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New American Choice-of-Law Principles and the European Conflict of Laws of Contracts

Introduction

Some of the characteristics of the American jurisprudence of this century have been its realism, its capacity for new thinking and its frequent advocacy of reform. It has endeavoured to look upon society as it is, and not as it appears through the smoke-coloured spectacles of legal tradition; it has made frequent use of economics, sociology and other social sciences to consider innovations; the American jurists have been among the front runners of those who have fought for social and legal reform.

This realistic and reformatory spirit has also penetrated into the theory of the conflict of laws. Here the traditional American jurists adhered to the venerable principles of the territoriality of laws and vested rights. These axioms among others had been adopted by Joseph Beale, the reporter of the first Restatement on the Conflict of Laws, who in his writings and in the Restatement applied his principles with the remorseless logic of a civil law jurist. In the twenties and thirties there was a glaring contrast between Beale's classical thinking and the philosophy of the modern realists.

American Law before the New-Thinkers

When the First Restatement was published in 1934 a system of inflexible rules was followed by the courts of a majority of the states. They either applied the law of the place of contracting or the law of the place of performance. In doing so, they acted under the influence of the Dutch writers of the seventeenth century, in particular Huber and Voet, of the English cases and of American authors such as Kent, Story and Beale. This main trend was made up of two variants: some decisions following Story applied either the law of

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the place of contracting or the law of the place of performance to the
contract. Commonly the intention of the parties, actual or pre-
sumed, was found to support the choice of one or the other of these
laws. Other decisions followed the theories of Justice Hunt in Scud-
der v. Union National Bank of Chicago,\(^3\) and later on of Beale; they
split the contractual problems into two parts: the formation, inter-
pretation and validity of the contract were governed by the law of
the place of contracting; the performance of the contract was gov-
erned by the law of the place of performance. This approach was
followed by the Restatement (1934).\(^4\)

In the period before the publication of the Restatement in 1934
the first variant was adopted in the majority of cases. Afterwards
decisions agreeing with the second variant became more numerous.
Of about 150 American decisions dating from the period 1945-1962
which were examined by the present writer, more than half clearly
followed the rules of the Restatement (1934) and nearly half of the
decisions cited Beale or the Restatement (1934). Among the rest of
these cases some clearly followed Story and applied one legal sys-
tem to the contract as a whole. Some of these decisions, however,
which followed the Restatement (1934) were compatible with the
theory of Story as well as some which cited him together with the
Restatement (1934) or with Beale.

Of the minority of cases that did not clearly follow the main
trend in either of its variants, a few did not reveal the grounds upon
which they were decided. One fourth or one fifth of the cases
clearly deviated from the main trend and these often posed real con-
flict problems because the conflicting laws differed on the point in
issue. The deviations did not always follow state lines.

Among the deviations from the main trend are those cases that
paid lip service to the traditional rules but which in fact followed

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3. 91 U.S. 406 (1875).

4. Restatement (1934) § 332: "Law Governing Validity of Contract. The law of
the place of contracting determines the validity and effect of a promise with respect
to (a) capacity to make the contract; (b) the necessary form, if any, in which the
promise must be made; (c) the mutual assent or consideration, if any, required to
make a promise binding; (d) any other requirements for making a promise binding;
(e) fraud, illegality, or any other circumstance which make a promise void or voida-
ble; (f) except as stated in § 358, the nature and extent of the duty for the perform-
ance of which a party becomes bound; (g) the time when and the place where the
promise is by its terms to be performed; (h) the absolute or conditional character of
the promise."

§ 358: "Law Governing Performance. The duty for the performance of which a
party to a contract is bound will be discharged by compliance with the law of the
place of performance of the promise with respect to (a) the manner of performance;
(b) the time and locality of performance; (c) the person or persons by whom or to
whom performance shall be made or rendered; (d) the sufficiency of performance;
(e) excuse for non-performance."
other principles than the principle of territoriality of laws. An openly admitted deviation from the main trend was the adoption of the so-called centre-of-gravity method, first used by the federal courts and the courts of New York State. By this method the courts searched for the state or the country having the closest factual relationship with the subject matter. However the decisions did not indicate uniformly whether regard must be paid to the most significant relationship of the contract with a particular state or country or to the preponderance of interest by a state or country in the individual issue involved.

The Contribution of European Law of the 19th and early 20th Century

The methods and rules which Beale and his followers had established were so obsolete that the approaches which came to replace them became revolutionary. The new-thinkers not only swept away the territoriality principle, the vested rights theory, and the hard and fast rules to which their predecessors had adhered. They tore down the entire structure of the conflict-of-law rules. Thereby they alienated themselves not only from Beale and his like-minded colleagues, but also from the European doctrines of the conflict of laws.

In the first half of this century the legal systems of Europe may not have had much to offer the Americans. This holds true in particular of the European theories and practices respecting the conflict of laws of contracts. The Europeans faced two main problems. One was whether and to what extent the parties were free to choose the law applicable to the contract. The other was which conflict-of-law rules to apply in the absence of an effective choice of law by the parties. As to the first problem confusion reigned in Europe, especially on the Continent. There was a cleavage between the writers and the courts. The writers opposed party autonomy. The argument was that the law must prevail over the will of the parties. The intention of the parties, they said, was incapable from a logical point of view of selecting the governing law because there did not exist any legal system which gave effect to that intention; moreover the scope of the substantive rule of law was for reasons of policy not to be enlarged or curtailed by the parties. It was left to the sovereign to decide that scope according to the social purposes of the law. The courts nevertheless gave effect to the choice of law by the parties. They endorsed an almost unfettered freedom. European courts had not—and some have not yet—realized that changing social and economic conditions might lead the courts to give up the laissez faire of

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5. The fact of this lip service has been noted by several American authors, see e.g., Ehrenzweig, A Treatise on the Conflict of Laws 465 (1962).
the 19th century. Freedom of contract had already then been substantially curtailed and this should have had some impact on the freedom of the parties to choose the applicable law.

As for the second problem, the law applicable in the absence of an effective choice of law by the parties, the European picture was unclear. Very few countries had any legislation on the subject. There was much writing but little agreement among the authors. The courts of England, France, Germany and a number of other countries paid lip service to the presumed intention of the parties. The law of the contract was the law by which the parties might fairly be presumed to have intended the contract to be governed. Relying on the test of presumed intention the courts were able to treat each contract individually. However, their application of the presumed intention showed no clear picture. In most of the countries no rules or even presumptions were established; there was a veil of mist around the reported cases. In most of the European countries it was, as Beale\(^6\) said in his comment on English case law, remarkable to notice the great regularity with which the courts found, by various methods, that it was the law of England which was intended by the parties. The law of the forum, however, was not applied in every case. Although the homeward trend was the only true common core of the legal systems, even that varied from court to court and from country to country. It was perhaps stronger in the big countries, England, France and Germany, than in the smaller ones such as Switzerland, the Netherlands and Scandinavia.

One cannot blame the Americans that in the European fog they did not see the light.

The American New-Thinkers

In 1933 Cavers showed that the courts of the United States had not allowed the elements of contact alone to determine the law applicable.\(^7\) Very often they considered the results which the application of the various laws would produce. A certain connecting factor was employed because it gave the court the opportunity to apply the law of the state or country to which it pointed, but this was not in fact an automatic application of a choice-of-law rule. The courts often found that by a happy coincidence the established conflicts rule promoted justice, but when, in their opinion, it did not, they established another in its place. They pretended to ask the question: which is the decisive connecting factor? However, they were aware of the fact that the real question for consideration was different.

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\(^6\) Beale, \textit{A Treatise on the Conflict of Laws} II-1102 (3 vol., 1935).

Cavers approved of the results of the decisions reached by the American courts but disapproved of their distortion of reality. In his opinion the outcome of each case should turn upon a scrutiny of the events of the transaction giving rise to the issue and on a careful comparison of the results that might be reached under foreign law with those that the law of the forum would produce. The court should appraise the significance of the connecting factors in light of the competing substantive rules. Cavers was inclined to allow the court more liberty to decide a case on its actual merits than previous writers had done, but he did not recommend an approach which abandoned principle and precedent. He wanted the court to take into consideration whether it was expedient to establish a particular solution as a rule of law. Such rules might be framed as rules for solving conflicts between substantive rules of certain jurisdictions and, sometimes, as general rules governing certain issues, such as the rule of validation in cases concerning usury.

In his later writings Cavers established, by way of example, two rules of preference governing contractual matters. One was a rule protecting the weak party against the adverse consequences of unequal bargaining power when such protection was offered by a law having a specified connection with the transaction, and the other a rule affirming the principle of party autonomy for other cases. In doing so Cavers disavowed a result-selective approach which would disregard the significance of the connecting factors and simply choose the substantive rule that best accords with today’s ideas of justice and convenience. However, the principles of preference he proposes are to be based upon some—as he hopes—universally recognized value judgments.

Several authors such as Cheatham and Reese, Leflar and Wein-

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8. Id., Choice-of-Law Process 181: “... Where, for the purpose of providing protection from the adverse consequences of incompetence, heedlessness, ignorance, or unequal bargaining power, the law of a state has imposed restrictions on the power to contract or to convey or encumber property, its protective provisions should be applied against a party to the restricted transaction where (a) the person protected has a home in the state (if the law’s purpose were to protect the person) and (b) the affected transaction or protected property interest were centered there or, (c) if it were not, this was due to facts that were fortuitous or had been manipulated to evade the protective law.”
9. Id. 194: “If the express (or reasonably inferable) intention of the parties to a transaction involving two or more states is that the law of a particular state which is reasonably related to the transaction should be applied to it, the law of that state should be applied if it allows the transaction to be carried out, even though neither party has a home in the state and the transaction is not centered there. However, this principle does not apply if the transaction runs counter to any protective law that the preceding principle would render applicable or if the transaction includes a conveyance of land and the mode of conveyance or the interest created run counter to applicable mandatory rules of the situs of the land. The principle does not govern the legal effect of the transaction on third parties with independent interests.”
10. Id. 122.
traub have emphasized that among choice-influencing factors a
court should be allowed to take into consideration that rule of a par-
ticular system of laws, among several which may be applicable,
which is "in tune with the times" or, as Leflar has it, "the better
rule of the law." Although by 1973 many courts had in fact fol-
lowed the method proposed by Cavers in his article of 1933, only a
few courts had openly adhered to this method.

Currie's theory has had several followers among writers and by
the beginning of the 1970s some among the American courts. The
theory briefly stated is based on three cornerstones, the existence of
true conflicts, of governmental interests and of the preponderance of
the lex fori.

Currie was chiefly interested in what he called true conflicts.
They occur when the laws of two or more states are potentially ap-
plicable to the subject matter, and each of them has a governmental
interest in the application of its laws. This interest is to be ascer-
tained through an inquiry into the policies of the laws of the respec-
tive states. By the ordinary process of construction and
interpretation of the competing rules the court must ascertain
whether the purpose of each of these laws is advanced by applica-
tion in the case. There is a false conflict if one of two states—
whether the state of the forum or a foreign state—has a governmen-
tal interest and the other has none. Then the law of the interested
state applies.

A true conflict arises when two or more states have a domestic
policy that would be advanced by application to the case and these
policies clash. In such cases Currie would let the law of the forum
govern. This applies to the usual case where there is a conflict be-
tween the law of the forum and some foreign law or laws. It also ap-
plies to the more unusual case where the law of the forum is
disinterested and the conflict arises between the laws of foreign
states.

(1952); Weintraub, Commentary on the Conflict of Laws 4, 284, 294 (1971).
13. See, inter alia, Vanston Bondholders Protective Committee v. Green, 329 U.S.
156, 161 (1946) and Global Commerce Corp. v. Clark-Babbitt Industries, 239 F.2d 716 (2
Cir. 1956).
14. Currie, Selected Essays on the Conflict of Laws (1963), passim; see also a brief
statement of Currie's theory in Reese & Rosenberg, Cases and Materials on the Con-
flict of Laws 523 (6 ed. 1971), and Heini, "Neure Strömungen im amerikanischen In-
15. Currie favored a "moderate and restrained" interpretation of the law of the
forum so as to avoid conflict with an interested foreign state, see Currie's opinion in
Cavers, Choice-of-Law Process 52 in which he approves of Justice Traynor's moderate
construction of a California rule of law in Bernkran v. Fowler, 55 Cal. 2d 588, 366 P.2d
906 (1961).
16. Currie was also in favor of applying the solution of the interested state, if it
Currie admitted that his theory would lead to different solutions of the same problem depending on where the action was brought. If with respect to a particular problem this appears to be a serious infringement of a strong national interest in uniformity of decision, the court should not sacrifice the legitimate interest of its own state but should leave it to the Congress of the United States to use its constitutional power to solve the problem through legislation.

In solving true conflicts von Mehren and Trautman are, as was Currie, concerned about finding the state interests behind the substantive rules or, as they term it, to apply the rule of the jurisdiction predominantly concerned. They do not seem to give the same priority to the law of the forum state as did Currie and they are more interested in what they call multijurisdictional considerations for the solution of cases where two jurisdictions are equally concerned about the issue.17

The Influence of the American New-Thinkers in Europe

As far as the conflict of laws of contracts is concerned, it has not been possible for me to trace any influential or significant follower in Europe of the new American theories. I have not found any writer of reknown who in this field has seriously advocated replacement of the traditional structure of the conflict-of-law rule with the new structures proposed by Cavers, Currie and other Americans of the same schools. Why have these ideas had so little impact upon European thinking? Although a number of European jurists may think in grooves, they are not all incapable of accepting new ideas.

The explanation is probably that the new theories have been difficult to apply to the European situation. This may be shown by a brief analysis of the theories of Currie and Cavers.

Currie's main point is that the relevant policies or the governmental interests behind the rule of substantive law determine its application in space. How is a court to proceed in applying this method?

Let us assume that country A has statutes prohibiting agreements between attorneys and clients for the payment of contingent fees. A brief statement in the travaux préparatoires condemns such agreements as dangerous and unethical; imprecise reasons of this nature are not uncommon. Relying on governmental interest analysis a court in country A is faced with difficulties. It may find that the object of the rule is to protect the client against being

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charged exorbitant fees. But it can hardly have been the purpose of the rule to protect all clients in the world. Following general rules of interpretation and construction it may then maintain that the rule should apply to agreements between attorneys and domestic clients. One may, however, question whether this limitation to domestic clients is justified. Why not protect a foreign client who has made an agreement with a domestic attorney to act in a case before the courts of A? And is it right to extend the rule to all domestic clients? Such protection might prevent clients of country A from litigating in country B where they cannot obtain legal aid and where the contingent fee agreement is the only device available to a poor client for bringing an action.

Frustrated by these doubts the court may hold that the rule must extend to all attorneys who have been admitted to the bar of country A on the ground that its aim is also to protect the ethics of the bar. Here again doubts arise. Why only protect the ethics of domestic attorneys? And should the attorneys of country A when engaged in business in country B be prevented from acting there on an equal footing with their colleagues in B who use the contingent fee?

As we have seen, the courts of country A face great difficulties in applying a governmental-interest approach. The problems facing the courts of other countries when confronted with these statutes are even greater.

The example serves to illustrate that the purpose of a statute or other rule of law is sometimes obscure. Sometimes it is also complex. Even when the purpose of the statute is known and straightforward, its application in space is doubtful. Very often it depends on general policy considerations applicable to a large number of substantive rules governing the same contract. One of these is to determine the economic and social center of the contract.

It is submitted that not only the governmental interests behind the substantive provisions, but also other considerations must be taken into account. Among these, what have been called the rules of the international system figure prominently. A country which, for instance, has been inimical to commercial arbitration may have enacted rules preventing its citizens and domiciliaries from agreeing to certain arbitration clauses. However, if these rules are extended to international contracts the result will be that on international markets the citizens of that country will find their position weakened.

Finally, if the application in space of each substantive rule were to be determined separately by the courts, the parties would not be

able to predict their application. When making the contract the parties cannot foretell the issue of a future dispute between them and therefore cannot foretell what conflicting rules will be pleaded, what are the conflicting governmental interests behind these rules and which rule will be applied in the end. A conflict rule which covers most aspects of the law of contract and is not restricted to a particular issue will enable the parties better to predict what law will apply.

Cavers' main concern is to promote the attainment of justice. The outcome of each case should turn on scrutiny of the facts of the transaction giving rise to the issue and on careful comparison of the outcome that might be reached under a foreign law with that which the lex fori would produce. The court should weigh both the connecting factors and the competing results of the substantive laws in conflict. In so doing the court should take into consideration whether it is expedient to establish a rule of law. Cavers himself establishes a few principles of preference in contractual matters.

The question is whether Cavers' doctrine is capable of being put into practice. His two principles of preference mentioned above, though aimed at covering a relatively large area of the conflict of laws of contracts (and property), still leave a substantial area uncovered by rules, especially in the province of international commercial contracts where protective laws are not in issue—or should be disregarded—and where the parties have made no agreement on the applicable law. So far it has not been shown how this method could be utilized on a larger scale. The courts have established only very few conflicts rules of a teleological character. Were Cavers' method to be adopted in international conflicts of laws it would require the establishment of a larger number of principles governing the choice of law of contracts. It would be necessary to examine and compare the substantive contract law of a great number of countries before a comprehensive set of principles could be developed. These principles would very likely be more detailed than Cavers' two principles, based as they are on the fairly homogeneous American substantive laws. A great number would be necessary and they would be difficult to formulate. The effort required would be very great in proportion to the number of conflict cases that arise. The degrees of success attained through an endeavour of this kind would turn on the degree to which scholars in various countries could agree on the principles to be established, and would depend upon whether legislatures and courts throughout the world were willing to adhere to them. General agreement is more likely if the rules for choice of law accord equal scope to the substantive law of each country than if they discriminate, for example, between laws offering a "higher"
and "lower" standard of protection.\textsuperscript{20}

In the United States a relatively uniform basis will better ensure that the exercise of such pragmatic judgments does not differ so much from state to state as could be expected between country and country in Europe and in other parts of the world. A federal system could much facilitate the adoption of a given policy; but Europe is not yet organized as a federal system.

\textit{A Cross-Breed between Old and Young: Second Restatement}

The approach of the American Law Institute in the Restatement 2d (1971) is very different from that of the Restatement (1934). The rigid rules have been replaced by flexible standards. In the case of contracts the Institute has chosen a compromise between reliance on the center-of-gravity theory proposed by the 1960 draft of the Restatement 2d (1971) and the methods advocated by Cavers, Currie, Leflar, von Mehren and Trautman, Weintraub and other protagonists of a policy-centered approach.

Restatement 2d (1971) \S 6, which lays down general principles determining a choice of law, also supplies the standards applicable to contracts. Among them are the factors which the new-thinkers consider relevant to the choice of the applicable rule of law.\textsuperscript{21}

\S 188 on the law governing in the absence of an effective choice of law by the parties provides in subsection (1) that the rights and duties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in \S 6. According to \S 188(2) the contacts to be taken into consideration in applying the principles of \S 6 to determine the law applicable to an issue include the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, the domicile, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

So far the particular issue is the primary concern. Beginning with \S 188(3) however, a shift of emphasis seems to occur: if the

\textsuperscript{20} See Currie 105.

\textsuperscript{21} Restatement 2d (1971) \S 6: "Choice-of-Law Principles. (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issues, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied."
place of negotiation and the place of performance are located in the same state the law of this state will generally apply unless otherwise provided in the following title B on particular contracts.\textsuperscript{22} Title B (§ 189-197) contains a number of presumptions. Most of these are formulated as § 191 on Contracts to Sell Interests in Chattels which runs as follows:

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

Here as in the other sections of title B the contract as such is the main object of regulation. The law of the place of delivery governs both the validity of the contract and the rights and duties of the parties unless the contract discloses a more significant relationship with another state with respect to the particular issue.

In the following title C dealing with particular problems it appears that most of these issues mentioned are to be governed by the law that has the most significant connection with the contract. The comment states expressly that the rules of title B which depend upon the type of contract provide a satisfactory basis for determining many of the questions that arise in contract, because most of them will usually be governed by a single law. On occasion however, it is said, an approach directed to the particular problem, rather than to the type of contract involved, will provide a more helpful basis for the determination of a problem of choice of law.\textsuperscript{23}

In the sections of title C most questions are determined by reference to the general rules set out in title B. Some special rules determine the law regarding capacity, formalities and usury, and these rules are validating rules supplementary to the general rules of contract.

The Restatement 2d emphasizes protection of the justified expectations of the parties as an important choice-influencing consideration.\textsuperscript{24} In the comment it is said that these factors vary in importance. They are of considerable weight with respect to issues involving the validity of a contract, but play a less significant role with respect to issues touching the nature and obligations of the

\textsuperscript{22} And also in § 298 on capacity, § 199 on formalities and in § 203 on usury.

\textsuperscript{23} Restatement 2d (1971), Introductory note to § 190.

\textsuperscript{24} Restatement 2d (1971) § 188 comment b.
parties. Parties will expect the contract to be valid, but if they have not spelled out the obligations in the contract, they will not be disappointed by the application of the directory rules (for instance on the time and mode of performance) of one state rather than the rules of another state. \(^{25}\) Hence in fashioning the choice-of-law rules concerning the rights and duties of parties to a contract which is valid, greater emphasis must be laid upon considerations other than the justified expectations of the parties. The relevant policies of the country of the forum and of other interested states, and the ease in determination and application of the law to be applied, may for instance have greater weight. \(^{26}\) The comment, as is seen, gives these recommendations with great caution.

However, the rules of the Restatement 2d (1971) dealing with particular contracts and with particular issues of the contract do not provide for any major difference between validity and obligation. Most sections of title B concerning particular contracts start out as classical conflict rules in which operative facts are governed by the law referred to by a connecting factor, and then it is added: "unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied." Apart from this reference to § 6, specific government interests or other considerations are very rarely mentioned in title B and title C concerning particular issues. The presumptions stated in the rules may be stronger when a question of obligations comes up, but not much is said about the distinction in titles B and C.

To sum up: to a considerable extent the traditional conflict-of-law rules are retained in the Restatement 2d. The bow to the new-thinkers is found in § 6 and in the repeated references to this section in § 188 and in the following sections on contracts. The Restatement says, in other words: I have two recipes: one is the traditional conflict-of-law method. The other is the new approach. You are advised to use the first recipe unless you choose to use the second. The Restatement seems to use what George Orwell called "double speak."

In January 1981 I examined about 50 American cases, most of

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25. The governmental analysis test may lead to the application of two different laws to the same relationship when two issues are involved in the same case. These issues may relate to two different claims under the same contract, e.g. a claim for specific performance and a claim for damages, or they may relate to the same claim, e.g. for damages. In the latter case Currie would apply one law only. You "cannot put together half a donkey and half a horse and ride to victory on the synthetic hybrid." What Currie would do if the two issues were related to two different claims we do not learn; see Currie in Cavers, Choice-of-Law Process 39.

which had been decided in 1978, 1979 and 1980. I found that some state courts were still following the traditional rules of the Restatement (1934). Of the majority of courts which now applied the methods and rules of the Restatement 2d, most relied on the contacts of the contract only, thus following a center-of-gravity or grouping of contacts test in the European meaning of these terms; that is, they applied the law of the state with which the contract had its closest relationship. From the reports of these cases I did not learn whether they presented “true” or “false” conflicts, on the basis of the contacts of the cases the court just held that the law of state X was applicable. A small minority of the cases analyzed the substantive rules of the two or more laws “in conflict” in order to apply the governmental-interest or the better-rule test. Some of these cases contained what the new-thinkers would call “real” conflicts. The parties had pleaded diverging substantive rules all of which probably “claimed application” to the issue and which would lead to conflicting results. However, it seemed that also here the courts applied the law which the (contact) rules of presumption recommended by the Restatement 2d would have led them to apply. I found only one case in which a state court applied forum law because it found it to be the “better law,” and where, perhaps, it would have applied the law of another state if it had followed a grouping-of-contacts test.27

Such a review of cases is of course to be looked upon with some reservation. The case material was relatively small. I did not find all the reported cases of that three year period. All I can say is that in the cases I read the courts had not yet given the new-thinkers much reward for their great intellectual efforts. From earlier years, and maybe even from the years 1978-1980, there are more cases showing “real conflicts” in which either openly or through “covert techniques” the American courts have followed the theories of Currie, Cavers and other new-thinkers. These cases have been made well-known by the authors, who have criticized or praised the courts and who have shown how these courts have or ought to have confirmed their theories. However, numerically and for everyday use these cases do not count for much. They are the caviar for the gourmet jurist, not the trivial kipper which the ordinary counsel gets from his client.

The methods and rules applied by a substantial number of the American courts which have followed or invoked the Restatement 2d have a considerable similarity to those provided for in the EEC Convention on the Law Applicable to International Contractual Obligations.28 Art. 4(1) of this Convention lays down that the contract

28. O.J. No. L 266/1 (1980).
shall be governed by the law of the country with which it is most closely connected. This principle and the rules of presumption attached to it in the other paragraphs of art. 4 and in other articles is gaining ground among European courts even before the Convention has come into force.

Whether in this respect America has influenced Europe or vice versa is difficult to tell. The center-of-gravity method was perhaps originally European. However, it could hardly have received such support in Europe if European scholars, led by the French author Henry Batiffol, had not seen it confirmed by so many American cases. Batiffol reached his theory on the localization of contract primarily through a careful study of what the American courts had done.29 He paid less heed to what they, still then using the traditional formulae, had said.

**A Limited European Parallel**

After the Second World War the "dirigism" of modern states over national economies faced Europeans with the problem whether courts and legislatures should pay heed to substantive rules of a jurisdiction which claimed to govern an issue in contract with such resolution as to exclude the application of any other law. Such substantive rules may be found in economic legislation, for instance in exchange control regulations and cartel laws, and in laws protecting the consumer and other presumably weak contracting parties, such as employees, agents and sole distributors, against unfair contract terms.

Some European scholars have argued that courts and legislatures, while maintaining the classical structure of the conflict-of-law rules, should apply or "take into consideration" the rules of a jurisdiction which claimed to govern an issue in contract in the resolute way mentioned above. Such rules they called "directly applicable rules" or "lois d'application immediate."30 The idea was that these rules operate immediately upon the issue. The conflict-of-law rule which would lead to another law on the issue is put out of action.

Hitherto such directly applicable rules have been applied when they formed part of the law of the forum state. In support of its application the courts in Europe have invoked public policy, the purpose of the rule of the forum, or other principles. Very seldom have such rules been applied when they formed part of a law other than that of the forum. Their application has therefore depended upon where the action was brought. This has sometimes caused forum

29. See Batiffol, *Les conflits de lois en matière de contrats* 3 (1938).
shopping and uncertainty in international transactions. The new theory will give fair play also to foreign public policies.

One of the very few European cases in which the theory on the directly applicable rule was accepted, in a dictum, was the famous Alnati case,\textsuperscript{31} decided by the Dutch Supreme Court in 1966. Here the court said that although the law applicable to contracts of an international character as a matter of principle can only be that which the parties themselves have chosen, "it may be that for a foreign state, the observance of certain of its rules, even outside its own territory, is of such importance that the courts . . . must take them into consideration and therefore apply them in preference to another law which may have been chosen by the parties to govern their contract." In the Alnati case, however, the Belgian Hague Rules in question were not applied. The Dutch law chosen by the parties was made applicable, although the contract was more closely connected with Belgium than with the Netherlands. The Belgian Hague Rules were obviously not considered to be so vital for the Belgians that they deserved application. In a later case, Kharagitsingh v. Sewrajsingh,\textsuperscript{32} where the Dutch Supreme Court could also have referred to the doctrine of directly applicable rules, no mention was made of it.


Art. 7(1) of the EEC Convention provides that when applying the law of a country under the Convention, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if, and so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard is to be given to their nature and purpose and to the consequences of their application or non-application.

There is some similarity between this provision and several of the factors relevant to the choice of the applicable rules mentioned in §§ 6 and 188 of the Restatement 2d. There are, however, also differences. The main difference is that § 6 and § 188 of the Restatement provide guidelines for the solution of all conflict-of-law situations involving contracts; art. 7(1) of the Convention is only an exception to the operation of the traditional conflict rule. However,

\textsuperscript{31} Hoge Raad, 13 May 1966, 1967 N.J. no. 3.
\textsuperscript{32} Hoge Raad, 12 January 1979, 1980 Rev. crit. d.i.p. 68.
as § 6 and § 188 have been applied by the American courts, the difference may not be so great as it seems. Further, the Restatement will consider the relevant policies of the interested foreign states and the relative interests of those states in the determination of the particular issue in contract, and when deciding whether the interest of a foreign state is worthy of consideration § 188 will weigh the contacts to the foreign state to be taken into account according to their relative importance with respect to the particular issue; art. 7 of the EEC Convention provides that "giving effect" to the mandatory rules of a foreign state is possible only when this state has a significant contact with the contract as a whole.

In spite of these and other minor differences between the American and European rules there is a similarity in the basic idea. The fertile American case law has provided and may provide examples which will teach the European courts when to apply art. 7 of the EEC Convention. Some of the much debated American cases involving "real" conflicts may provide food for thought.

Conclusions

As has been seen the present writer has had difficulties in accepting the new American theories. He has more belief in the methods and principles adopted by the EEC Convention of 19 June 1980. Under this Convention the contract is to be governed by the law of the country in which its center is located socially and economically. On the one hand the court is not bound to rely on one connecting factor for all contracts of a particular type. It may take the various connecting factors into consideration and consider them individually in each case. On the other hand the normal structure of the conflict rules is maintained. In general, only the connecting factors count. Furthermore, the connecting factors of the entire contractual relationship as a social phenomenon are taken into consideration and not the contacts relating to the particular issue.

The proper law of the contract is not to be ascertained by counting but by weighing the connecting factors. These factors derive their weight from the general social policies behind the substantive law rules and from the policies underlying international commercial intercourse, one of which is to consider the average interests of the parties. When weighing the factors the courts should consider these policies.

The law of contract, in so far as it deals with contracts relating to interests in immovables, is intended to apply to immovables situated in the country where these rules are in force, and the country in which an immovable is situated is, in general, more interested
than are other countries in having such contracts governed by its laws.

Equality of status among employees and peace of the labor market are ensured if all work carried out in the same country is governed by the same rules. Therefore the country where an employee carries out his work is generally more interested than are other countries in having its law govern the contract of employment.

The manufacturer or the merchant who exports goods is subject to more complex duties than the importer. An exporter who sells to importers in different countries has a greater interest than has the importer in calculating the risks and costs on the basis of one law, which is his own law.

The normal policy of a country whose law contains rules protecting the weak party to a consumer contract will be to extend this protection to its residents. This social policy is in general so important that the habitual residence of the consumer will be regarded as the center of gravity of a consumer contract.

These and other considerations attaching particular weight to a certain connecting factor or to a constellation of such factors are of a general kind. They cover most contracts of a certain type and sometimes several types of contracts. These general choice-influencing consideration will therefore lead to the establishment of presumptions for the various types of contracts and for typical contractual situations. Presumptions will perceptibly reduce the uncertainty and lack of predictability which are likely to result if the center of gravity or individualization without the assistance of presumptions is made the basis of the choice of law.

The main difference between the European grouping-of-contacts test and the new American theories is the following: the Americans consider the purpose or the social effects of each substantive rule in order to determine its spatial scope of application. The Europeans try to determine in which environment the entire contract as a social phenomenon is localized. In doing so they take into consideration the social and political interests which would normally govern a contract of that type and with these contacts.

If the EEC Convention is adopted in the Europe of the 10 (or 12), and if the Restatement 2d is applied in the future as it seems to have been applied in a substantial number of the cases hitherto decided under it, the conflict-of-law rules of the two continents will approach each other considerably. One day our successors may then meet again in Europe's oldest university and discuss the publication of an American-European Restatement on the Conflict of Laws.