahrbuch fuer Schiedsgerichtswesen 374; *cf.* Mann (1937) (17) British Yearbook of International Law 101.

[67] Haudek, *op. cit. supra* note 6, at 49 and n. 1, 50; Lewald, *op. cit. supra* note 32, at 202–207, nn. 262–264; 10 Rep. 72, nn. 6–9; RGZ. IPR. Rspr. (1933) n. 21.

[68] Haudek, *op. cit. supra* note 6, at 54, with quotations.

[69] Haudek, *op. cit. supra* note 6, n. 1, quoting OGH. 26.5 (1908); GIUNF XI no. 4249.

In England the parties may by reference incorporate some part of foreign law into their contract, which as such, will remain to be governed by the proper law. Thus in the *Dobell* v. *Steamship Rossomore Co.* case,[70] a bill of lading incorporated sections of the Harter Act by reference. Kay, J., said, »This bill of lading must be read as if the words of the Harter Act were set out at length in it.« Also in *Rowett Leaky and Co. v. Scottish, Provident Institution,*[71] there were policies which Astbury, J., declared to be an English contract and construable by English law. The words »bona fide onerous holder« occurred and his Lordship said that he thought expert evidence was admissible to show the precise meaning of the phrase. He eventually decided the case by saying the result was the same whether he looked at the evidence or not. The words quoted above being a common usage in Scots law.

There is no reason why parties in the United States cannot, instead of putting certain specific clauses in their contract, merely refer to a foreign rule of law, if that rule is not contrary to the public policy of the forum.[72] This would be true of course in states which permit the free choice of law of the parties and those which seek to find the proper law of the contract, but it should also be true in those states applying a rigid rule, for the reason that what the parties are really doing is inserting a particular clause in their contract which should be enforced as any other clause in the contract is enforced.

Renvoi

If choice of law is taken in the sense that it means nothing more than including into a contract, governed by a de|fined and unchangeable system of law, of references to a substantially different set of rules of another system, instead of providing for each separate case by special clause containing the material solution of the foreign system, the question of *renvoi* cannot arise. For instance, the parties may feel inclined to provide for the parting of the risk in a sale at a time different from that provided in their own system. They may define this in a number of provisions or they may refer to a set of rules in another system of law which would comply with their wish and would save them the trouble of reembodying all these provisions in the form of their contract. In such a case the contract is not taken out of the system of law governing it originally as decided by the law of the forum. But when the parties decide to take the contract as a whole out of that system, including its

---

[70] L. 895 2 Q. B. 403.
[71] 42 T. L. R. 331.
[72] See *supra* note 46.

rules of municipal conflict of laws and public policy upon which the latter insists in all contracts governed by it, then reference to the foreign system of law does not differ at all from the reference by that foreign municipal system of conflicts of law to still another system. This means that we have to consider the question of *renvo*i.

Lewald states that he has only come across three cases in German law dealing with this matter, and in all of them *renvoi* is denied. No other system of law on the Continent has been discovered by us to contain a similar case.[73] *Prima facie* one feels inclined to say that if the parties did refer to a system of law, they meant it, and did not consider that this system could refuse to accept the reference to it.[74] But does this reason not hold as well when the law of the forum itself prefers another system? Perhaps one may say that the parties, when referring to a foreign system of law, made that selection because it was more convenient to them; if the law refers to a foreign system, it does so for the sake of justice and good administration, but it remains always in the background as a subsidiary system, only too willing to lend its | aid, as municipal law is always ready to be applied by municipal courts. The question of *renvoi,* in the law of contracts, is a comparatively new field, and many countries have not had occasion, as yet, to deal with the matter.

In England a controversy, or rather an extreme doubt, existed for some time as to whether or not the doctrine of *renvoi* was a part of the common law. Four cases[75] give a rather disputed and none too clear decision on the question. However, both Dr. Cheshire and the late Professor Mendelsohn-Bartholdy held that the doctrine was not part of English law. In the case of *In re Ross,* an English woman who died domiciled in Italy leaving a will valid according to Italian law but void as to English law, Luxmoore, J., held that under English Private International Law the will was good as the *lex domicilii* must apply. This is the same result that would have been reached had the doctrine of *renvoi* been followed, but the court did not follow that line of reasoning.[76]

In the case of *In re Annesley*[77] Russell, J., had a similar situation of an

---

[73] At 206, n. 264: OLG. Colmar, 19.5 (1893); (1895) Clunet 141; 4 ZIR. 152; LG. Hamburg, 2.1 (1903); 14 ZIR. 82; 2.1 (1903); OLG. Braunschweig, 7.2 (1908); (1909) Clunet 520; 16 OLG. Rspr. 362.

[74] 2 Arminjon, *op. cit. supra* note 6, at 311–312, n. 102; Niboyet (1927) (I) Rec. des cours 58/61, whom Arminjon quotes in support of his opinion takes a different view, starting from his conception of *liberté des conventions*.«

[75] *In re* Ross (1930) 1 Ch. 337; *In re* Anneseley (1926) Ch. 692; *In re* Askew (1930) 2 Ch. 259; Collins v. Attorney-General (1931) 145 L. T. 551.

[76] Cheshire, *op. cit. supra* note 38, at 45 et *seq;* Bendelsohnn-Bartholdy, Renvoi in Modern English Law 67 *et seq.*

[77] See note 75, *supra.*

English woman dying in France, having her *de facto* domicile there. The court here did not accept the remission to English law but applied what may be termed a double *renvoi* and applied the law of the domicile – as a French court would have done it. Although the doctrine of *renvoi,* being a part of English law, was not discussed, the words of the judge do not leave the matter clear. However, the other two cases clearly point out that *renvoi* is not a part of English law and although the decisions since that time have not been in perfect unanimity, writers are inclined to agree that English law has not adopted the doctrine as a ruling principle.[78]

In America there seems to be a dearth of authority on this point, with only two cases in the entire country cited on the principle. The case of *Harral* v. *Harral*[79] does not seem | to be a real problem of *renvoi*. However, the case of *Carter* v. *Mutual Life Insurance Co.* not only discussed the question, but the court held that a reference by the parties to the law of New York (from Hawaii) included the whole of the law – conflict of laws as well.[80] No support seems to have come for the principle laid down in this case although a thorough search of its subsequent history was beyond our power.

The objections against autonomy of will or free choice of law by the parties is two-fold.[81] Firstly, it can be said that it is more than anomalous that instead of the law governing the parties the parties should govern the law. In fact a choice exercised without a system allowing the parties to do so is an invalid attempt at a legislative act. But it may be said with some confidence that there is always a system which *ex poste* determines whether the parties could or could not take their choice. This is the law of the forum which now has jurisdiction over the case on some disputed point of the contract. It may not be very satisfactory to have this question deferred until an actual dispute arises because it is often impossible to determine in advance what the forum will be. It is our opinion that one of the purposes of law is stability through certainty, which certainty cannot be had where free choice is allowed. Secondly, there is a far more serious objection to be dealt with. If the parties are free to take their contract out of one system and to submit it to another, they are empowered to avoid all those rules of municipal law which parties contracting under this system are not entitled to stipulate away.[82] But then we

---

[78] See note 76, *supra.*

[79] 39 N. J. Eq. 279 (1884).

[80] Carter v. Mutual Life Ins. Co., 10 Hawaii 559 (1900). However, in the case of *In re* Talmadge, 109 Misc. 696, 181 N. Y. Supp. 336 (1919), the New York court held that reference to another system of law did not include reference to its system of conflicts. See Lorenzen (1910) 10 Col. L. Rev. 190.

[81] 2 Frankenstein, *op. cit. supra* note 6, at 158; Niboyet, *op. cit. supra* note 6, at 50–69; 2 Arminjon, *op. cit. supra* note 6, at 253–262, nn. 78–80; Lewald, *op. cit. supra* note 32, at 199–202, nn. 260–261; Haudek, *op. cit. supra* note 6, at 5–6, with references.

[82] Haudek, *op. cit. supra* note 6, at 3; Niboyet (1927) (I) Rec. des cours 53–69.

find a new tendency outlined above to distinguish between absolute free choice of law and *liberté des conventions*. This is a sign that the courts have become aware of a possible solution, namely, free choice of law where the contract is connected with several systems | of law and *liberté des conventions* where only connected with one system – connexion having a very wide meaning and including every conceivable test. This, for the reason that it is believed that the law is an institution for the convenience of the parties and therefore that every possible convenience and freedom be given the contracting parties. In the case, therefore, of two Swiss contracting in London it should be permissible for them to stipulate that Swiss law govern the contract inasmuch as they are familiar with the provisions of their own law. In the event of future litigation in the English courts, Swiss law should be applied.[83]

The *lex loci contractus* is likewise open to criticism. If the contract is concluded between present parties, the rule works smoothly. However, on the Continent, because of the relative smallness of the countries and the great diversity as to nationality and legal rules, this solution results very often in a chance application of a system of law which has no interest in the parties or the subject matter of the contract. For example: two Englishmen on a train traveling through Luxemborg conclude a contract concerning subject matter in England. Under the above rule the contract would be governed according to the law of the place where it was made. In the case of contract concluded between absent parties (absentes) it is difficult to determine where the contract has been concluded. A contract concluded by telephone between a Swiss in Geneva, making the offer, and a Frenchman in Paris, accepting the offer, is a contract between present parties (presentes) in Swiss law, and absentes in French law.[84] The result is that, according to Swiss law, the residence of the acceptor is where the contract was concluded, while, according to French law, the residence of the offeror where the contract acceptance was received is the place of the making. In the same manner if a contract were made, by previous arrangement through the mail, between a man in Tucson, Arizona, accepting an offer made by a man in Frankfort, Germany, the contract would be concluded – ac|cording to the law of Arizona when the acceptor there posted his acceptance, while under German law the contract would not be made until the acceptance was received. The result is that a different system of law will be applied depending on where the action is brought. This solution, which might be feasible in the case of common law jurisdictions, is unsatisfactory in Europe.

---

[83] *Cf.* Schnitzer, Handbuch des Internationalen Privatrechts 278–279; Mann, *op. cit. supra* note 66, at 98.

[84] Niboyet, *op. cit. supra* note 6, at 87–89; Lewald, *op. cit. supra* note 32, at 223, n. 279; 2 Arminjon, *op. cit. supra* note 6, at 267, n. 83; 2 Frankenstein, *op. cit. supra* note 6, at 153–158.

The *lex loci solutionis* has also come in for its share of attack.[85] It is again a question of classification (qualification) in the various countries which constitute the eventual forum, coupled with the additional difficulty that even municipal systems are not always unequivocal as to what ought be understood by the *lexus executionis*.[86] For example, a contract is made in England for the sale of goods which are to be delivered in several countries. Here performance takes place in any number of places and it is impossible to determine the *lex loci solutionis*. Some courts have attempted to solve this matter by using the place of the breach as the law governing but there may be more than one breach and the difficulty is still with us.[87] In bilateral contracts the use of this rule may lead to a splitting up of the contract[88] concerning which we shall have more to say below.

The *lex patria* is suggested, and in a number of places actually applied.[89] The number of its adherents is small, that of its opponents great.[90] The foundation of this doctrine is not empirical but rational. Zitelmann, arguing from the point of view of international law, commands nationals through the medium of their state to fulfill their obligations; Frankenstein believes that, primarily, every person is connected only with his *lex patria*. It is not necessary here to go further into this dispute between the national and inter|national schools and further reference may be had in the note.[91]

Attaching the contract to the law of the debtor's domicile in cases other than unilateral contracts means again splitting up the contract, but apart from that, the solution is not altogether unsound when it coincides with either the law of the place of making or performing the contract. It is generally considered good legal advice to a client to sue his debtor where he may be found. But this is open to the old objection of rigidity and often being unconnected with the contract, as well as to classification of disputes.[92]

---

[85] Niboyet, *op. cit. supra* note 6, at 89; Lewald, *op. cit. supra* note 32, at 224, nn. 281–285; 2 Arminjon, *op. cit. supra* note 6, at 268, n. 84; 2 Frankenstein, *op. cit. supra* note 6, at 132–152; Mann, *op. cit. supra* note – [editorial note: 66], at 100 sq.

[86] Lewald, *op. cit. supra* note 32, n. 285.

[87] 2 Beale, *op. cit. supra* note 8, at 1089.

[88] For in a bilateral contract we find two debtors.

[89] Czechoslovakia, Austria, Italy, Poland.

[90] To quote the most outstanding: 2 Zitelmann, Internationales Privatrecht 366; Pillet, Traité de droit international, p. 441, n. 232; (1896) Clunet 5 sq.; Frankenstein; ca.: *e.g.*, Niboyet, *op. cit. supra* note 6, at 85–86; 2 Arminjon, *op. cit. supra* note 6, at 269, n. 85; Lewald, *op. cit. supra* note 32, at 229, n. 256 (RGZ. 95–164); Schnitzer, *op. cit. supra* note 83, at 276.

[91] See above note 1a; Balladore-Pallieri (1936) (6) Rivista di diritto privato 217–54; Ago (1934) (17) Rivista di diritto internazionale 197–232; (1936 (IV) Rec. des cours 252–278; Gutzwiller (1934) (8) Zeitschrift fuer Auslaendisches und Internationales Privatrecht 652; 4 Makarov, Rechtsvergleichendes Handwoerterbuch 338. For an enumeration of older writers and writings see: Potu (1913) Clunet 482.

[92] Lewald, *op. cit. supra* note 32, at 230, n. 287; Schnitzer, *op. cit. supra* note 32, at 277; 2

To submit the contract to the municipal law of the forum is a way out which can only be characterized as rough and regrettable because it would be impossible to determine where the plaintiff would bring his suit.[93]

This leaves us to deal with proposals brought forward by some of the writers which are not covered by the above discussion. Arminjon, not satisfied with all the splits outlined above – capacity, form, essential validity, etc. – has thought it advisable to suggest a further splitting up of the contract into even more phases of possible litigation (entering into, avoiding, object of a contract, cause, invalidity, nullity).[94]

We adhere to the ideal of the French school, which, in order to save the unity of the contract, deemed the free choice of law by the parties the best method of obtaining that unity. For this reason we cannot accept this proposal as it introduces unnecessary complications without increasing the certainty of the rule. Niboyet has offered a solution which up to a certain point deserves serious consideration. First of all he introduces definite tests similar to the Polish statute | of 1926[95] discussed above; *e.g.,* the sale of immovables to be governed by the *lex res sitae* or the place where the thing is situated; state contracts governed by the law of the state; transactions on the stock exchanges and other markets by the law governing such market; retail sales by the *lex loci contractus,* etc.[96] But once he has reached the stage of having ascertained the law applicable he proceeds to add the privilege of *liberté des conventions*. Another rather imposing objection to the suggestions of Professor Niboyet is that it is almost impossible to determine, especially for a foreign lawyer, what rules of the municipal system of law involved may be stipulated away and what rules may not be so stipulated (or in other words what rules of that Continental system are called *droit imperatif* and what are called *droit superlatif*). The solution advanced by the Polish statute has, however, much to be said in favor of it. It is an objective test and avoids questions of classifications by making the rule of law governing the case determinable by the proof of a fact, *e.g.,* the locale of the stock exchange, instead of making it a question of law, *e.g.,* as to what in the particular case might be the *lex loci solutionis*. Such were the tests applied by the Mixed Arbitral Tribunal which, like the Permanent Court of International Justice, has no *lex fori* to apply for classification purposes. The Mixed Arbitral Tri-

---

Arminjon, *op. cit. supra* note 6, at 273; Niboyet, *op. cit. supra* note 6, at 86; Neumeyer (1925) (32) Annuaire de l'institut de droit international 99–101; Cassin (1930) (IV) Rec. des cours 795, n. 95.

[93] Niboyet, *op. cit. supra* note 6, at 84; Schnitzer, *op. cit. supra* note 83, at 278; ca. 2 Arminjon, *op. cit. supra* note 6, at 294, n. 92.

[94] 2 Precis 291 sq.

[95] See above 5a; see also Int. Law Assn. (1928), proposals cited by Niboyet, *op. cit. supra* note 6, at 100, n. 1; Nolde (1927) (I) Ann. de l'inst. de droit int. 939.

[96] (1927) (I) Rec. des cours 91 sq.

bunal applies the objective test in many cases[97] while the Permanent Court prefers to leave the choice entirely in the hands of the parties. Those solutions appear, from one point of view, to be equally advantageous as they offer a uniform system of law governing the contract as a whole.

Conclusions

1. It is our belief that the first and most important step in the solving of these intricate questions is through the me|dium of international co-operation by means of convention. This for the reason that such matters as the infinite variety of public policies (*ordre publique*) and the rules which may be stipulated away by the parties and those which may not be (*droit imperatif* and *droit superlatif*) make it obvious that some measure of compromise be effected for the purpose of uniformity.[98] Secondly, the law governing contracts lends itself peculiarly to international convention because it contains few if any of those elements of national policy, racial and religious opinion, that have proved themselves to be insuperable barriers to international agreement in the matter of marriage and divorce.[99]

2. We believe that free choice of law by the parties is a workable solution provided the system chosen has some connexion, however remote, with the circumstances of the case.

3. In case the parties have not exercised their freedom of choice of law when making the contract, we submit that the proper law of the contract should be applicable as a purely objective test and not by the interpretation of the intention of the parties. By the proper law of the contract we mean that system of law which is most closely connected with the contract. The convention might, if it saw fit, lay down definite factual tests for the determination of the proper law somewhat along the lines of the Polish statute set out above.[100]

4. Formalities of the contract should be governed, in our opinion, either by the law governing the contract or by the *lex loci actus*. If the provisions of either of these systems were complied with, the contract should be regarded as formally valid.

5. The law governing the capacity of the parties to enter into a contract

---

[97] *E.g.,* Recueil des decisions des tribunaux arbitraux mixtes 2, 294; 3, 275; 3,800; 3, 380; 3, 365; 4,268; 4, 315; 4, 321, 82; 5, 168; 5, 349; 5, 779; 5, 14; 5, 1083; 6, 138; 6, 229; 6, 320; 6, 635; 6, 634; 6, 727; 7, 347; 7, 468; 7, 512.

[98] Arr. 14, p. 42; arr. 15, p. 121; *cf.* TAM 5, 200; 3, 1020.

[99] In spite of the resignation expressed by the Institut de Droit International (1927) (III) annuaire 336.

[100] *Id.* at 5a.

should be governed by the personal law of the parties or by the law of the place where the transaction took place. A man would therefore be capable of contracting, if he were capable according to either of those two systems.

It is to be noted that no reference is made to the system | of law that should govern contract where an attempt at rescission is made on the ground of fraud, error, etc., nor have we discussed the question of illegality. These were conscious omissions as we felt them to be beyond the scope of the present article.[101]

---

[101] At this point the American member must, however reluctantly, make known his dissent from some of the conclusions of his eminent and learned Continental colleagues.

It is his belief that free choice of law by the parties and the so-called »proper law« are theoretically unsound and somewhat destructive in practice. They allow the parties to perform a legislative act – make their own law – an anomaly in the law. He believes that his colleagues have put the cart before the horse and selected these solutions because of the fact that they make it easier for the judge to settle the case. This ignores the fact that it is the purpose of law to prevent litigation, not to settle matters easily after the dispute has already come before the courts. Every case wherein a new rule of law is laid down represents a failure of the law to perform its proper function.

With respect to the »proper law« more particularly, his objection is that it is difficult to determine what the proper law is and so counsel may never, with confidence, say to his client what law will govern the prospective contract in the event of suit. He never knows what the future forum will be and what the judge of that forum will decide the proper law to be. This is far too uncertain for practitioners; however, it may please academics.

The alternate solution with respect to form introduces two possible systems governing an already complicated problem. An Englishman contracting with a Czech who is incapable according to English law, must investigate the intricacies of Czech law to decide whether or not he may enter into a contract. Why introduce the second system at all Is not the first the best from a commercial and almost every point of view?

Besides the above objections, the dissentor finds himself in fundamental disagreement with his fellows of the Continent on the question of Personal and Territorial Sovereignty and the logical and legal bases of Conflict of Laws. Discussions on this point, however, engendered such considerable heat and such very little light that it was thought best to omit any discussion of the matter and leave each reader to his own opinion.

The American member regrets exceedingly the necessity for this note, but was encouraged to include it by his colleagues in this undertaking who, by force of physical majority, controlled the thought of the textual conclusions and recommendations. He therefore wishes to express his thanks to them for this opportunity to touch on some of the views which he holds so strongly. He also wishes to express his appreciation to Mr. G. G. Tilsley (LL.B., Birmingham) for his invaluable aid in the preparation of the English law included in this paper.

Editor's note: Inasmuch as the completed article arrived from Cambridge, England while the rest of volume XII, number 2, of this review was at press, it was impossible, in the time allowed, to edit the footnotes according to the regular law review form.

Conflicts of Law in Matters of Unjustifiable Enrichment[1]

The situation which is created when rules of quasi-contract are in conflict has been neglected by English writers and has also received little attention on the Continent. It is possible, no doubt, to explain this lack of interest on the ground that the question is not one which occurs very often in practice. The various Continental rules relating to quasi-contract do not, in substance, differ widely from one another. Further, the somewhat narrow view of quasi-contractual liability hitherto taken by English law has probably discouraged foreign creditors from pressing claims of this type in our Courts. In particular, English law does not, in principle, recognise the rights of a *negotiorum gestor*[2] and the right to the restoration of an unjustified enrichment at common law must still be regarded as the subject-matter of a controversy in which we do not propose to take sides. It would, however, be unwise to dismiss the question of conflict as being in this instance of no practical importance when we have regard to the growth of interest in qua-

---

[Editorial note: essay by *H.C. Gutteridge* and *Kurt Lipstein*; first published in Cambridge Law Journal 7 (1939), 80–93.]

[1] This attempt to deal with the question is a by-product of the discussions in the Cambridge Seminar on Comparative Law during the Michaelmas Term, 1938, and the Lent Term, 1939. We desire to take this opportunity of expressing our gratitude to the members of the Seminar for the help which we have received from them and in particular to E. Lange (Trinity College and the University of Upsala) and E. von Hantelmann (Trinity College and the University of Göttingen).

[2] See *Leigh* v. *Dickeson* (1885) 15 Q. B. D. 60.

si-contract which has been a feature of the literature of English law during the last two or three years,[3] and to the possibility that English law may undergo revision in this direction. Changes in the rules of a system of law cannot be made *in vacuo*, and due regard must be had to possible repercussions in the international sphere.

The objects we have in mind are to attempt an exploration along comparative lines of such rules of conflict as can be found in the different systems and to make certain suggestions as to | the principles which, in our view, are best adapted to secure a satisfactory solution of the problem which is involved when a claim submitted to an English Court is based on an unjustifiable enrichment arising abroad. The first part of our study will deal with the position at Common Law, whilst the second part will be concerned with the rules of Continental Law. The third part will contain the conclusions at which we have arrived, though not without considerable hesitation.

The Attitude of the Common Law

The English text-book writers have very little to say about conflicts in matters of quasi-contract. Dicey,[4] who devotes only a short note to the question, is chiefly concerned with the problem of 'classification' and leaves it, otherwise, very much in the air. He refers in a footnote, without any discussion of its import, to a solitary case[5] and gives no indication as to the rules which should, in his opinion, govern the matter. Westlake[6] treats the question with more respect but with a lack of precision. He does not attempt any analysis of the different states of fact which may give rise to the problem in practice, nor does he discuss in any detail the rules to be applied. He confines himself to the statement that there can be little doubt that the proper law of a quasi-contractual obligation ought generally to be drawn from the place with which the act that occasions it has the most real connexion. Burge's Colonial and Foreign Law contains a somewhat obscure passage[7] dealing with a very recondite aspect of the matter, but is otherwise confined to a short statement of the views of certain Continental authors.[8] Baty dismisses the question as

[3] See Winfield, The Province of the Law of Tort; Lord Wright, *Sinclair* v. *Brougham*, 6 C. L. J. 305; Jackson, The History of Quasi-Contract; Friedmann, 'The Principle of Unjust Enrichment', Canadian Bar Review, xvi, 247, 369; Logan, 'Restatement on Restitution', 2 Modern Law Review, 153. Cf. Holdsworth, 'Unjustifiable Enrichment', 55 L. Q. R. 37; Gutteridge and David, 'Unjustified Enrichment', 5 C. L. J. 204.

[4] Conflict of Laws, 5th ed. at p. 783.

[5] *Batthyany* v. *Walford* (1887) 36 Ch. D. 269.

[6] Private International Law, 7th ed. § 235. He refers to *De Greuchy* v. *Wills* (1879) 4 C. P. D. 362.

[7] 2nd ed. vol. ii, p. 39.

[8] *Ibid.* pp. 484 and 485.

being 'comparatively unimportant'.[9] Foote and Cheshire ignore the problem altogether, as also do the editors of the relevant title in the Hailsham edition of Halsbury's Laws of England.[10]

|In the American Restatement of the Conflict of Laws the choice of law in quasi-contract is said to depend in the case of a benefit on the law of the place where the benefit is conferred[11]; in cases of unjustifiable enrichment the law of the place of enrichment is the determining factor.[12] American writers do not, however, deal with the question at any length. Beale's treatment of the matter is somewhat guarded. He says: 'It seems clear that a right arising on quasi-contract is determined by the law of the place where the benefit or other enrichment is rendered. There seem to be no cases in which the question of Conflict of Laws has been raised.'[13] Wharton deals very briefly with the point, but is inclined to favour the application of the *lex loci actus* giving rise to the claim.[14] Story and Goodrich are silent.

Certainly, so far as English law is concerned, there is an absence of authority which, however inconvenient it may be, has at least the advantage of leaving the way open for a solution which seeks to reconcile the requirements of logic with those of expediency. It is not always possible to deal with matters of conflict in a way which is either elegant in the legal sense or logical. Rules which are designed to have extra-territorial effect must often be moulded on lines which offend an orderly mind because their purpose may be to meet a situation which is complicated by differences in the structure of society and differing economic methods.

It is possible to simplify the problem somewhat by the elimination of certain aspects of maritime law which are said to possess a quasi-contractual character. Whether general average and salvage are quasi-contractual in nature does not seem to be open to doubt,[15] but, in any event, maritime law has, in this instance, found its own solution of questions of conflict[16] and it would

---

[9] Polarized Law, pp. 51 and 52.

[10] Dr. Frankenstein (Internationales Privatrecht, ii, p. 392, note 31) suggests that *Re Bonacina* [1912] 2 Ch. 394, may, perhaps, be treated as a case of the application of the doctrine of unjustified enrichment, but this was not the issue and the decision proceeded on other grounds.

[11] § 452.

[12] § 453.

[13] Treatise on the Conflict of Laws, 1935, vol. ii, p. 1429.

[14] Treatise on the Conflict of Laws, 2nd ed. at p. 484.

[15] See Winfield, The Province of the Law of Tort, p. 139; Holdsworth, 'Unjustifiable Enrichment', 55 L. Q. R. 37. Cf. C. L. J. vol. v at pp. 224, 225.

[16] In the case of general average the accepted rule is that the proper law is that of the port at which the adventure is lawfully terminated. Moreover the York-Antwerp Rules, 1924, which are the product of unification, are applicable in the majority of instances of conflict. Salvage is covered to some extent by international agreement. (See Maritime Conventions Act, 1911, ss. 6 and 7; Air Navigation Act, 1920, s. 11.) The outstanding problems are being

seem that no useful purpose is served by the introduction of rules of conflict into questions which are so essentially | international in character that conflicts are best solved by the process of unification of the law.

So far as English law is concerned it is also possible to eliminate the test of the nationality of the parties which has been suggested by Continental jurists as applicable in certain circumstances. A solution of this nature would be unacceptable for reasons which have been stated so often that it is unnecessary to repeat them.

This objection does not apply to the test of the domicil of the parties, but domicil raises difficulties of classification which should be avoided whenever possible. It is submitted that as the law now stands an English judge has a free hand to select any test by which conflicts of quasi-contract may be resolved, but discussion of the principles which, in our view, should govern his choice are, we think, best deferred until the rules of Continental law have been examined. There are, however, certain questions of a special character which arise if the problem is regarded solely from the angle of English law, and it will be convenient to deal with these at once.

In the first place, difficulties may conceivably arise as to the classification by an English Court of quasi-contractual claims of foreign origin. In *Batthyany* v. *Walford*[17] it was argued that the claim was not quasi-contractual but delictual both in Austrian and in English law, in which event the English Statutes of Limitation would have barred the claim. It is submitted, however, that an English Court applying either the *lex fori* or the foreign law to the classification would find no difficulty in assigning to the realm of quasi-contract foreign obligations, imposed by law, which do not belong either to the domain of contract or of tort.

There are, it is true, certain claims of a quasi-contractual nature which are recognized in Continental law but have no counterpart in our system, *e.g.*, claims by a *negotiorum gestor* or the claim by the holder of a bill of exchange who has lost his remedy on the bill owing to the absence of protest or notice of dishonour. Will an action lie in England to enforce claims of this kind? The answer would seem to be in the affirmative. The matter was put very clearly by Cardozo, J., when he said that 'a right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs | to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home'.[18] In *Batthyany* v. *Walford*[19] an

---

considered by the International Maritime Committee and C. I. T. E. J. A. (See Bulletin No. 102 of the International Maritime Committee, 1938.)

[17] *Ubi supra.* See also Dicey, *op. cit.* p. 783 and Beckett, 'Classification in Private International Law', British Year Book of International Law, 1934, vol. xv, p. 62, note 4.

[18] *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, cited by Unger, 'The Place of Classification

English Court was requested to give effect to a rule of Austrian law imposing liability for deterioration of the property on the life tenant of an estate in Hungary subject to a *Fideikommis*. There is no strict analogy in English law to this liability, though it is, perhaps, akin to liability for 'waste', but the Court of Appeal found no difficulty in enforcing it. It was treated as being quasi-contractual in nature and therefore not subject to the English Statutes of Limitation.

A further problem arises which is of some difficulty owing to the absence of direct authority. If the English Court decides that it will enforce the quasi-contractual right based on foreign law, what is the remedy to which the plaintiff is entitled? Is he entitled to the remedy given to him by the foreign law or must he be content with the remedy, if any, provided by the *lex fori*?

The point may be illustrated in the following way. Let us suppose that, as the result of the labours of the Law Revision Committee, the rule in *Chandler* v. *Webster*[20] were to be altered so as to allow the recovery of money paid in advance under a contract which is subsequently frustrated. Let us also suppose that the reforming English statute lays it down that in such a case the person paying in advance is entitled to recover the whole of his advance, but that under the foreign law which the English Court decides is to be applied to the quasi-contract in the circumstances of the case, the claimant is entitled to recover only the amount of his advance less any expenses incurred by the other party in connection with the transaction. Which rule is to prevail? This is a question which we propose to examine when framing our conclusions.

---

in Private International Law', The Bell Yard, No. xix, p. 7. It cannot be said that it is contrary to the policy of English law to enforce quasi-contractual rights based on unjustifiable enrichment. Many claims based on this ground are in fact recognized. See 5 C. L. J. at p. 226 and L. Q. R. vol. 55 at p. 44.

[19] *Ubi supra.*

[20] [1904] 1 K. B. 493.

The Attitude of the Continental Legal Systems

Every approach to the problems of private international law from a comparative point of view must of necessity envisage | the differences of basic conceptions between English and Continental law. Quasi-contractual obligations in Continental law are based on a universally recognized principle of natural justice,[1] and if they are often classified as being quasi-contractual, this expression is used to distinguish them from obligations arising in contract or tort rather than for the purpose of assimilating them to contract. In particular the action for unjustifiable enrichment is an action *ex lege* which is frequently resorted to in order to smooth out hardships created by the rigidity of the law, and though it is often applied in connexion with contracts it does not presuppose a contract.

The classification of unjustifiable enrichment as a quasicontract and its frequent connexion with a contract have induced some Continental writers to regard claims arising out of such enrichment as contractual. Laurent[2] and Weiss[3] favour the French rules of conflict which are applied to contracts, *i.e.* the national law, if both parties are of the same nationality, and the *lex loci contractus* if they are not. Despagnet,[4] however, makes the pertinent observation that, apart from any intention of the person who is impoverished to recover what he has paid if it should prove not to be due, the intention of the person enriched must also be considered. As it is highly improbable that the latter, can ever have intended to return that which he receives whether it be due or not, for otherwise he would not have accepted it, a presumption of intention becomes necessary in practice.[5] If the person enriched acts in bad faith the transaction takes on the complexion of a tort rather than that of a contract. In any event it will be necessary to imply a contractual relationship, and this involves a cumulation of fictions which seems to be inadmissible. Laurent's attempt to introduce his doctrine into Belgian municipal law was unsuccessful as a draft law prepared by him for this purpose was rejected.[6]

In Germany the problem appears in a somewhat different form. Gutzwiller[7] and Wolff[8] hold the view that every | case of enrichment flows from

[1] Fiore (1900), Clunet 27, 451; Pillet-Niboyet, Manuel de droit international privé, ii, 610; Cass. civ. 23.2.1891; D. 1892. 1. 29; S. 1895. 1. 78.

[2] Droit civil international, viii, p. 9, quoted by Fiore, *op. cit.* 455.

[3] Traité théorique et pratique de droit international privé, iv, pp. 387–90.

[4] Précis de droit international privé, 5th ed. p. 933.

[5] See Planiol et Ripert (Esmein), Traité pratique de droit civil français (1931), vii, p. 65 (no. 767). As to German law see the judgment of the German Supreme Court of (at p. 174) 5.7.1910 in Reichsgerichtsentscheidungen (RGZ), vol. 77, p. 171.

[6] See Weiss, *op. cit.* iii, p. 190, note; Lainé in Bulletin de la Société de Législation comparée, 1889–90, vol. xix, p. 554.

[7] Internationalprivatrecht (in Stammler: Das gesamte Deutsche Recht) at p. 1624.

[8] Internationales Privatrecht, p. 104–5.

some previous transaction, *e.g.* a donation or the acquisition of a right of property by prescription. According to them each case of enrichment has its proper law which it derives from the previous transaction. It seems to follow from this that in the majority of cases the proper law is the *lex rei sitae* in the case of land or chattels and the *lex loci actus* in other cases. This solution certainly seems to demand serious attention where the *locus* of the transaction resulting in enrichment can be ascertained without difficulty.

Where there has been what an English lawyer would term a failure of consideration or where performance of a contract is frustrated there is a body of opinion on the Continent which advocates that any questions of enrichment which arise should be determined in all cases in accordance with the law of the original contract.[9] This solution comes dangerously near to the doctrine of Laurent which has already been referred to and is otherwise open to criticism. Even if the proper law is the correct test of the existence or non-existence of a contract it appears to be illogical to extend this test to the *sequelae* of the contract when the proper law of the contract results in a finding that the contract has ceased to exist.[10]

The majority of Continental writers favour the *lex loci actus* (the *locus* being unspecified), whether the enrichment is connected or not with a pre-existing contract which has been determined. This principle is supported by a body of opinion which is almost overwhelming in character.[11] It is adopted as a test by codified law in many instances[12] and is also given effect to by judicial practice in many countries.[13] Whether this, notwithstanding its widespread recognition, is the correct principle to apply to conflicts in the case of quasi-contract is a matter which will be discussed hereafter.

Other tests which have been suggested are those of the personal law of the parties based either on nationality or domicil. The nationality of the parties is adopted by Zitel|mann[14] as a general principle and, as a preliminary rule of factual connexion (*Anknüpfung*), by Frankenstein.[15] It is also sponsored by

---

[9] Arminjon, Précis de droit international privé, 2nd ed. ii, p. 339. This view is also supported by two recent decisions of the German Supreme Court of May 4, 1932, IPRspr. 1932, p. 86, no. 38, and May 15, 1930 IPRspr. 1930, p. 120, no. 50. See also the decision of the Supreme Court of the Netherlands quoted in the Répertoire de droit international (Pays Bas), vol. vi, no. 251.

[10] Schnitzer, Handbuch des Internationalen Privatrechts, p. 290.

[11] The majority of French, Swiss and Dutch writers favour this view. Opinion is divided in Germany.

[12] For the relevant statute law see Ficker in Rechtsvergleichendes Handwörterbuch, vol. iv (sub tit. Quasikontrakte) p. 387.

[13] See the articles in Répertoire de droit international, vols. vi and vii, under the heading of Belgium, Bulgaria, Italy, The Netherlands and Switzerland. In Germany the practice varies.

[14] Internationales Privatrecht, ii, p. 523, cited by Frankenstein, ii, p. 391, note 29.

[15] Internationales Privatrecht, ii, pp. 392, 393.

Rolin[16] and Poullet[17] where the parties are of the same nationality. The domicil of the person enriched is the test preferred by Walker[18] and it has also been accepted by the Austrian[19] and the Czecho-Slovak Courts.[20] Von Bar[21] also advocates the law of the domicil, though he does not make it clear whether he means the domicil of the person enriched or the person impoverished. Arminjon[22] accepts the test of domicil if it is common to both parties.

The *lex loci solutionis* has been adopted by the German Courts.[23] It is submitted that this was done partly because the *lex loci solutionis* is a very convenient supplementary test in cases of debts of any kind and partly because it coincides, as a rule, with the law of the debtor's residence.

There remains the test of the *lex fori* which was adopted by the Anglo-German Mixed Arbitral Tribunal in a case presenting the same problem as *Chandler* v. *Webster*.[24] The Tribunal rejected the test of the *lex loci actus* and applied the principle of unjustifiable enrichment as embodied in Scots and German law. This conclusion was arrived at by treating the principle of unjustifiable enrichment as a matter of international public policy (*ordre public externe*) and applying it in this way as the *lex fori* of the Tribunal.[25] Of writers on private international law Valéry[26] and perhaps Pillet-Niboyet[27] support the application of the *lex fori* on grounds of national public policy (*ordre public interne*) and the only French decision in point seems to favour this solution.[28]

The position in Continental law may perhaps be summarized in this way. In spite of the general acceptance of the principle | of unjustifiable enrichment as based on natural justice, conflicts occur and there is no certainty or uniformity in the solutions which have been arrived at. From the standpoint of the English system of private international law these solutions are very useful in so far as they furnish a background against which the difficulties of the problem stand in relief. But their value as a guide to the principles which should prevail is more doubtful.

---

[16] Principes de droit international privé, vol. i, p. 568.
[17] Manuel de droit international privé belge, 2nd ed. p. 395.
[18] Internationales Privatrecht, 2nd ed. p. 467.
[19] Répertoire de droit international (Autriche), vol. vi, no. 178.
[20] *Ibid.* (Tchécoslovaquie), vol. viii, no. 184.
[21] Theorie und Praxis des Internationalen Privatrechts, 2nd ed., vol. ii, pp. 123, 124, 113.
[22] *op. cit.*, p. 339.
[23] Supreme Court of July 5, 1910, RGZ, vol. 77, p. 171; see also of March 16, 1928, IPRspr. 1928, p. 37, no. 58.
[24] [1904] 1 K. B. 493.
[25] Décisions des Tribunaux Arbitraux Mixtes, vi, pp. 13, 58, 607, 639.
[26] Manuel de droit international privé, p. 970.
[27] *op. cit.* p. 610.
[28] Cass. civ. 23.2.1891, D. 1892. 1. 29; S. 1895. 1. 78 and the decision of the Court of Appeal of Athens cited in Clunet, vol. 34 (1907), p. 503.

Conclusions[1]

In view of the absence of authority an English judge who is called upon to adjudicate in a dispute of a quasi-contractual nature, which contains a foreign element, has, it is submitted, a free hand as regards choice of law. He has it in his power to select one or other of the following tests: –

(A) The domicil either (i) of the party who is impoverished, or (ii) of the party who has been enriched.
(B) The *lex loci actus, i.e.*, either (i) the law of the place in which the unjustifiable enrichment occurs, or (ii) the law of the place in which the transaction takes place which subsequently results in the enrichment.
(C) The proper law of the quasi-contractual obligation ascertained by means of the presumed intention of the parties and by way of analogy to the case of a contract.
(D) The *lex fori, i.e.*, English law.

Which of these solutions is to be preferred is a question of some considerable difficulty, and the submissions which follow are made with great diffidence. The difficulty is enhanced by the fact that the principle on which relief in quasi-contract is based in English law must be regarded as uncertain until the House of Lords has pronounced on the matter. If the views held by Lord Wright and Professor Winfield are accepted an element will disappear which may possibly give rise to difficulties of classification, *i.e.*, the antithesis between quasi-contract founded on the principle of *ex aequo et bono* and a right dependent on the possibility of implying a contract to pay for a benefit or to restore an unjustifiable enrichment. But subject to this | an examination of the solutions outlined above appears to lead to the following conclusions.

The Law of the Domicil

This seems to be inappropriate. Suppose that A, a domiciled Frenchman, enters into a contract with B, a domiciled Englishman, for the hire of a seat from which to view a coronation procession in London. A pays 500 francs in advance to B in Paris, but the procession is subsequently abandoned. To apply either French law (the law of A's domicil) or English law (the law of B's domicil) would seem to be arbitrary, for why should either domicil be

[1] No reference is made to the *lex patriae* because it appears to be inappropriate to the decision of conflicts submitted to an English Court except in so far as it might possibly be introduced into the matter by the operation of the doctrine of renvoi. Lack of space has precluded us from dealing with the subsidiary problems of classification or renvoi which may arise. Our concern has been to present the problem in its broad outlines.

preferred to the other? Moreover, it is conceivable in cases of this kind that A might be unaware of the exact domicil of B or *vice versa* or that the parties would, in the present state of the law, have to take counsel's opinion before they could in any way be sure of their ground.

The Lex Loci Actus

This test, which seems to offer the best solution from a practical point of view is nevertheless open to criticism. To begin with what do we mean by the *locus*? Is it the place of enrichment or the place of impoverishment or the place in which the transaction occurs which results in an enrichment? There seems to be little doubt that the *locus* is the place in which the payment of money or transfer of property occurs which constitutes the unjustifiable enrichment. This is the solution which has been adopted by the American Restatement,[2] and, in substance, it also appears to cover most of the cases envisaged by Wolff and Gutzwiller.[3] The application of this test may, however, lead to a result which is not easily reconcilable with the principle of *ex aequo et bono*. Neuner[4] instances the case in which there is a contract made between a domiciled German and a domiciled Englishman which is frustrated. Subsequently a claim is made by the German for the restitution of an advance payment under the contract. Here the law of the place in which payment is made may be of paramount importance. If the German has paid in England he cannot recover owing to the operation of the rule in *Chandler* v. *Webster*.[5] If he is careful to pay in Germany or in France he will be able to recover by | virtue of Art. 812 of the German Civil Code and Arts. 1183–4 of the French Code Civil.[6] Nevertheless, it would seem that the law of the place in which the money is paid or in which the property becomes vested in the person who is enriched will in the great majority of instances be the law which has the closest connexion with the enrichment. It operates independently of the nationality or domicil of the parties. It avoids the employment of a cumulation of legal fictions and does not lend itself, save in exceptional cases, to attempts to turn a rule of conflict to the profit of one or other of the parties. It meets the cases of restitution *ex aequo et bono* and also the cases in which a contract to restore is implied by law. These are extremely cogent reasons for its adoption.

---

[2] § 453.
[3] *Ante*, p. 85.
[4] Zeitschrift fuer auslaendisches und internationales Privatrecht (1928), vol. ii, p. 122, note 1.
[5] *Ubi supra.*
[6] See Cass. civ. 4.5.1898; D. 1898. i. 457.

The Proper Law

The test based on the presumed or objective intention of the parties – for such it must necessarily be – is in this instance highly artificial in character. It involves a cumulation of fictions: the first fiction being the assimilation of quasi-contract in the strict sense, and the second fiction being the presumption of an intention that restitution should take place. This would in some cases involve a distortion of the attitude which the parties would have adopted if they had thought about the matter. If we may revert to the last illustration given, the German, having in mind his own law, would have thought that he was entitled to restitution whilst the Englishman would consider that he was entitled to retain the advance payment. An attempt to presume a common intention in these circumstances is to work the theory of a proper law to death. It may be added that if English law should adopt the principle that quasi-contractual rights arise *ex aequo et bono* the search for a fictitious intention would be otiose. Such intention would be irrelevant because restitution would rest on an overriding principle of law and not on any legal fiction.

Where the enrichment springs from a previous contract, the solution which would apply the law of the original contract is attractive, but it might lead to an impasse. Certain systems of law, *e.g.*, French law, regard frustration as avoiding a contract *ab initio*. If the proper law of the contract in such a case is held to be French law there is *ex hypothesi* no contract and an English Court would have to seek for some other solution.

| *The Lex Fori*

This test has few supporters. Its champions on the Continent base their opinion on municipal public order (*ordre publique interne*) by which is meant the principle that it is contrary to the policy of any system of law to permit a man to retain that which he receives by way of unjustifiable enrichment. This is also, when applied to the international sphere, the principle underlying the decision of the Anglo-German Mixed Arbitral Tribunal, to which reference has been made.[7] But this solution is not a practical one so far as choice of law by an English Court is concerned, since it does not base the right to recover on public policy. Moreover, the test of the *lex fori* is open to serious objection on other grounds. It would lead to a manoeuvring for position by the parties which should be avoided whenever possible in matters of conflict. The facts in *Chandler* v. *Webster*[8] furnish a case in point. If

[7] *Ubi supra.*
[8] *Ubi supra.*

the plaintiff and the defendant in that case had been resident in different jurisdictions we might well have witnessed a scramble, wholly incompatible with the dignity of the law, by each party to commence proceedings in that country whose law was most favourable to him. The adoption of the *lex fori* as a test would also serve as an encouragement to the type of recalcitrant debtor who has carried to a fine art the practice of evading those jurisdictions in which he might be held liable. On the other hand, the test possesses certain merits. It gives uniform treatment irrespective of the personal law of the parties or of any fortuitous elements which may be present in any particular case. It also relieves the trial judge of the unenviable task of probing into perplexing questions of foreign law.

The Remedy

There still remains the thorny problem of the law which is to be applied in determining the quantification of the relief to be granted by an English Court in a case of unjustifiable enrichment which contains a foreign element. There is no direct authority in point, but the order made by the Court of Appeal in *Batthyany* v. *Walford*[9] shows that the Court was of the opinion that the questions of *quantum* which arose fell to be determined by the law governing the quasi-contract. On principle it would seem that the extent of an obligation must | be fixed by the law from which the obligation takes its source.[10] The quantification of the amount which is due by way of restitution from the person who is enriched is not a procedural matter as in the case of the assessment of damages. It is rather in the nature of a debt the amount of which must be ascertained by the law governing the obligation and not by the *lex fori*.[11]

It is unlikely that the remedy given by the law of the obligation will be one unknown to our law, since relief must take the form of the restitution of property or the repayment of money. But where the remedy prescribed by the law of the obligation is the restitution of something other than money (*e.g.* the re-conveyance of an immovable or the delivery up of a chattel) it is more than doubtful if an English Court would apply the remedy. It would certainly not do so if the property is abroad and its decree would be entirely ineffectual. Moreover, until it is settled whether a claim for an unjustifiable enrichment rests upon a 'supereminent equity' or not[12] the elements which

[9] *Ubi supra.*

[10] Cheshire, *op. cit.* pp. 657, 658.

[11] Valéry, who favours the application of the *lex fori* to claims for restitution admits that the quantification of the sum to be restored must be governed by the law of the obligation.

[12] See *per* Lord Dunedin, *Cantiare San Rocco* v. *Clyde Shipbuilding and Engineering Co.* [1914] A. C. at p. 434.

must be present before an English Court will order the restitution of property as being retained against conscience appear to be lacking. The matter is, however, one which cannot be pursued in this place.[13]

The Choice of Law

The respective merits and demerits of the various solutions which have been proposed are somewhat evenly balanced, but it would seem that the law of the domicil and the law of the forum should be ruled out. The law of the domicil raises technical difficulties which, in our submission, are fatal to its adoption. The *lex fori* lends itself too readily to abuse to be regarded as a satisfactory test. If the 'proper law' of the obligation means the search for an objective intention, then, as we have endeavoured to show, it is inappropriate in the circumstances which lead to a claim for the restitution of an enrichment.

Our submission is that conflicts of law in matters of unjustifiable enrichment should be resolved in accordance with the law of the place in which the payment of money or the | vesting of property occurs which constitutes the enrichment. This is the solution adopted by the American Restatement and we venture to think that it is supported both by theoretical considerations and by the fact that it seems to be the rule best calculated to do justice in the majority of cases which, after all, must be the chief aim of any system of the Conflict of Laws.

Finally, if we have laid ourselves open to the charge that we have made a mountain out of a molehill, may we plead in extenuation that the subject-matter is one which seemed to us to afford an unusual opportunity for the application of the comparative method to the conflict of laws owing to the absence of direct authority in any national system. We venture to express our belief that if private international law is to be rescued from the condition of malaise which affects it throughout the world at the present time the remedy must be sought in the comparative method of study. Otherwise its claim to be international in character can never be more than a fiction and we hope that this will be taken into consideration in mitigation of any sentence that may be pronounced.

---

[13] See, generally, Dicey, *op. cit.* p. 207 *passim*; Cheshire, *op. cit.* p. 563 *passim.*

Conflict of Laws before International Tribunals*

A study in the Relation between International Law and Conflict of Laws

---

[Editorial note: first published in Transactions of the Grotius Society 27 (1941), 142–175].

*The decisions of the Mixed Arbitral Tribunals (M.A.T.) are cited according to Gidel, *Recueil des décisions des Tribunaux Arbitraux Mixtes*, 9 vols. (1921–80). References are to the volume and page of the *Recueil.* The names of the parties are omitted for reasons of space.

I

The Relation between International Law and Conflict of Laws

The question of the relationship between international law and conflict of laws has formed the subject of many discussions during the last fifty years. There is a substantial school of thought whom for convenience's sake we shall call »Internationalists.«[1] Compared with these, the so-called »national school« believes that the sovereignty of the state is, in the absence of specific rules of international law, as untrammelled in matters of private international law as on any other subject. The question resolves itself into two: firstly, whether there actually exist rules of international law bearing upon conflict of laws and, secondly, whether such rules, if existing, are capable of exercising | any influence upon municipal systems of conflict of laws. This second problem requires some explanation. Apart from treaty, states are not bound to introduce uniform rules of private law. It may be remembered that international responsibility for denial of justice is not incurred for the mere reason that a state does not possess any particular rule or any particular category of rules of private law. But there is denial of justice when the fundamental principles of law as observed by all civilised nations are violated. International law furnishes the criteria by which to judge whether the private law of a state complies with the requirements of international law. It does not lay down rules of private law proper. In other words, discussion on this subject has hitherto been directed towards ascertaining whether any rules of international law (to which I will, in this paper, refer as »preliminary rules«) prescribe any specific rules of municipal conflict of laws.[2] But it has been

[1] See Huber, *Praelectiones juris romani. De conflictu legum diversarum in diversis imperiis* (1707), t. ii, p. 23, quoted by Arminjon, *Hague Recueil,* 44 (1938), p. 9. For an enumeration of its adherents see Makarov, *Rechtsvergleichendes Handwörterbuch*, 4 (1933), p. 338; Kahn, *Abhandlungen zum Internationalen Privatrecht*, i (1928), p. 8, note 2; p. 269, note 28; p. 270, note 29; Gutzwiller, *Zeitschrift für ausländisches und internationales Privatrecht*, 8 (1934), p. 652; Potu, *Clunet*, 40 (1913), p. 482. For recent surveys see Ago, *Rivista di diritto internazionale*, 26 (1934), pp. 197–232; *ibid.*, 29 (1937), pp. 442–444; *Hague Recueil*, 58 (1936), pp. 252–278; Arminjon, *Hague Recueil*, 21 (1928), pp. 433–509; *Revue de droit international et de législation comparée*, 1929 (3rd ser. vol. x), pp. 680–698; Balladore-Pallieri, *Rivista di diritto privato*, 6 (1936), pp. 217–254; Neumeyer in *Strupp, Wörterbuch des Völkerrechts*, i (1924), pp. 567–570. See also Oppenheim, *International Law*, 5th ed. (1987), i, p. 6.

[2] See Kahn, loc. cit., p. 286; Arminjon, *Hague Recueil*, 21 (1928), pp. 433 ff. especially pp. 459 ff.; *Revue de droit international et de législation comparée,* loc. cit., pp. 680–698; Lorenzen, 20 (1920) *Col. L. Rev.*, p. 278; 33 (1923–24) *Yale L.J.*, p. 740, note 17; p. 741, note 20; p. 748, note 40; W. W. Cook, 28 (1918–19) *Yale L.J.*, p. 69, note 7; 33 *ibid.*, 457, at pp. 485–486. See also the summaries in Beale, *Conflict of Laws*, iii (1935), pp. 1948–1957; Streit, *Hague Recueil*, 20 (1927), pp. 23–39. De Lapradelle, »*De la délimitation du droit international public et du droit international privé,« Nouvelle Revue de droit international*

overlooked that such rules are not self-executory and that the non-compliance with such preliminary rules of international law relating to conflict of laws does not have any immediate effect on municipal law,[3] although in the international sphere their disregard would entail the responsibility of the state in question.[4] Apart from private | international law in that sense, that is to say, private international law conceived as a system of preliminary rules of international law in the matter of conflict of laws as applied within the state, there is another conception of private international law. This is private international law as a separate branch of international law. A system of conflict of laws as a separate branch of international law must be, of necessity, law governing the relationship between states as such who have taken up the case of their subjects,[5] or a system between states acting as subjects of private law. It must be admitted that these cases are, in substance, cases of private law. Up to the present time, such cases have very rarely arisen before international tribunals, though not so rarely as is often believed.[6] Until now, they have received little attention[7] on the part of international lawyers. These rules of International Conflict of Laws are the subject of this paper. I do not propose to discuss here the position of the »national« and »international« school in Private International Law. But it is necessary to give a brief summary of their principal tenets.

---

privé, 1934, pp. 9 ff., was not available. See also Westlake, *Transactions of the Juridical Society*, 1 (1855–58), p. 173, at p. 177.

[3] Ago, *Hague Recueil*, 58 (1936), p. 291, note 1, says: *»Il ne s'agirait donc jamais de l'existence de cette norme coutumière internationale concernant directement le droit international privé«*; Maury, *ibid.*, 57 (1936), p. 351 ff.; pp. 429 ff.; Balladore-Pallieri, loc. cit., p. 228, note; pp. 242–254; Raape in *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch*, 9th ed. (1931), vi, 2, pp. 51–52; perhaps also Starke, 52 (1936) *L.Q.R.*, p. 396 at p. 400.

[4] Balladore-Pallieri, loc. cit., p. 251, quoting Bruns, *Fontes Juris Gentium*, ser. B, sectio i, tomus 1, pp. 454–455; Niboyet, *Mélanges Fillet* (1929), i, pp. 153–177; *Hague Recueil*, 40 (1932), pp. 157–231; Basdevant, *Revue de droit international privé*, 1 (1905), pp. 817–822; *ibid.*, 2 (1906), pp. 861–873; Maury, *Hague Recueil*, 57 (1936), p. 355; Kuhn, *Comparative Commentaries on Private International Law* (1937), pp. 25–26; Kahn, loc. cit., i, p. 285 ff. *Contra*: Aubry, *Clunet*, 28 (1901), p. 651; Rundstein, *Revue de droit international et de législation comparée*, 1936 (3rd ser., vol. xvii), p. 586 ff.; Melchior, *Die Grundlagen des Deutschen Internationalen Privatrechts* (1932), p. 86; Beckett, *B.Y.I.L.*, 7 (1926), p. 84.

[5] M.A.T., 4, p. 673.

[6] See *e.g.* Schmitthoff, *Journal of Comparative Legislation*, 1987 (3rd ser. vol. xix), p. 179 ff., and see also the proposals of Coquoz, *Revue générale de droit aérien*, 7 (1938), pp. 39–40.

[7] See below, note 33.

The National School in Conflict of Laws. The English View

England and the United States may be described as strongholds of the »national school.« From the days of Story[8] onwards, conflict of laws was regarded in these countries as a branch of municipal law, subject, at best, to considerations of international comity. This view was subsequently fully accepted by English writers. Says Westlake[9]: »the place of private international law is in the division of national law.« Harrison[10] states: »Private international law is a substantive part of municipal law.« He excepts such topics as nationality, extradition and international criminal law, which form part of international law, although they are often included in treatises on conflict of laws. His views have been elaborated by Mr. Beckett,[11] who may be | described as an adherent of the »national school.« He says[12]: »When all the topics which are not properly part of private international law are excluded, it does not appear that amongst what remains there is anything which as between states is regulated by the law of nations. Private international law is therefore not only municipal and not international law, but it treats only of matters which are, by the existing law of nations, within a state's exclusive sovereignty to legislate upon as it pleases.« And again: »There is no system of rules of private international law at present existing with obligatory force between nations.«[13] Wharton[14] forms an exception to that general trend; he states: »The law of nations is part of the common law and private international law is part of the law of nations.« However, he does not substantiate his contention. With the publication of Dicey's *Conflict of Laws*, the controversy has shifted to a different ground. Private international law is henceforth treated as governed by the paramount principle of acquired (or vested) rights. Thus we find Dicey stating: »Any right which has been duly acquired under the law of any civilised country is recognised and in general enforced by English courts and no right which has not been duly acquired is enforced or, in general, recognised by English courts.«[15] And again: »The incidents of a right of a type recognised by English law acquired under the law of any civilised country, must be determined in accordance with the law under which it is acquired.«[16] That doctrine governed the Eng-

---

[8] *Conflict of Laws*, 8th ed. (1883), pp. 32–33.
[9] *Private International Law*, 7th ed. (1925), p. 4.
[10] *On Jurisprudence and the Conflict of Laws* (1919), p. 180.
[11] *B.Y.I.L.*, 7 (1926), p. 76.
[12] *B.Y.I.L.*, 7, p. 94.
[13] *Ibid.*, p. 81.
[14] *Conflict of Laws*, 2nd ed. (1881), p. 5.
[15] *Ibid.*, 5th ed. (1932), p. 17.
[16] *Ibid.*, p. 43.

lish approach to private international law for a period of nearly half a century. It must now be regarded as obsolete. Dr. Cheshire, one of the leading authorities on conflict of laws of today, has described this theory – to quote his words – as insignificant, untrue and as begging the question.[17] This criticism has been generally accepted. The theory of acquired rights does in fact beg the question, for private international law, which, it is said, must respect acquired rights, must determine by its own rules of conflict of laws whether a right has been acquired or not. This is a vicious circle.[18] Dr. Cheshire attacks with equal vigour the »international school.« He says: »Many objections may be raised to the theory of the internationalists, but the one that is both the simplest and the most fatal is that the general customary law of which they speak exists only in their own minds.«[19] Dr. Cheshire favours the view that conflict of laws is municipal law unfettered by any rules of international law. He states: »Anglo-American tribunals have always attempted to reach a just decision in accordance with their own conception of utility and justice.«[20]

This utilitarian and national conception of conflict of laws has also been put forward by the most representative American writers like Beale,[21] Lorenzen,[22] Goodrich[23] and W. W. Cook.[24]

The International School in Conflict of Laws

Before proceeding, it will be convenient to state the principal tenets of the »international school.« They are as follows:

(1) Every state must have a system of private international law.
(2) States may not exclude the application of foreign law altogether.
(3) No state may impose its own rules as to status upon persons who are merely temporary residents.
(4) With regard to immovables, the *lex rei sitae* must be applied and rights acquired according to a previous *lex rei sitae* must be recognised and respected.

---

[17] *Private International Law*, 2nd ed. (1938), pp. 86–87.

[18] Savigny, *System des heutigen Römischen Rechts*, 8 (1849), p. 132 (par. 361 (5)); W. W. Cook, 33 (1923–24) *Yale L.J.*, p. 457 at pp. 468–469, 485; Arminjon, *Revue de droit international et de législation comparée*, 1929 (3rd ser. vol. x), p. 680 ff.; *Hague Recueil*, 44 (1933), pp. 5–105.

[19] *Private International Law*, p. 84.

[20] *Ibid.*, p. 91; see also Foster, *Hague Recueil*, 65 (1938), pp. 399–423; Llewelyn Davies, *ibid.*, 62 (1937), pp. 427–488; Holland, *Jurisprudence,* 13th ed. (1924), p. 422.

[21] *Conflict of Laws*, i (1935), p. 52.

[22] 33 (1923–24) *Yale L.J.*, p. 736.

[23] *Conflict of Laws*, 2nd ed. (1938), pp. 9–11.

[24] 33 (1923–24) *Yale L.J.*, p. 457.

(5) Form is governed by the *lex loci actus.*[25]

| Of these five points, the first three are what I have previously described as preliminary rules. They do not prescribe a definite rule of municipal law, but only a certain tendency to be followed by states. They do not decide a particular case, such as whether the law of nationality or of the domicile is to govern personal status.[26]

The last two rules set out above do represent, it must be admitted, the practice of municipal systems of laws. But that does not necessarily mean that they are rules of international law.[27] Nothing but a complete transformation of such rules of private law can create rules of international law. (Reference may be had to the process of adaptation of Roman law principles into rules of international law by the founders of that science.) In spite of the dearth of rules of private international law common to all states, and regardless of the fact that these rules are not necessarily rules of international law, it has been contended that rules of international law in matters of conflict of laws exist. It must suffice here to set out the leading principles of this doctrine.

It is said that private international law is international law as to its substance; that international law proper does not contain rules of private international law and that, in the absence of such rules, municipal law is permitted to supplement international law by laying down its own rules of private international law. Such rules, it is contended, are municipal law as to form and source only, but, in substance, they are rules of international law.[28]

---

[25] Kahn, loc. cit., i, pp. 284–287; Diena, *Principi di diritto internazionale,* 2nd ed. (1930), ii, p. 27; Balladore-Pallieri, loc. cit., p. 238; Ago, *Hague Recueil*, 58 (1936), p. 286, note 2, note 3; Rundstein, loc. cit., p. 544, note 1; Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926), p. 167. But see the decision of the Court of Appeal of Brussels, of January 9, 1937, *Clunet,* 65 (1938), p. 367, to the contrary effect.

[26] Kahn, loc. cit., i, p. 283; Jitta, *Revue de droit international privé,* 4 (1908), p. 567; *ibid.*, 5 (1909), p. 486; Rundstein, loc. cit., p. 548, underrates the importance of these preliminary rules.

[27] Jitta, loc. cit., 4 (1908), p. 555; 5 (1909), p. 497; Rundstein, loc. cit., p. 325, citing Ago, *Teoria del diritto internazionale privato* (1934), p. 129: *»Si rischia di confondere un semplice comportamento uniforme degli Stati nella propria attività legislativa dettata unicamente da esigenze pratiche e da necessità reali con l'adempiamento di un obbligo internazionale«*; Balladore-Pallieri, *Rivista di diritto privato*, 6 (1936), pp. 223, 238; Wolff, *Internationales Privatrecht* (1933), p. 5; Streit, *Hague Recueil*, 20 (1927), p. 36 with further literature; Maury, *ibid.*, 57 (1936), p. 428 ff.; Ago, *ibid.*, 58 (1936), p. 289; Rundstein, loc. cit., p. 528. See also *Giesler* v. *Giesler Heirs*, decided July 11, 1035, by the Swiss Federal Tribunal, *Annual Digest and Reports of Public International Law Cases*, 1935–37, case no. 1. *Contra*: Kahn, loc. cit., i, pp. 286, 291–292.

[28] Anzilotti, *Studi critici di diritto internazionale privato* (1898), p. 120; *Il diritto internazionale nei giudizi interni* (1905), p. 122, cited by Balladore-Pallieri, *Rivista di diritto privato*, 6 (1936), p. 219; Maury, *Hague Recueil*, 57 (1936), p. 366; but see Anzilotti, *Corso di diritto internazionale privato* (1925), p. 5 ff., *Corso di diritto internazionale*, p. 54 ff.

| On the other hand, it is stated that international law contains a set of subsidiary rules in matters of private international law. These rules are applied by municipal courts to supplement their own rules of private international law.[29]

Seeing that the existence of such systems is not borne out by the practice of states, these sweeping contentions must be regarded as attempts to establish *a priori* systems.[30]

Recognition and Application of Foreign Law

Neither is it possible to agree that there is support for the »internationalists« in the fact of the connection between recognition and the application of foreign law.[31]

(1) It is one thing to say that foreign law must not be applied unless the foreign state is recognised. This means simply that prior to recognition only the predecessor state's law may be applied.

(2) It is another thing to contend that foreign law must be applied, if the foreign state is recognised.

This second sweeping statement represents the law as laid down in *Luther* v. *Sagor.*[32] However high the authority of this rule may be, it is not unassailable, but there is no time to go into | that here. A short statement must suffice. The effect of recognition can be only to establish that the new legal order of a state is regarded as law by the recognising state and that the old law of the recognised state has been superseded. In other words, recognition estab-

---

(transl. Gidel, p. 56 ff.), where the author sides with the »national« school. Balladore-Pallieri, *Le origini internazionali del diritto internazionale privato, Temi Emiliana,* 1980, i, p. 89, and the same author's article *»L'élément international dans le droit international privé,«* reviewed by Maury, *Revue critique de droit international, 32* (1938), p. 167, were not available.

[29] Zitelmann, *Internationales Privatrecht*, i, pp. 72, 122; ii, p. 13, cited by Balladore-Pallieri, *Rivista di diritto privato*, 6 (1936), p. 225, note 1; see also the summaries in Streit, *Hague Recueil*, 20 (1927), p. 34; Ago, *ibid.*, 58 (1936), pp. 253–254; Rundstein, *Revue de droit international et de legislation comparée*, 1986 (3rd ser. vol. xviii), p. 320; Beale, *Conflict of Laws*, iii (1935), pp. 1953–1957: »The private international law in force in each state is therefore composed: first of statutes passed by the state itself, and concerned with private international law; second, of rules of the supra-state private international law which bind the parties and the judge in default of statute« (at p. 1954).

[30] See *e.g.* Lorenzen, 88 (1928–24) *Yale L.J.*, pp. 736, 750; W. W. Cook, *ibid.*, p. 460; Arminjon, *Revue de droit international et de législation comparée,* 1929 (3rd ser. vol. x), p. 688; Rundstein, *ibid.*, 1986 (3rd ser. vol. xvii), pp. 820, 514.

[31] For a critical discussion see Sereni, *Rivista di diritto internazionale,* xxx (1938), pp. 102–141; Balladore-Pallieri, loc. cit., p. 240; Rundstein, loc. cit., p. 822; Melchior, loc. cit., p. 85, p. 151, note 1; I hope to give a survey of pertinent decisions in another article.

[32] [1921] 8 K.B. 582.

lishes which of two systems succeeding each other must be applied if the private international law of the recognising state refers to the law of the recognised state. Recognition establishes which of several foreign systems must be applied. It does not prescribe when foreign law must be applied.

International Conflict of Laws

It would exceed the limits of this paper to survey the practice of all international tribunals, but it is convenient to study the practice in this matter of that long series of tribunals usually referred to as Mixed Arbitral Tribunals, which were set up after the first World War for the performance of a variety of functions.

In the light of the introductory remarks, we may investigate to what extent the practice of the Mixed Arbitral Tribunals has had the result of producing a coherent body of rules of international law in matters of conflict of laws.[33]

Absence of lex fori

It is to be noted that both the Mixed Arbitral Tribunals and international tribunals in general have no | *lex fori*[34] in the sense of being bound by mu-

[33] See also: Basdevant, *Revue de droit international privé*, 1 (1905), pp. 817–832; *ibid.*, 2 (1906), pp. 861–873; Blühdorn, *Hague Recueil*, 41 (1932), p. 226; Gutzwiller, *Jahrbuch für Schiedsgerichtswesen*, 3 (1931), pp. 123–152; Hammarskjöld, *Revue critique de droit international*, 29 (1934), pp. 315–844; Niboyet, *Hague Recueil*, 40 (1932), pp. 157–231; *Mélanges Pillet*, 1 (1929), pp. 153–177; *Revue de droit international privé*, 24 (1929), pp. 478–489; Rabel, *Zeitschrift für ausländisches und internationales Privatrecht*, 1 (1927), pp. 33–47; Witenberg, *Clunet*, 56 (1929), pp. 991–1003. See also: Maury, *Hague Recueil*, 57 (1936), p. 861; Neumeyer, *Juristische Wochenschrift*, 1922, p. 753. See also Oppenheim, *International Law*, 6th ed. (1940), ii, p. 51, note 2.

The following books were not available: Geier, *Das Internationale Privatrecht der gemischten Schiedsgerichtshöfe* (1930); Weselowski, *Les conflits de lois devant la justice internationale*, thèse, Paris (1936).

For the purpose of this study, it appears permissible to assume that the Mixed Arbitral Tribunals, not being municipal courts, must be regarded as international tribunals. See M.A.T., 2, p. 268; 6, p. 243 (246); *ibid.*, p. 342; *ibid.*, p. 499; 7, p. 47 (53); *ibid.*, p. 865; *ibid.*, p. 871; *ibid.*, p. 877; 8, p. 195; but see M.A.T., 7, p. 743; 8, p. 195, to the contrary effect.

See also Niboyet, *Sirey*, 1921, Part 2, p. 81; *Revue de droit international et de legislation comparée*, 1928 (3rd ser. vol. ix), p. 809, note 1; Rühland, *Zeitschrift für ausländisches und internationales Privatrecht*, 5 (1931), p. 754; Blühdorn, loc. cit., pp. 144–146; Rabel, loc. cit., pp. 33–40.

In the absence of treaty provisions, these tribunals apply rules of private law; M.A.T., 8, p. 568.

[34] M.A.T., 4, p. 73 (75); 5, p. 200 (211); see Niboyet, *Revue de droit international privé*,

nicipal rules of procedure or of substantive law. The procedure of the Mixed Arbitral Tribunals was laid down either in the Peace Treaties setting up the tribunal in question, or by the courts themselves.[35] The relevant international conventions do not attempt to formulate rules of substantive law and the courts have felt little inclined to formulate general rules of their own.[36] They prefer to apply municipal law[37] and to reserve for themselves the decision of the question what municipal system is to apply according to the circumstances of the case; in other words, they create a system of conflict of laws for their own use.

But while private international law within the state chooses between the application of the municipal law of the court concerned and foreign law as a subsidiary source of law, international courts, owing to the absence of a *lex fori*, must elect between two or more systems, none of which can claim the privileged position of *lex curiae*. Consequently, it is impossible for the courts to decide in favour of one system of conflict of laws in preference to any other.[38] As there is no *lex fori* and no *lex curiae*, a municipal system of conflict of laws based upon the particular conceptions of public policy of the municipal law concerned would be of little avail.[39]

The courts, therefore, have felt it necessary to have recourse to general principles in order to lay down their own rules of conflict of laws. With regard to the Mixed Arbitral Tribunals, | two trends can be distinguished: a strictly municipal and a comparative trend, according to whether the principal aim of the court was to ascertain the municipal law most apposite to be exclusively applied in the circumstances, or whether it aimed at achieving a degree of harmony between the municipal systems available for choice. The great advantage of the comparative method consists in dispensing altogether with the application of private international law. As a rule, the Mixed Arbitral Tribunals were only competent to deal with, and consequently were confronted with litigation between nationals of the states which set up these

---

22 (1927), p. 103 ff.; *ibid.*, 24 (1929), pp. 480, 482; Mendelssohn Bartholdy, *Juristische Wochenschrift*, 1922, p. 154; *Contra:* Gutzwiller, loc. cit., p. 128; Dreyfus, *Clunet*, 48 (1921), p. 484, who holds that the *lex fori* of the defendant must be applied.

[35] M.A.T., 4, p. 6.

[36] For exceptions see below, note 123; note 192; M.A.T., 3, p. 291 (295); 4, p. 645; 6, p. 13; for the application of an international Convention see M.A.T., 6, p. 922; see also M.A.T., 8, p. 6, where municipal law applicable according to the rules of private international law of the tribunal was disregarded on the ground that the Treaty of Versailles contained an overriding provision; see also M.A.T., 6, p. 556; 8, p. 71; *ibid.*, p. 75. According to the Anglo-Bulgarian Mixed Arbitral Tribunal, M.A.T., 4, p. 671, the court may administer »analogies of municipal law and general principles of jurisprudence.«

[37] As applied and interpreted by municipal courts: M.A.T., 4, p. 852 (p. 854); *P.C.I.J.*, arr. 14, p. 46; arr. 15, p. 124; Niboyet, *Revue de droit international privé*, 24 (1929), p. 488.

[38] M.A.T., 6, p. 246; for exceptions see below, notes 62, 63.

[39] See below, p. 156 ff.

tribunals. The easiest method which, at first sight, eliminates hardship, and secures the greatest amount of justice, is that of coupling rules of substantive law of the countries concerned.[40]

In resorting to the comparative approach, the tribunals either apply the method of expressly coupling municipal systems,[41] or they invoke a conception of *»droit commun«* which in reality consists of a cumulation, comparison and merger of the national systems concerned.[42] The same tendency influences the courts when applying »analogies of municipal law and general principles of jurisprudence,«[43] *»principes généraux,«*[44] *»principes d'équité et de justice,«*[45] *»règle en tous pays,«*[46] and, sometimes, though not always, when judging according to *»règles généralement admises,«*[47] *»jurisprudence traditionelle de tous les pays,«*[48] | *»principes ordinaires du droit,«*[49] *»principes universellement adoptés,«*[50] *»principi elementari di diritto.«*[51]

This comparative method is illustrated by the case of *Bonnet-Dupeyron* v. *Ephraim Meyer* decided by the Franco-German Mixed Arbitral Tribunal. The facts were as follows. Before the first World War, the plaintiff, a French national, had appointed a German national his agent for the purpose of carrying out banking transactions with the defendants, bankers of German nationality. During the war the agent continued to transact such business on behalf of his principal. The plaintiff contended that these transactions were not binding upon him. The Mixed Arbitral Tribunal held that the transactions were binding upon the plaintiff. The Tribunal said: »Even admitting that the contract of agency has become invalid for one reason or another, the ordinary business transactions carried out between the agent on behalf of the

---

[40] See Gutzwiller, loc. cit., p. 141, with further literature.

[41] M.A.T., 1, p. 587; *ibid.*, p. 847; *ibid.*, p. 899 (903); 2, p. 89; *ibid.,* p. 235; *ibid.*, p. 247; *ibid.*, p. 753; *ibid.*, p. 786; 8, p. 155; *ibid.*, p. 220; *ibid.*, p. 286; *ibid.*, 296; *ibid.*, p. 328; *ibid.*, p. 340; *ibid.*, p. 387; *ibid.,* p. 408; *ibid.*, p. 534; *ibid.*, p. 570; *ibid.*, p. 872; *ibid.*, p. 988 (991); *ibid.,* p. 1020; 4, p. 366; *ibid.*, p. 417; 5, p. 200 (213); *ibid.*, p. 224; *ibid.*, p. 846; *ibid.*, p. 637; *ibid.*, p. 790; 6, p. 565; *ibid.*, p. 671; 7, p. 221; *ibid.*, p. 429; *ibid.*, p. 589; *ibid.*, p. 792; *ibid.*, p. 881; 8, p. 933; *ibid.*, p. 1000; 9, p. 424; *ibid.*, p. 560; doubtful: 3, p. 806 (808).

[42] See *e.g.* M.A.T., 2, p. 247; *ibid.*, p. 251; *ibid.*, p. 641; 4, p. 530; 5, p. 520; 6, p. 943; 7, p. 17; *ibid.*, p. 25; *ibid.*, p. 57; *ibid.*, p. 601; *ibid.,* p. 785 (792); 8, p. 994; 9, p. 302.

[43] M.A.T., 4, p. 671.

[44] M.A.T., 2, p. 89; *ibid.*, p. 784; 3, p. 274; 5, p. 410; 8, p. 5; *ibid.,* pp. 171–172; *ibid.*, p. 173. See also 7, p. 23; 9, p. 694; *ibid.*, p. 697, where the tribunals applied *»principes reconnus tant dans le droit national que dans le droit international.«*

[45] See the rules of the Mixed Arbitral Tribunals, *e.g.* 1. p. 57 (art. 98); *ibid.*, p. 73 (art. 92). See also M.A.T., 3, p. 291 (295).

[46] M.A.T., 3, p. 291 (295).

[47] M.A.T., 3, p. 570; 4, p. 366; 8, p. 325; see also 5, p. 887; 8, p. 114; *ibid.*, p. 403.

[48] M.A.T., 8, p. 374; *ibid.*, p. 570; 5, p. 58.

[49] M.A.T., 8, p. 111.

[50] M.A.T., 8, p. 993; *ibid.*, p. 1000.

[51] M.A.T., 8, p. 871.

plaintiff and the bank remained valid in all circumstances, in virtue of the general principles to be found both in German and in French law to the effect that third persons acting in good faith are protected.«[52]

As already pointed out, this tendency aims expressly at harmonising two equally applicable systems of municipal law,[53] but it was stated very correctly by the German-Roumanian Tribunal in the case of *Negreanu* v. *Meyer and Sons* that far from resulting invariably in a reconciliation of municipal systems of laws, this method endangers the strict application of even one municipal system, let alone of two.[54]

Thus in the case of *Société Communale des Tramways de Bucarest* v. *Phoenix S.A.* the same Tribunal had to decide whether the defendants were liable for a delay in the performance of a contractual duty. Both Roumanian and German law laid down in identical terms that there is no delay on the part of the debtor unless the creditor has claimed performance by means of serving a notice upon the debtor. But upon further investigation it | appeared that according to German law service of notice had to be presumed if the time when the performance of the contract was due could be ascertained. Roumanian law, on the other hand, did not know of such a presumption.[55]

Where a quick glance shows an apparent identity of solutions, their specific application may reveal far-reaching differences. The comparative method does not, in such cases, yield the expected results and the tribunals have to apply the rules of conflict of laws.

The second method aims at elaborating such rules of conflict of laws. The sources of such rules are usually referred to by the tribunals as *»principes de droit international,«*[56] »principles of international law,[57] *»droit international commun,«*[58] »comity of nations,«[59] *»doctrine et jurisprudence,«*[60] *»principes généraux de droit international privé,«*[61] or, in short, »private international law.«[62] I propose in this paper to examine the nature of these rules so variously described.

It is clear, in the first instance, that in thus applying private international law, the tribunals are not »sitting as English, French, or German

---

[52] M.A.T., 2, p. 89.
[53] M.A.T., 5, p. 218. See also Neumeyer, *Juristische Wochenschrift,* 1922, pp. 753, 1566.
[54] M.A.T., 5, p. 200 (210); *ibid.*, p. 226.
[55] M.A.T., 5, p. 218 (226).
[56] M.A.T., 3, p. 800; see also 2, p. 783.
[57] M.A.T., 7, p. 518.
[58] M.A.T., 7, p. 128 (134); *ibid.*, p. 140 (147).
[59] M.A.T., 4, p. 6, at p. 9.
[60] M.A.T., 3, p. 261; 6, p. 943.
[61] M.A.T., 1, p. 22 (26); 6, p. 247; *ibid.*, p. 806.
[62] M.A.T., 4, p. 655.

courts.«[63] The few cases in which they have not adhered to this principle and in which they have adopted a particular municipal system of private international law as such, either without giving any reasons,[64] or on the ground that it was the law of the debtor's domicile,[65] have led to unnecessary complications.

The objections raised here are well brought out in the case of *Luttges and Company* v. *Ormiston and Glass Company,*[66] decided by the Anglo-German Mixed Arbitral Tribunal, where the facts were as follows. The defendants, British nationals, had bought | 477 dozens of knives from the plaintiffs, German nationals. The plaintiffs now sued for payment. The defendants contested the claim and contended that property in the knives had not passed. The claim was dismissed. The Tribunal held, first, that English private international law applied (it will be noted that this is a first choice of law); secondly, the Tribunal found that according to English private international law »the passing of the property should be decided according to the law of the country where the goods are situate at the time when acts relied upon as passing the property have taken place« (this is a second choice of law). The Tribunal then found that the property in the goods had not passed under German law, when they were dispatched in Germany, nor according to Dutch law, while they were in transit, nor according to English law, when they arrived in England. It will be noticed that this decision was reached by a circuitous and complicated process of reasoning. First of all, it is not clear why English private international law was chosen in preference to German private international law. Secondly, this choice did not solve the question before the Tribunal. The Tribunal then applied the rule – alleged to be one of English private international law proper – that movables are governed by the law of the place where they are situate. The simpler course which, in addition, would have excluded the possibility of further complications (to be discussed later on), would have been to regard the principle that the *lex rei sitae* governs movables as a rule of international conflict of laws directly binding upon international tribunals.

The above case illustrates the objections which can be raised against the indiscriminate application of municipal systems of private international law. The adoption of municipal systems of conflict of laws, without any test, or even applying the test of the domicile of the debtor, is a purely arbitrary procedure.[67] The same applies to the cumulation of two systems of conflict

[63] Sir Herbert Jenner in *Collier* v. *Rivaz* (1841), 2 Curt. 855, at p. 859; Luxmoore J., in *re Ross, Ross* v. *Waterfield*, [1930] 1 Ch. 377, at p. 403.

[64] M.A.T., 5, p. 670; 6, p. 565 (569); *ibid.*, p. 637; 7, p. 421; *ibid.,* p. 435; *ibid.*, p. 512; 8, p. 67.

[65] M.A.T., 6, p. 543; 7, p. 345 (348).

[66] M.A.T., 6, p. 564.

[67] In fact, municipal systems of private international law are usually disregarded. See

of laws.[68] The adoption of a municipal system of conflict of laws as a whole means in fact the exercise by the Tribunal of a primary choice of law. It means that in order to decide the particular | case in question, the Tribunal must then, sitting as a municipal court and applying municipal conflict of laws, exercise a secondary choice of law in accordance with the private international law first adopted, together with the possibility of a reference back (*renvoi*) as a third. This peculiar situation did in fact arise, if only in a few cases.[69] Thus in the case of *Weiser and Company* v. *Heirs of L. Dürr*,[70] decided by the Anglo-German Mixed Arbitral Tribunal, the plaintiffs, British nationals, claimed a sum of money arising out of transactions in stocks and shares in England from the defendants, German nationals. The claim was resisted on the ground that it was barred by prescription. The Tribunal found that the contract was governed by English law and that under English law the rules of prescription were rules of procedure only. The claim was dismissed on the ground that it was barred by the German law of prescription. The Tribunal said: »The debtor, being a German national, resident in Germany, the Tribunal have to apply the principles of German private international law. According to these principles, the question of prescription is to be decided in accordance with the law governing the contract, the *lex contractus*. If the *lex contractus* is a foreign law, that foreign law has to be applied. If, however, the provisions of prescription of that foreign law are part of the law of procedure only, these foreign rules of procedure are not applicable under German private international law, and one has to fall back on the provisions of German domestic law.«

It will be noticed that the Tribunal adopted the rules of German private international law and sat as a German court. German private international law referred to English law. English law did not accept the reference, as it regarded rules of prescription as procedural rules, and referred the case back. Since the Tribunal had adopted German private international law in the first instance, and was thus sitting as a German court, the law of procedure of the court was German law, including its law of prescription.

Such an identification of an international tribunal with the courts of a particular country, so as to adopt the law of that country as *lex curiae*, before embarking upon the real question | of choice of law, appears contrary to the true character of international tribunals. It amounts to a capitulation of the international tribunal before the private international law of a particular country.[71]

M.A.T., 6, p. 243 (240); *contra*: Gutzwiller, loc. cit., p. 136, and the cases cited above notes 65 and 66.

[68] See *e.g.* M.A.T., 5, p. 670 (672).

[69] M.A.T., 4, p. 78 (75); 5, p. 687; 6, p. 548; *ibid.*, p. 682.

[70] M.A.T., 6, p. 632.

[71] Niboyet, *Mélanges Pillet*, 1 (1929), p. 166; *Hague Recueil*, 40 (1982), p. 229.

Public Policy

The second danger resulting from the application of a particular system of private international law for the solution of a case before the tribunal, is that the tribunal may be compelled to apply the rules of public policy of the substantive municipal law in question, aiming at excluding the application of yet another system.[72] No instances of this kind are to be found in the case law of the Mixed Arbitral Tribunals. But I may refer to the decisions of the Permanent Court of International Justice in the Serbian and Brazilian Loan Cases as illustrating this tendency. It is only necessary to read »private international law« instead of »municipal law« in the passage which follows. In the Brazilian Loan case the Court said[73]: »Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.« The Court referred to its statement in the Serbian Loan Case where it was held: »For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal and which, in its results, seems to the Court reasonable, would not be in conformity with the task for which the Court has been established, and would not be compatible with the principles governing the selection of its members. It would be a most delicate matter to do so, especially in cases concerning public policy – a conception the definition of which in any particular country is largely dependent on the opinion | prevailing at any given time in such country itself – and in cases where no relevant provisions directly relate to the question at issue.«[74]

The flaws of this solution need not be stressed. International tribunals have no *lex fori*, save their own.[75] The public policy of any particular system of law is not the basis upon which international tribunals can properly proceed. There are express statements of the Mixed Arbitral Tribunals to the effect that they must not apply municipal public policy,[76] that mandatory

---

[72] Niboyet, *Revue de droit international privé*, 24 (1929), p. 488; *Mélanges Fillet*, loc. cit., p. 170; *Hague Recueil*, 40 (1982), p. 177 ff.; but see *P.C.I.J.*, arr. 14, pp. 41, 46; arr. 15, pp. 124–125.

[73] *P.C.I.J.*, arr. 15, p. 125.

[74] *P.C.I.J.*, arr. 14, p. 46.

[75] See above, note 34.

[76] M.A.T., 5, p. 200 (211); Gutzwiller, loc. cit., p. 151.

rules of municipal law may be disregarded[77] and that they are guided solely by their own *»ordre public international.«*[78]

Thus in the case of *Negreanu* v. *Meyer and Son,*[79] decided by the German-Roumanian Mixed Arbitral Tribunal, the Tribunal said: »According to established principles of private international law, the national law of one of the parties may be disregarded as a whole only if it conflicts with the rule of public policy of the *lex fori*. Mixed arbitral tribunals, not belonging to any state, and sitting wherever it is deemed expedient, do not possess a *lex fori*. Thus the national law of the parties can only conflict with the rules of »international public policy.« More specifically, in *Feldmann* v. *German Government,*[80] it was held by the same Tribunal that a contract concluded in Roumania during the first World War between a German and a Roumanian national was not necessarily void for an infringement of the Roumanian Trading with the Enemy Act. The Mixed Arbitral Tribunal was entitled to disregard rules of municipal public policy.

In one case, however, in accordance with the comparative method, a cumulation of two municipal public policies was attempted.[81]

Classification. – We have said that the reason why inter|national tribunals ought not to rely on a specific system of private international law is that there is no *lex fori*. The absence of a *lex fori* accounts also for the absence of difficulties of what is technically known as conflicts of classification.[82] At the risk of saying things which are known to this audience, perhaps I ought to say what the problem of classification means in this connection. The case of *In re Annesley,*[83] decided by Russell J. (as he then was), may serve as an illustration. Mrs. Annesley, a British subject, died in France, leaving movables in England. According to English private international law, movable property is to be distributed according to the law of the domicile at the time of the death of the *de cuius*. According to the English conception of domicile, Mrs. Annesley was domiciled in France. According to the French conception, she was domiciled in England. How, then, was the technical term of domicile to be interpreted? Russell J. held that before an English court the English interpretation of a technical rule of private international law was

---

[77] M.A.T., 1, p. 726 (729); 7, p. 112 (114).
[78] M.A.T., 4, p. 515, at pp. 524, 525.
[79] M.A.T., 5, p. 200, at p. 211.
[80] M.A.T., 7, p. 111, at p. 114.
[81] M.A.T., 1, p. 899 (903). In fact, this case turns upon the cumulation of the rules of illegality contained in two systems of laws. The tribunal was not concerned with the exclusion of a particular rule of foreign law, applicable in the circumstances. This, however, is the function of *»ordre public«* in the realm of private international law.
[82] Niboyet, *Revue de droit international privé*, 22 (1927), pp. 103 ff. with further literature; Gutzwiller, loc. cit., p. 149.
[83] [1926] Ch. 692.

alone admissible, on the ground that English law was the *lex fori*. In this respect, in the absence of a *lex fori*, the Mixed Arbitral Tribunals were in a more favourable position.

Except for international treaties and conventions,[84] the tribunals have been able to lay down their own rules of private international law in unequivocal terms and could, therefore, avoid the application of such tests as might have led to ambiguities, having regard to different meanings attributed to such tests by the various municipal systems. In applying international treaties and conventions, however, such conflicts could not be avoided nor could they be disregarded.[85]

Only in rare cases have the courts attempted to classify according to an arbitrarily chosen municipal system,[86] or by coupling the interpretation given by two systems,[87] or by opposing|them to a third.[88] Two tendencies can be observed: one based upon general conceptions of jurisprudence, and another based upon a somewhat unfortunate principle of private international law. In general, the tribunals classify according to »common juridical notion,«[89] *»principes universellement admis en matière législative,*[90] *»portée générale,«*[91] *»sens large,«*[92] or they examine whether in the case in question institutions in both systems concerned tally in substance, despite the fact that they are classified under different headings.[93]

In matters of contract and succession, a tendency can be noticed to classify according to the law applicable to such contract or succession.[94] This practice may end in a vicious circle for the reason that the question what system of laws applies to the contract or succession may, in turn, depend upon the question according to what system of laws the tribunal classifies.

---

[84] Niboyet, *Revue critique de droit international*, 30 (1935), pp. 1–34, especially pp. 29 ff.

[85] M.A.T., 3, p. 305; 4, p. 842 (847); 9, p. 230 (233).

[86] M.A.T., 3, p. 274 (277); 5, p. 218 (224); *ibid.*, p. 235 (240); 6, p. 542; *ibid.*, p. 635 (637); *ibid.*, p. 665 (670). See also 7, p. 324 (326); but see 2, p. 211 (212); 3, p. 255 (256).

[87] M.A.T., 4, p. 390 (393); 5, p. 200 (214); *ibid.*, p. 429; *ibid.*, p. 670 (672); 7, p. 353 (iii); 8, p. 402.

[88] M.A.T., 1, p. 730 (733); 7, p. 353; *ibid.*, pp. 741 ff.

[89] M.A.T., 7, p. 353 (iii); *ibid.*, p. 947.

[90] M.A.T., 2, p. 395 (400).

[91] M.A.T., 1, p. 616 (619).

[92] M.A.T., 1, p. 600 (605).

[93] M.A.T., 3, p. 67 (72); *ibid.*, p. 223 (225); *ibid.*, p. 252; *ibid.*, 749 (753); 4, p. 59 (63); *ibid.*, p. 657 (660); 5, p. 303 (305); *ibid.*, p. 506 (512); *ibid.,* p. 635; 6, p. 2 (8); *ibid.*, p. 77 (80); *ibid.*, p. 228 (230); *ibid.*, p. 243 (248); *ibid.*, p. 655 (658); *ibid.*, p. 828 (830); 7, p. 403 (408). See also M.A.T., 2, p. 703; 6, p. 397 (399); 7, p. 280 (282); but see 8, p. 64 at p. 71, where the Anglo-German Mixed Arbitral Tribunal disregarded both the English and the German conception as to the time when a claim for general average falls due and substituted a conception of its own. See also Niboyet, *Revue de droit international privé*, 22 (1927), pp. 105–106.

[94] M.A.T., 2, p. 715 (718); 3, p. 232 (234); *ibid.*, p. 918 (922); 5, p. 305 (308); 6, p. 11 (13); 7, p. 516 (518) (Succession).

In a few cases, the law of the debtor's domicile provides the basis for the purpose of classification[95] – an arbitrary principle. Lastly, tribunals, on occasions, declare that their choice of law, including classification, is based upon »common ground.«[96] This seems to indicate a voluntary agreement of the parties on entering the litigation – a method which, although of practical importance,[97] need not be discussed in detail.

| II

Practice of Mixed Arbitral Tribunals

We have thus seen the dangers which beset any method based on the application of a specific system of municipal rules of private international law. International tribunals – and especially Mixed Arbitral Tribunals – have been alive to that danger and have, on the whole, decided cases by dint of the application of what may be called a system of private international law of their own. The object of the second part of this paper is to show by reference to specific questions how that method has been put into practice by the Mixed Arbitral Tribunals.

Nationality and Domicile

Both nationality and domicile have always been of great importance as tests with a view to ascertaining the status of persons. Tendencies in favour of the Anglo-American test of domicile or the Continental test of nationality are both to be noticed in the case law of the Mixed Arbitral Tribunals. When the test of domicile, familiar to English law though less to Continental law, is applied, it is applied in accordance with the meaning attached to it by English law.[98]

Nationality is, of course, determined by the law of the country in question.[99] The solution adopted by the Mixed Arbitral Tribunals in the case of

[95] M.A.T., 1, p. 730 (734); 2, p. 217 (219–220).

[96] See *e.g.* M.A.T., 6, p. 60 (62); *ibid.*, p. 75 (76); *ibid.*, p. 585 (587); *ibid.*, p. 643 (645); *ibid.*, p. 671 (674); 7, p. 330 (333); *ibid.*, p. 370; *ibid.*, p. 453.

[97] See *e.g.* M.A.T., 4, p. 530 (534); *ibid.*, p. 717; 5, p. 551 (563); 6, p. 573 (577); *ibid.*, p. 587; *ibid.*, p. 641; 8, p. 60; *ibid.*, p. 280; 9, p. 224; *ibid.*, p. 482; *ibid.*, p. 687.

[98] See the cases referred to above, note 86.

[99] M.A.T., 6, p. 220 (224); *ibid.*, p. 338 ff.; *ibid.*, p. 347; 7, p. 328; *ibid.*, p. 470; *ibid.*, p. 601; *ibid.*, p. 647; *ibid.*, p. 735; 8, p. 156; *ibid.*, p. 187; *ibid.*, p. 375; *ibid.*, p. 388; *ibid.*, p. 401; *ibid.*, p. 452; *ibid.*, p. 682; *ibid.*, p. 951; 9, p. 81 (85); *ibid.*, p. 253; *ibid.*, p. 438; *ibid.*, p. 593; *ibid.*, 620; *ibid.*, p. 627; *ibid.*, p. 763.

double nationality must be regarded as very satisfactory. For the purpose of these tribunals, nationality in such cases is to be determined by the law of that country with which a connection both of law and also of fact can be established,[100] a solution which found clear expression in the Hague Convention on Double Nationality of 1930.

The private status of persons has been very rarely the concern of the Mixed Arbitral Tribunals. Capacity appears to be governed by the *lex patriae*.[101] The law governing the relations between husband and wife was the object of three decisions. It is the | *lex patriae* of the spouses[102]; in a claim for maintenance it does not appear clearly whether the father's law is meant to be that of his *lex patriae* or of his domicile.[103] The position of a *curator absentis* is governed by the *lex rei sitae*.[104]

Nationality and Status of Corporate Bodies

The question whether corporations can possess a nationality has been the subject of much discussion for many years.[105] It is to be regretted that statements such as that by Lord Westbury in *Udny* v. *Udny*,[106] where he distinguished between the bonds of nationality and of domicile in matters of status, were originally confined to the status of individuals only. The Mixed Arbitral Tribunals have not been able to avoid confusion when confronted with this intricate question. But two outstanding decisions of the Franco-German Mixed Arbitral Tribunal have done much to elucidate it. In these cases, it was held that the essence of nationality consisted in the enjoyment of civic rights and in the bond of allegiance; that corporate bodies, unlike individuals, could not enjoy such rights and be subject to such duties and that, in order to ascertain the nationality of a corporate body, the corporate veil must be lifted. Seeing that the shareholders, being individuals, possessed a nationality, the majority of the shareholders determined the nationality of

---

[100] M.A.T., 6, p. 499 (503); *ibid.*, p. 806 (809), referring to *Annuaire de l'Institut de droit international*, 1888–89, p. 25; not quite clear: M.A.T., 2, p. 72; 7, p. 327 (329).

[101] Not quite clear: M.A.T., 9, p. 295.

[102] M.A.T., 1, p. 935; 6, p. 922 (925). See also 8, p. 553 (557).

[103] M.A.T., 6, p. 614.

[104] M.A.T., 2, p. 305; 3, p. 824 (828); 5, p. 502 (505); 9, p. 564.

[105] For a general survey see Travers, *Hague Recueil*, 33 (1930), pp. 1–109; Rühland, *ibid.*, 45 (1933), pp. 391–467 with further literature; Streit, *Revue de droit international et de législation comparée*, 1928 (3rd ser. vol. x), pp. 494–521. For a discussion of the practice of the Mixed Arbitral Tribunals on this question see Vaughan Williams and Chrussachi, 49 (1933) *L.Q.R.,* pp. 334–349; Gutzwiller, loc. cit., p. 130 with further literature; Ruze, *Revue de droit international et de législation comparée*, 1922 (3rd ser. vol. iii), pp. 54–60.

[106] [1869] L.R., 1 Sc. & Div., 441, at p. 457.