

THE USE OF CHOICE-OF-LAW CLAUSES IN INTERNATIONAL COMMERCIAL CONTRACTS

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I. INTRODUCTION

A. *Nature of the Problem*

A tendency toward certainty in commercial transactions should be encouraged by the courts.¹

It is necessary to the facilitation of international commerce to provide a legal framework which maximizes certainty. It is necessary to the just resolution of disputes that the legal principles applied be those under which the parties expected their relationship to be governed. More important, it is necessary to the conduct of daily affairs that businessmen be able prospectively to ascertain what their rights and obligations are.

Because the internal laws of the various legal systems with which an international trading transaction may have contacts often differ—with regard both to mandatory rules, such as those governing the validity of contracts, and to optional provisions, such as rules of construction—the promotion of certainty is a function primarily of the principles of the conflict of laws.² Because of the conflicting and confused state of those conflicts principles in various jurisdictions, they cannot alone provide the certainty which the parties to international commercial transactions desire.³ The focus of this article is the ques-

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1. Harlan, J., in *Siegelman v. Cunard White Star, Ltd.*, 221 F. 2d 189, 195 (2d Cir. 1955) (dictum).

2. The need to know what law will be applied has been described as the "central problem," from a legal point of view, arising out of an international trade transaction. Schmitthoff, *The Export Trade* 68 (1948). Note, however, that the relevant question is not what law governs in general, but what law governs the particular legal issue in dispute. Cheshire, *Private International Law* 205-06 (5th ed. 1957) (hereinafter cited as Cheshire).

3. The authorities almost uniformly conclude that no area in the field of the conflict of laws is more confused than that relating to the law applicable to various contractual issues. This is particularly true with regard to validity. See, e.g. 2 Beale *Conflict of Laws* 1077 (1935) (hereinafter cited as 2 Beal); Goodrich, *Conflict of Laws* 321 (3d ed. 1949) (hereinafter cited as Goodrich); 2 Rabel, *The Conflict of Laws: A Comparative Study* 357 (1947) (hereinafter cited as 2 Rabel); Note, 62 *Harv. L. Rev.* 647 (1949).

The basic reason for the unsatisfactory state of authority in this area is undoubtedly the sheer complexity of the problem. International contracts are of various types and may have many contacts; and the particular issues, interests and contexts differ from

tion of the extent to which an express choice-of-law clause can effectively be utilized, within the conflicts systems of various courts in which litigation might occur, to fulfill that need.

The goal of certainty involves two basically distinct objectives for the realization of which a choice-of-law clause might be employed. The first of these subsidiary objectives is to assure that matters of mandatory law,⁴ such as contractual capacity and essential validity, will be determined under the legal system with a view to which the parties contracted. Because the businessmen presumably desire the contract and its specific terms to be binding and enforceable, this objective is really to guarantee validity of obligations.⁵

The second objective is to promote certainty concerning the nature and extent of the contractual rights and duties once they are validly created. This is a matter of construction, because the definition

case to case. There are also differences in the basic views of scholars as to the nature of conflicts problems and the proper approach to their solution. The usual coincidence of several contacts in the country, the law of which is applied, makes most decisions inherently ambiguous, a fact upon which the proponents of opposing theories have capitalized. See Goodrich 332; Note, 57 Colum. L. Rev. 553, 555 (1957). Decisions are also inconsistent within jurisdictions. See 2 Beale 1078. Judges have seldom articulated the importance they have attached to various contacts involved. Nor do they appear often to have thought out the implications of alternative rules of reference or to have attempted to reconcile inconsistent decisions. On most issues no clear answer exists; and on many a number of conflicting theories can tenably be argued.

4. The distinction between mandatory and optional spheres of law is suggested, among others, by Wolff, *Private International Law* 416 (2d. ed. 1950) (hereinafter cited as Wolff). His first term is "compulsory." The distinction turns upon whether the principle is one which the parties can alter or avoid by express provision within the particular legal system. See also Cheshire, 220; Goodrich, 340.

5. The focus of theoretical controversy and of judicial confusion has been the question of the proper means of selecting the law which is to govern the "essential validity" of a contract. This term is employed to connote all matters requisite to the creation of a binding obligation other than those of capacity and of contractual formalities. It includes such issues as lack of assent, want of consideration, fraud, mistake, and illegality. It ordinarily excludes the matters of discharge, rescission, and the defense of frustration by unforeseen events or the law of the place of performance, because these issues or contingencies can admittedly be provided for in the contract by an express allocation of the risk. But see *Sokoloff v. National City Bank of New York*, 239 N.Y. 158, 170, 145 N.E. 917, 920 (1924) (dictum regarding unforeseeability).

There are, nevertheless, inter-relationships between the definition of the parties' obligations and the determination of their validity. For example, one of two possible constructions could make an agreement invalid, or the interests of third parties or the state might be involved and remove the matter of construction from the sphere of purely optional law. See *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, 269 N.Y. 22, 198 N.E. 617, cert. denied 297 U.S. 705, remittitur amended 269 N.Y. 602, 199 N.E. 691 (1935); Note, 57 Colum. L. Rev. 553, n.6 (1957). Even in the case of ordinary defenses, such as discharge, the effect of the forum's selection of the applicable law upon the parties' rights is just as severe as is that of the choice of the law governing the initial question of validity. Moreover, the most numerous issues of essential validity concern specific provisions which attempt to vary the substantive rights and duties which are decreed by specific statutes and judicial decisions. See Sec. III *infra*.

of rights and duties is admittedly within the control of the parties even within a single legal system. It involves the incorporation into the contract of either specific provisions or general bodies of rules of construction.⁶ The realization of certainty depends not only upon acceptance of the parties' stipulation, but also upon the ability of the selected body of law to provide clear answers to the questions which may arise, and upon the ability of the parties to anticipate a high degree of uniformity in its application by various potential loci of litigation.

In terms of these subsidiary purposes, there are two basic types of choice-of-law clauses. The first may usefully be termed a choice-of-governing-law clause. Its function is to designate the legal system which, under the conflicts rules of the forum, is to be utilized in resolving issues of validity. It is ordinarily a general statement that the contract is to be "governed by" the law of the designated country.⁷ It may, however, take the form of a clause incorporating a statute which itself provides that the parties "shall be deemed to have intended to contract according to" the desired law.⁸ At least in the English courts, a provision for the arbitration of future disputes in a particular country can be considered a choice of the law of that nation.⁹

The more limited type of stipulation may be termed an incorporating choice-of-law clause. The most common form of this is a provision expressly making certain trade customs a part of the contract.¹⁰ But the category includes everything from the incorporation by reference of a specific statute¹¹ to a general designation of the law of a country as that under which the agreement is to be construed.¹²

These types are merely analytical. There is some overlapping,

6. See, e.g. *G. E. Dobell & Co. v. The Steamship Rossmore Company, Ltd.*, 2 Q.B.D. 408 (1895); *Ex Parte Dever*, 18 Q.B.D. (1887). See also *Cheshire* 220-21 ("... they become English terms of the contract and must be construed as such.")

7. See, e.g. *E. Garli & Co., Inc. v. Cunard S.S. Co.*, 48 F.2d 115 (1931); *Vita Food Products, Inc. v. Unus Shipping Co. Ltd.* [1939] A. C. 277 (P.C.). But see *The Torni*, [1932] P. 78 (C.A.).

8. See, e.g. *Ocean Steamship Company, Ltd. v. Queensland State Wheat Board*, [1941] 1 K.B. 402.

9. See footnote 71 *infra*.

10. See, e.g. *Nippon Ki-Ito Kaishi, Ltd. v. Ewing-Thomas Corp.*, 313 Pa. 442, 170 Atl. 286 (1934) ("Terms and provisions of the Raw Silk Rules of the Silk Association of America, Inc.").

11. See, e.g. *G. E. Dobell & Co. v. The Steamship Rossmore Co. Ltd.*, [1895] 2 Q.B.D. 408 (Harter Act). Some would probably not consider such a specific reference, or even a reference to trade custom, to be a "choice-of-law clause." See *Schmitt-hoff, Legal Aspects of the Export Trade* 5 (1953). However, all of these forms appear to serve the same function and to present the same problems, though in varying degrees.

12. See, e.g. *Boale v. Union Marine Ins. Co.*, 52 Cal. App. 207, 148 Pac. 416 (1921) ("Law and Customs of England").

in that a choice-of-governing-law clause will presumably be intended to apply also with respect to issues of construction. In each case there is a question of construction as to the intended scope of the clause. Parties employing the device probably do not often discern the difference between the two types. Nevertheless, it is important. The choice-of-governing-law type can be effective only if accepted, under the conflicts rules of the form, as the proper basis for selecting what might be considered the essential national character of the contract. The second category of stipulations operates to elaborate provisions which the parties, in theory at least, could directly have written out in the agreement. For this reason the latter are legally acceptable regardless of what law governs validity.

In evaluating the utility of the choice-of-law clause in promoting certainty in these respects, it is also essential to bear in mind that it can operate only through the conflict of laws, or private international law, principles of the forum. It cannot affect the substance of the applicable law once selected. Nor can it influence the way in which the government of the place of performance directly controls conduct within its borders, although it can specify the effects which certain applications of the law of that country will have upon the contracting parties' relations between themselves.¹³ Even within the realm of the functioning of the forum, in selecting the law under which to resolve matters in issue, its operation is circumscribed by public policy, statutory rules, and local procedure.

B. The Extent of Present Use of the Choice-of-Law Clause Device

The extent to which choice-of-law clauses are presently utilized is not clear.¹⁴ Of the reported cases of appellate courts, relatively few have involved express stipulations of the governing law. It is reasonable to assume, however, that the decisions furnish no accurate indication of the actual frequency of their use. In general, the second type, especially its more specific forms, is probably in common use, and the first type is probably not.

In terms of the types of contracts involved in international com-

13. Cf. *Jacobs, Marcus & Co. v. The Credit Lyonnais*, 12 Q.B.D. 589 (1884) (frustration of performance by rebellion).

14. No general survey appears to have been made concerning the use of this device. The conclusions here stated are drawn *inter alia* from the case law plus from the following sources, none of which is well documented: 2 *Rabel*, 376-84, 388; *Cheshire* 215; *Schmitthoff, Legal Aspects of the Export Trade* 5, 75 (1953); *Wolf* 426-27; *Cavers, "A Critique of the Choice of Law Problem,"* 47 *Harv. L. Rev.* 173, 185 n.25 (1933); *Nussbaum, "Conflict Theories of Contracts, Cases v. Restatement,"* 51 *Yale L.J.* 893, 896 (1942); *Note*, 57 *Colum. L. Rev.* 553, 555-61 (1957) *Note*, 62 *Harv. L. Rev.* 647, 659 (1949).

merce, the choice-of-governing-law clause has most frequently been found in bills of lading. Because of the substantial uniformity which has in recent years developed in this area, the use of this technique in such shipping agreements may be less extensive today. Contracts of sale, especially in established commodity trades, appear regularly to employ the more limited forms of choice-of-law clauses. Stipulations to trade customs are the most common examples. The combination of these with arbitrary provisions is a frequent practice.

In geographic terms the device is probably in more widespread use in England and on the Continent than in the United States. In this country the choice-of-governing-law clause seems most often to be used in efforts by banking institutions to avoid usury laws and by insurance companies to subject various policies to the control of the law of the insurer's place of business. The second type of clause is, of course, much more widely employed than the first. A single agreement frequently incorporates different provisions for different aspects of the relationship.

C. *The Nature of the Article*

The primary purpose of this article is to assess the utility of both forms of choice-of-law clauses as means of promoting commercial certainty. This objective will be sought by investigating (1) the acceptability of choice-of-law clauses in terms of fundamental conflict of laws theory and authority; (2) the limitations or qualifications which are imposed upon the use of such clauses by the conflicts and related legal principles of the forum, and (3) various additional limitations upon the effectiveness of the device. The use of the choice-of-governing-law type of clause will be focused upon because it is the center of theoretical dispute and best illustrates the considerations involved. The general conclusion of this investigation is that it is worthwhile and advisable to include choice-of-law clauses in international commercial contracts (especially with regard to interpretive issues, because of their much greater frequency and of the greater acceptability of the device in that sphere), but that the effectiveness of such clauses in achieving the certainty which the businessman desires is severely limited by several sets of factors. A secondary purpose of the present discussion is to point up the theoretical merits of a basically receptive judicial attitude toward the use of choice-of-law clauses.

This discussion must necessarily be general. There are differences among jurisdictions; the courts of England, for example, will allow a broader scope of free choice than will those of the United States.¹⁵

15. See Sections II, part B, and III *infra*.

There are significant differences among types of contracts; the ability to select the governing law is much more closely circumscribed with regard to negotiable instruments and bills of lading than it is in other agreements.¹⁶ Nevertheless, no attempt will be made definitively to discuss the special problems as categorized on these bases. For one reason, the status of existing authorities does not make such an approach worthwhile. More important, there is a greater present need for consideration of the common problems and fundamental principles. Finally, the differences among jurisdictions show some signs of giving way to the development of a consensus, and the differences among types of contracts depend primarily upon the varying degrees to which they raise the same considerations.

This inquiry is also limited to the judicial acceptance of choice-of-law clauses. Although the majority of international commercial agreements appear to include arbitration agreements, there are presumably many businessmen who prefer the greater certainty which the prospect of judicial settlement of disputes might provide. In selecting the law applicable to various contractual issues, moreover, the arbitrator can reasonably be expected to be at least as favorably inclined toward effectuating the stipulations of the parties as is the judge.¹⁷

II. THE ACCEPTABILITY OF CHOICE-OF-LAW CLAUSES UNDER CONFLICT OF LAWS THEORY AND AUTHORITY

The threshold question involved in an analysis of the effectiveness of choice-of-law clauses is, of course, their legal acceptability under the theories and authorities of the conflict of laws which are followed in the various potential loci of litigation. Because of the inconclusive state of the judicial authority, this issue turns principally upon theoretical considerations, at least in the case of the choice of the law governing validity. It is the principal purpose of this section to analyze those considerations and to suggest the theoretical merits of a basically receptive attitude toward both types of choice-of-law clauses. A secondary purpose is to demonstrate that the judicial decisions of the major commercial jurisdictions are consistent

16. *Id.*

17. Only the judicial authorities of England, New York, and the Federal Second Circuit, have been examined in any detail. Even in these jurisdictions, the search cannot purport to have been exhaustive, at least with regard to cases not involving decisions on choice-of-governing-law clauses. Rather than to present a definitive statement of the law, it is the intent of this article to suggest the considerations which the businessman, and the courts should bear in mind regarding this device.

On the choice-of-law problem as faced by an arbitrator, see Mezger, "The Arbitrator and Private International Law," in *International Trade Arbitration* 229 (Domke ed. 1958).

with the utilization of such a view as the point of departure in determining the role to be afforded to the device.

A. *The Theoretical Merits of a Basically Receptive Attitude Toward Parties' Choice of the Governing Law*

Although the effectuation of the incorporating type of choice-of-law clause is consistent with almost any of the competing theories of conflicts, the acceptance of the parties' stipulation of the governing law is dependent, in the main, upon the willingness of the forum to follow what is termed the "autonomy" or "intention" approach. This is one of four principal, competing theories as to the proper means of selecting the law by which to determine the validity of a contract. A brief summary of these theories is warranted in order to provide a background against which to analyze the theoretical merits of effectuating the choice-of-law clause in this sphere.

The major theories urged as the proper basis for determining the legal system under which the validity of a contract should be assessed can be classified as mechanical theories, flexible theories, and others. The mechanical category is composed of theories which make the issue turn upon one contact. On essential validity the place of the making and place of performance theories are the important ones. The flexible theories consider the aggregate of factors. They are the autonomy theory¹⁸ and the grouping of contacts theory. In the absence of an express choice of governing law clause, the latter two approaches are virtually identical.

The place of the making (or *lex loci contractus*) theory is that the law of the place where the last act necessary to create a binding agreement occurred must govern essential validity. It finds its strongest advocates in Beale and Goodrich.¹⁹ Primarily because of the former, it is the rule of the *Restatement*.²⁰ Some say it is presently the majority position of American cases,²¹ but its position as such is doubtful.²² It probably is, nevertheless, the main point in the frame of reference within which the acceptability of a choice of governing law clause must be considered in this country.

At the root of this theory is the concept of territoriality. Ac-

18. The autonomy theory could not be classified as a flexible one if it were utilized without qualifications when there is an express choice of the governing law by the parties.

19. 2 Beale, 1090-1100; Goodrich, 332-33.

20. Restatement, Conflict of Laws, secs. 332-40, 342-44, 346-48, 350-51 (1934) (hereinafter cited as Restatement). Ancillary rules which determine what is the place of contracting are provided by Restatement, secs. 311-31.

21. Cheshire 10; Goodrich 332; see Beale's classification, 2 Beale, 1772-73.

22. See Nussbaum, "Conflict Theories of Contracts, Cases v. Restatement," 51 Yale L.J. 893, 905 (1942).

ording to its proponents, only the country in which acts occur can attach legal consequences to them, a view derived from the field of torts.²³ Moreover, the advocates claim for this rule the greatest practical advantage: Its operation is certain;²⁴ and the country in which a contract is formed is that in which the parties can most easily obtain legal advice.²⁵

This rule operates satisfactorily in the ordinary contractual situation. As a universally applicable theory, however, it is subject to severe criticism. Opponents reject its premise, the principle of necessary territoriality.²⁶ Moreover, its certainty becomes undesirable and arbitrarily rigid in cases in which contracts are formed fortuitously in otherwise unrelated countries,²⁷ or in which they are concluded by correspondence.²⁸ Nor is there always agreement on, or evidence of, the place of contracting.²⁹

The second mechanical approach is the *lex loci solutionis*, or place of performance, theory. It provides that the law of the country in which an agreement is expected to be performed is the proper reference by which to judge the validity of a contract. Seldom, if ever, does this theory appear to be unreservedly urged.³⁰ Its most important use is found in statutes requiring the forum to apply local internal law when aspects of performance occur within the jurisdiction.³¹

The bases of this theory appear to be two. It was originally justified on grounds that it accorded with the presumed intention of the parties.³² Perhaps more significant to those who favor objective approaches, however, is the importance of performance as a contact. The fact that the contemplated conduct is to occur in its territory gives the law of the place of performance strong grounds for asserting

23. Goodrich, 54; 2 Beale, 1091.

24. Goodrich, 309, 3221; 2 Beale, 1045, 1091.

25. Goodrich, 322; 2 Beale, 1091-92.

26. E.g. 2 Rabel, 460.

27. See, e.g. id; Lorenzen, "Validity and Effect of Contracts in the Conflict of Laws," 30 Yale L.J. 565, 655, 663 (1921).

28. See, e.g. 2 Rabel, 453-58, 480 (this is especially true when the correspondence is between common law and civil law countries); Wolff, 414-15.

29. See, e.g. Union Nat. Bank of Chicago, v. Chapman, 169 N.Y. 538, 62 N.E. 672 (1903); 2 Rabel, 455.

30. See *Andrews v. Pond*, 38 U.S. (Pet.) 65, 78 (1839).

31. Rabel cites Austria and several South American countries as having such code provisions. 2 Rabel 370-73. Statutes of some states in this country so provide, generally, regarding the interpretation of contracts, but none appears to apply to validity. See, e.g. Cal. Civ. Code, sec. 1646 (West 1954). See also sec. III B *infra*, regarding specific substantive statutes.

32. Story, *Conflict of Laws* 233 (2d ed. 1841). See Goodrich 331. This is ordinarily the justification which courts give when applying the *lex loci solutionis*. See *Pritchard v. Norton*, 106 U.S. 124, 136 (1882).

a regulatory jurisdiction which other nations' conflicts rules should recognize.³³

The place of contracting enthusiasts criticize this rule as affording extraterritorial effect to the *lex loci solutionis*,³⁴ although in the situation where a party knows that performance will be illegal where it is to occur, they in effect permit the *lex loci solutionis* to vitiate the agreement by way of the substantive *lex loci contractus*.³⁵ Other schools object to the theory because of the rigidity which it shares with the first view.³⁶

Its major weakness is demonstrated by positing a case in which performance is to occur in several places or the place of performance is not initially known. In the former situation the unqualified use of the *lex loci solutionis* would subject different aspects of the agreement to different tests of validity.³⁷ In the latter it could operate at all only by utilizing fictions, such as the presumption that performance is intended to occur at the place of contracting.³⁸

The third major theory is that of the center of gravity or grouping of contacts. Its purpose is to designate the legal system which has the closest connection with the transaction, in terms of both quantity and quality of contacts.³⁹ Just what kind of contacts merit consideration, however, is not clear.

Respected authority in England insists upon an "objective intention" or "contract localization" view of the "proper law" concept which is employed in that jurisdiction, which would make that doctrine an example of this theory rather than one of autonomy.⁴⁰ As is

33. See Goodrich, 325.

34. Goodrich, 324-25; 2 Beale, 1086.

35. See Restatement, sec. 360.

36. E.g. 2 Rabel, 472; Cook, "Contracts and the Conflict of Laws; Intention of the Parties," 32 Ill. L. Rev. 899, 919 (1938) (hereinafter cited as Cook).

37. See Goodrich, 325; 2 Rabel, 466-70.

38. See Goodrich, 325; 2 Rabel, 470-71. See also 2 Beale, 1045 regarding the difficulty of ascertaining the place of performance.

39. See Cheshire, 10, 207, 210-12.

40. For general discussions of the two views of the proper law, see Cheshire, 206-19; Graveson, 187-96. In cases which involve no express choice by the parties, there is no practical difference of significance between these approaches, although the questions the judge will ask himself will differ. Under the objective theory, the role of the subjective intention of the parties is limited to selection of the factual contacts. From these the court will determine "the place with which it (the contract) has the most substantial connection," Denning, L.J. in *Boissevain v. Weil*, [1949] 1 K.B. 482, 490, or will impute to the parties the intention which "just and reasonable men" would have had, Burdett, L.J. in *The Assunzione* (1954) P. 150, 180. See Westlake, *Private International Laws* 302 (7th ed. 1925).

Where there is an express stipulation, this theory would refuse to give it effect. Cheshire, 216, insists that the case should be decided upon a weighing of objective contacts, just as if no choice had been stated by the parties. Clearly the English courts have not so acted. Even Cheshire, 214, concedes that they will give effect to a choice

true of all doctrines, it finds some support in the United States, although apparently not as a unique and universally applicable theory.⁴¹ The primary advantage of the grouping of contacts theory is its flexibility. The selection of the most closely connected legal system cannot be determined by the fortuitous location of a single contact. At the same time, it precludes the possibility of avoidance of mandatory requirements, either by express choice or by contact-rigging.

In this quality of flexibility, however, lies also the weakness of the doctrine. For the subjective evaluation of contacts by the judge is undoubtedly a source of uncertainty. And, unlike the intention rule, this theory provides the parties no avenue for avoiding that uncertainty.

Finally, there is the autonomy theory, which makes the express or implied intention of the parties determinative of the legal system by which even the essential validity of a contract should be governed.⁴² It is said to have been derived from the civil law by Lord Mansfield,⁴³ and it has long found strong support in England.⁴⁴ In this country, too, it has lengthy history and a great deal of current vitality.⁴⁵ In

of governing law clause. For subjective view writings see Schmitthoff, *The Export Trade* 69 (1940); Wolff, 414-16; 2 Rabel, 430-31, 439. See also note 94.

41. See *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954); *Jones v. Metropolitan Life Insurance Co.*, 158 Misc. 466, 286 N.Y.S. 4 (App. Div. 1936). Goodrich, 323, expresses a second choice for this approach. See also 2 Rabel, 436. Most implied intention cases, and even most rigid-rule decisions, could be read as consistent with this view.

42. In addition to these four principal theories, other bases for selecting the law governing the validity of a contract have been suggested. See, e.g., Lorenzen, "Validity and Effect of Contracts in the Conflict of Laws," 30 *Yale L.J.* 565, 655, 673 (1921); 2 Rabel, 407, 440, 442-43, 480-84; Cavers, "A Critique of the Choice-of-Law Problem," 47 *Harv. L. Rev.* 173 (1933).

Although classified here as a flexible theory, the autonomy view can really mean different things in different situations. Where there is an express stipulation, this view would—if applied without qualification—be essentially as rigid as the mechanical approaches. Only the nature of the pivotal factor would be different. Ordinarily, however, it is almost indistinguishable from the grouping of contacts view in application.

43. *Robinson v. Bland*, 2 *Burr.* 1077, 97 *E.R.* 717 (1760). See also Goodrich, 327; 2 Rabel, 363.

44. E.g. Wolff, 415-16; Schmitthoff, *The Export Trade* 69-71 (1948). For judicial authority see footnote 71 *infra*.

45. See, e.g. *Pritchard v. Norton*, 106 U.S. 124, 136 (1892) ("The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation."); *Dushkin v. Pennsylvania Central Airlines Corp.*, 167 F.2d 727 (6th Cir. 1948) (express choice in employment contract). Cook is said to have been the first to articulate the modern intention theory as the proper explanation for American decisions. See Note, 62 *Harv. L. Rev.* 647, 648 (1949). His views are contained in the following series of articles, entitled "'Contracts' and the Conflict of Laws," 31 *Ill. L. Rev.* 143 (1936), 32 *Ill. L. Rev.* 899 (1937), and 34 *Ill. L. Rev.* 423 (1939). Some of the additional scholarly authority is 2 Rabel, 366-67; Nussbaum, "Conflict Theories of Contracts; Cases v. Restatement," 51 *Yale L.J.* 393 (1942); Yntema, "'Autonomy' in Choice of Law," *Am.*

the Continental systems of private international law, it is said to be the prevailing doctrine.⁴⁶

Whether or not the autonomy theory is worthy of acceptance in all cases, the basic attitude of the law toward an express choice-of-law clause should be one of receptivity, even in the range of issues relating to the validity of contractual obligations.⁴⁷ Considerations of commercial convenience and of conflicts theory weigh heavily in favor of this view. Difficulties and the possibility of abuse do exist, but these warrant limitation rather than outright rejection.

The positive argument for autonomy is strong. It rests mainly upon the interests of the parties to the contract, but it is supported by those of the commercial community and of the courts as well. Because of this, it is in the general social interest to provide a legal system favorable to the prospective resolution of conflict-of-laws uncertainties by the parties, unless sufficiently forceful doctrinal and practical objections appear.

The relevant interests of the parties themselves are freedom of action and certainty of rights and obligations. If no other persons are affected by the choice of law, and if the contractual stipulation is made after informed and equal bargaining,⁴⁸ there is strong reason

J. Comp. L. 341 (1952); Rheinstein, Book Review, 15 U. Chi. L. Rev. 478, 485-87 (1948). See also footnotes 73, 74, 76, 77 and 80.

46. See Cheshire, 206; 2 Rabel, 368. The autonomy principle has been incorporated into multilateral treaties to which European and other nations are parties, most recently by the Seventh Hague Conference in the Draft Convention on the Law Applicable to the Sale of Goods, art. 2, in 1 Am. J. Comp. L. 275-77 (1952) (capacity and formalities excluded by art. 5).

47. The important thing is the starting point of reasoning. Appropriate limitations can be imposed to prevent distortion and abuse; these will be considered in section III infra. The first task, however, is to establish the premise, which depends upon fundamental considerations of theory and judicial policy. The thesis here presented is, in essence, that in view of the compelling arguments in favor of effectuating the parties' stipulation, the burden rests with the opponents to answer the question "Why not?" They have not done so. The arguments which have been advanced against autonomy justify only limitations.

Negotiable instruments, however, constitute a separate category of obligations, in which a rigid *lex loci contractus* rule should govern. Standardization is "essential to the whole institution of negotiable instruments." Nussbaum, *Principles of Private International Law* 152 (1943). Third party interests are also involved, as the instruments are intended for negotiation. The *lex loci contractus* should be utilized even in matters of construction. *Swift & Co., Inc. v. Bankers Trust Co.*, 280 N.Y. 135, 19 N.E.2d 992 (1939). See also (English) Bills of Exchange Act, 1882, § 72 (1) (45 & 46 Vict. c. 61); Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes, opened for signature at Geneva, June 7, 1930, arts. 2-7, 143 LNTS 317, in 5 Hudson International Legislation 550, 552-54 (1936). For this reason, the following discussion is not intended to apply in the field of negotiable instruments, although cases involving this kind of obligation which contain authority favorable to intention, e.g. *Hall v. Cordell*, 142 U.S. 116, 120 (1891) (*dictum*), are a *fortiori* relevant to other contracts.

48. See text at footnotes 115-121.

for effectuating the choice-of-law clause and little reason to worry about avoidance of particular prerequisites. As a matter of principle, freedom of choice should be limited only to the extent to which public or third-party interests are affected or there is an absence of real agreement. Even then, the importance of promoting certainty warrants a basically receptive attitude toward the parties' choice of law.

Giving effect to the express intention of the parties would ordinarily furnish the most sound and certain way by which the forum can fulfill its obligation to select the law by which the validity of an obligation should be assessed.⁴⁹ At the least it will indicate the law which is just in terms of the expectations of those involved. Moreover, encouraging the use of the technique might well be expected to ameliorate judicial burdens by preventing disputes from arising.

In the face of such considerations, the arguments against giving legal effect to a choice-of-law clause in the matter of validity seem insignificant. The opponents of the intention theory of the choice of law contend, first, that this theory of conflicts is objectionably uncertain.⁵⁰ As applied to a case where an express choice has been made, such an objection is clearly without merit. To argue against accepting a choice-of-law clause because other courts might reject it is to argue in reverse.⁵¹ In the long-distance contracts which characterize international trade, permitting the parties to designate the governing law affords a greater likelihood of certainty than does the rule of the place of the making.⁵²

The second set of arguments against accepting a choice-of-law clause under any circumstances is more serious. It is the doctrinal view that the intention of the parties is necessarily incapable of influencing the court's selection of the law by which to determine validity. Those who adopt this principle fall within two schools of thought which are otherwise in opposition to each other: (a) the proponents of the *lex loci contractus* rule; and (b) the advocates of a purely objective form of the proper law or grouping of contacts

49. "If we agree that it is one of the very basic policies of the conflict of laws to prevent the application of a legal system of which the parties could not have thought, or to express the same idea in a positive way, if we regard it as one of the principal purposes of the conflict of laws to protect the justifiable expectation of the parties, then the intention of the parties rule is the one which fulfills that purpose better than any rival rule." Rheinstejn, Book Review, 15 U. Chi. L. Rev. 478, 486 (1948).

50. E.g. 2 Beale, 1083 states that this practical objection to the intention theory is "conclusive." Both 2 Beale, 1085 and Goodrich, 327, explicitly contend that the rule is uncertain even where there is a choice-of-law clause, because the courts might reject the selection.

51. Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 195 (2d Cir. 1955) (dictum).

52. See 2 Rabel, 376; Cook, 899, 901, 920. See also Cheshire, 214.

approach. Both accept as definitive on this point the oft-quoted dictum of Learned Hand in the *Gerli* case:

. . . an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull one's bootstraps. Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes.⁵³

Those who contend for the law of the place of the making believe that it is only that legal system which can change the moral agreement of the parties into one having legal force. The place where the acts occur must govern their consequences. From this premise it follows that a choice-of-law clause which attempts to remove the validity of a contract from the scrutiny of the law of the place where it is entered is an improper, private usurpation of the legislative function.⁵⁴ From it also follows, at least implicitly, the conclusion that the court's effectuating the clause infringes the sovereignty of the state of the making.

The answer to this line of argument lies in rejecting its premise. The authorities clearly establish that there is no unqualified territoriality principle underlying even Anglo-American jurisprudence. There are many instances in which courts assert extraterritorial jurisdiction over matters in which other nations have a greater interest than is true with regard to the validity of commercial agreements.⁵⁵ Within the context of the principles of conflicts themselves, the English courts' receptivity to the intention theory would seem to be a sufficient reply.⁵⁶

No specific contact can logically give a particular legal system a compelling claim to control. It is the forum alone which has power to resolve the dispute. Whether it utilizes the vested rights or the local law theories, its primary objective in referring a question to a foreign system is to achieve a just decision.⁵⁷ In this endeavor, the

53. *E. Gerli & Co., Inc. v. Cunard S.S. Co.*, 48 F.2d 115, 117 (1931). See also 2 Rabel, 394.

54. 2 Beale, 1079-80 ("The fundamental objection"); Goodrich, 326. See also Lorenzen, "Validity and Effects of Contracts in the Conflict of Laws," 30 Yale L.J. 658 (1921).

55. E.g. *Cook v. Tait*, 285 U.S. 47 (1924) (taxation); *King v. Oliphant* [1905] 2 K.B. 67 (criminal); *United States v. Minnesota Mining & Manufacturing Co.*, 92 F. Supp. 947 (D. Mass. 1950) (anti-trust).

56. See footnote 71 *infra*.

57. It is particularly difficult to understand why those who believe the "local law" theory to be the proper basic approach to conflicts questions nevertheless feel that either the *lex loci contractus* or the law of closest objective connection must necessarily be utilized to determine the validity of contracts. Yet Cheshire and Hand, at least, strongly adhere to this view, as opposed to the "vested rights" theory. Cheshire, 3-5, 9; L. Hand in *Direction der Disconto-Gesellschaft v. United States Steel Corp.*, 300 Fed. 741, 744 (S.D.N.Y. 1924). (dictum). If it is only the law of the forum which can

considerations favoring the application of the law selected by the parties would seem more important than the doctrinaire argument in opposition. True, comity is also a factor;⁵⁸ but it is difficult to imagine that any nation feels its sovereignty to be infringed whenever its internal law is not applied to test the validity of a contract there formed. Moreover, a rigid adherence to the *lex loci contractus*, in a case where the transaction is more closely connected with another system, would give the former law an extraterritorial effect in a more meaningful and invidious sense.

Nor does the use of a choice-of-governing-law clause constitute a legislative act. It ordinarily affects only the parties.⁵⁹ More important, the stipulation is not self-executing. It is only by virtue of the conflicts rules of the forum that any body of law is selected. As former Circuit Judge, now Mr. Justice, Harlan has observed, the choice-of-governing-law clause should be received as a commendable act of assistance to the forum rather than as an usurpation of sovereign power.⁶⁰ The use of such a clause at the inception of the agreement does not differ significantly, in this respect, from a stipulation by counsel at the time of trial that the agreement is valid.

The second form of the doctrinal rejection of the entire concept of autonomy is manifested in the localization view of the English proper law as advocated by Cheshire.⁶¹ These authorities emphatically reject one-contact approaches; but they nevertheless assume that one legal system has a natural claim to govern the validity of the contract.

apply in any case, why may not the judges who create that law take into account the expectations of the parties as to the legal system which should serve as the model? See Cook, 899, 901-2; Rheinstein, Book Review, 15 U. Chi. L. Rev. 478, 485 (1948). Even if the vested rights theory were accepted, the question of what rights existed and, therefore, of what law governed, would remain to the forum.

58. See footnotes 95 and 120 *infra*. Note, also, that if the law of a particular country had a compulsive claim to control, as on grounds that the acts which created the purported agreement occurred there, logic and comity would require not the application of the rules which that country applies to ordinary internal contracts, but the utilization of a *renvoi* approach, to decide just as would the courts of that nation in that case. See Cook, 906-12.

59. Cook, 899, 902.

60. Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 195 (1955) (Dictum). See also Cook, 889, 902.

61. Regarding the localization theory in general, see footnote 40 *supra*. The present consideration is Cheshire's contention (Cheshire, 216), applicable when there is an express stipulation, that, "The preliminary question, whether the parties are contractually bound . . . must in the nature of things be governed by a law independent of their volition . . . by the law to which the contract naturally belongs, ascertained objectively in the light of all the circumstances." See also Morris & Cheshire, "The Proper Law of a Contract in the Conflict of Laws," 56 L.Q. Rev. 320, 329, 337 (1940). Although Cheshire, 207-08 cites Westlake as advocating the objective view, the latter does not appear to have had the case of an express choice-of-law clause in mind. See Westlake, Private International Law, 305-06 (5th ed. 1912); 2 Rabel, 403; Cook, 899, 918, n.78.

It is that of the country with which the agreement is more closely connected by objective contacts. Such a theory really differs from the Beale approach only in the number of contacts deemed relevant, although the greater leeway thus permitted the judge undoubtedly does make for practical flexibility.

The weakness of this doctrine lies not in its refusal blindly to accept the express intention of the parties. It lies in its absolute refusal to take that intention into account. The doctrine insists that the court must determine the law governing validity in precisely the same manner where there is a choice-of-law clause as it does where there is none. This analysis leaves a broad undistributed middle—within which the most desirable solution would seem to lie.

Although none of the authorities appears to have articulated such a theory, the most satisfactory way in which to regard the choice-of-law clause in this area would be *as a contact*, normally the one of paramount importance. On one hand, the unrestricted autonomy theory is subject to valid criticism. If an express choice has been made, it would operate as rigidly as do other one-factor rules. It fails to take third party interests into account. It leaves no room for the comity element of the motivation for referring to foreign law. It provides no security against calculated evasion or inequality of bargaining power.

On the other hand, the inclusion of an express choice-of-law clause should hardly be considered irrelevant. The parties' interests are the most important ones involved. Their desire to promote certainty should not unnecessarily be frustrated. The fact that they have contracted with reference to a particular legal system is surely as important a connection as are objective contacts.

The optimum balance of considerations, therefore, would be promoted by a judicial approach of accepting a stipulation of the governing law except where there is strong reason for refusing to do so. The point of departure should be an attitude of receptivity; abuse should be avoided by the utilization of careful limiting principles. The theoretical framework within which this approach could best be elaborated, and under which a consensus of most could be achieved, would be one which treated the choice of law by the parties as the paramount contact, the weight of which could be overcome only by a forceful grouping of objectives in another state.⁶² In any event, there is no

62. Even though no scholar or judge has suggested this view as a general rule for selecting the law under which to determine the validity of obligations, it is not without the support of authority. English courts customarily consider such semi-subjective factors as language and the nature of terms in ascertaining the proper law. Thus in *Spurrier v. La Cloche*, [1902] A.C. 446, 450 (P.C.) these were the only contacts with England which were mentioned as bases—although the insurer also had an English

reason, in theory or policy, for disregarding entirely the parties' stipulation.

The final objection which has been interposed to the acceptance of the parties' choice of the governing law is that it would permit the calculated avoidance of mandatory requirements and prohibitions.⁶³ This appears more frequently as an unarticulated fear than as a stated argument. Its precise meaning is not clear. At times it seems to rest on the premise that a certain legal system is naturally applicable;⁶⁴ at others it appears to arise from aversion to adhesion contracts.⁶⁵

Such a fear is not without a good deal of merit, at least in its concern for protecting other interests and in promoting the comity of nations. The suggestion that there is no problem because the mandatory law of the selected legal system will be applied⁶⁶ is not a satisfactory answer. Nevertheless, the problem can best be handled by limiting principles and by the public policy of the forum. It provides no sufficient reason for rejecting receptivity as the basic point of

home office, there was an arbitration clause, and the court appeared to utilize an intention theory. See Cheshire, 211 and 2 Rabel, 432-34 for contacts ordinarily considered. Moreover, the approach here suggested appears to be precisely that which was utilized in *In re Claim by Helbert Wagg & Co., Ltd.* [1956] ch. 323, where a stipulation to German law was given effect only after the court weighed other factors.

Just what combination of contacts would be necessary to counterbalance the choice-of-law clause would, of course, remain for judicial elaboration. Certainly it would have to be very sizeable. The actual decision would almost always be the same as would result from the use of the autonomy doctrine with its qualifications. But it would seem to offer advantages over that rule, because it would solve issues without reliance on exceptions, and because it would lead to the selection of the law with which the contract is most meaningfully connected. Under the limited autonomy theory, for example, the locus of other contracts is irrelevant so long as some substantial contact exists with the selected law; whereas under the theory here proposed, the stipulation should be ignored if all contacts pointed to country X except the stipulation of the parties and a factor such as the domicile of one of them. The sacrifice of certainty would not be significant, as the parties could know and select a system which is already sufficiently connected that no rebutting combination of factors could exist.

Rabel would reject this theory, because he regards the express stipulation as itself a contract, legalized by the conflict of laws principles of the forum, under which the parties agree that the selected law shall govern the main agreement. 2 Rabel, 366. It should be acceptable, however, at least in operation, to those autonomy advocates who recognize the value of limitations. See, e.g. Cook, 889, 914-16, 919.

63. See, e.g. 2 Beale, 1080; Goodrich, 326. But see, 2 Rabel 428-29; Cook, 889, 908-915.

64. E.g. 2 Beale, 1080 states that the meaning of the intention theory is that the parties "at their will can free themselves from the power of the law which would otherwise apply to their acts."

65. See, e.g. Frank, J. dissenting in *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189, 201-02 (2d Cir. 1925); Scrutton, L. J., in *The Torni*, [1932] 78, 84 (C.A.); Cneatham, Book Review, 84 Colum. L. Rev. 1267, 1268-69 (1948).

66. See Rheinstein, Book Review, 15 U. Chi. L. Rev. 478, 486 (1948).

departure in the conflicts approach of courts, when there is an express choice of the governing law.⁶⁷

B. *The Judicial Authorities Favoring a Principle of Basic Receptivity Toward the Parties' Choice of the Governing Law*

The judicial authorities of the commercial jurisdictions do appear somewhat to manifest a receptivity toward governing law clauses. Despite the doubts and irreconcilable opposition of some⁶⁸ writers, the courts have been willing to give effect to such clauses, at least in some situations. The only question is under what circumstances, which is a matter simply of qualifications and limitations.⁶⁹ Only if the courts adhered rigidly to a particular, mechanized theory of contracts, especially the *lex loci contractus* view, could it be said that the law does not permit the parties to designate the governing law. No such theory has consistently been followed in courts of the United Kingdom, New York, or the federal Second Circuit, if, indeed, it has been anywhere.⁷⁰

The certainty of acceptance, and the scope of autonomy, are greater in England than they are in the United States.⁷¹ They are

67. Moreover, a rigid adherence to the place of contracting rule would itself permit avoidance by the simple means of contract-rigging, especially in the case of an agreement formed by correspondence. See Cook, 899, 916-17.

68. See 2 Beale, 1079-86; Cheshire, 207-08; Goodrich, 326-28.

69. See, e.g. 2 Rabel, 367 ("Only the limits remain controversial").

70. See, e.g. 2 Rabel, 399 ("All versions of a predestined law have been abandoned by the present jurisprudence of mercantile countries."); id at 274, 384, 402. Even the *lex loci contractus* school concedes the existence of some degree of judicial permissiveness. See 2 Beale, 1081; Goodrich, 330-31; Greene, "The New York Law as to the Validity of Contracts," 12 *Corn. L.Q.* 286 (1927).

71. Even Cheshire, 214, admits that the principle that the intention of the parties will govern, if expressed, is "undoubtedly admitted by the English Law." The only question is whether there must be a substantial connection. Express choice of governing law clauses have been given effect: *In re Claim by Helbert Wag & Co., Ltd.*, [1956] Ch. 323 (discharge issue); *Ocean Steamship Co., Ltd. v. Queensland State Wheat Board*, [1941] 1 K.B. 402 (conflicting clauses, construed as choice of Australian law); *Vita Food Products Inc. v. Unus Shipping Co., Ltd.*, [1939] A.C. 277 (English law). Only in *The Torni*, [1932] P. 78 (C.A.) does such a choice appear to have been rejected; and the decision there was that the Hague Rules necessarily applied to a shipment from one adherent country to another (see footnotes 88 & 95 *infra*). Moreover, this case was criticized in the *Vita* case, *supra*.

The strongest authority is furnished by the cases in which arbitration clauses have been treated, and effectuated, as choices of English law. E.g. *N.V. Kwich Hoo Long Handel Maatchappij v. James Finlay & Co., Ltd.*, [1927] A.C. 604; *Austrian Lloyd S.S. Co. v. Gresham Life Assurance Soc. Ltd.*, [1903] 1 K.B. 249; *Spurrier v. La Cloche*, [1902] A.C. 446 (P.C.); *Hamlyn & Co. v. Talisher Distillery*, [1894] A.C. 202. Some dicta in implied intent cases favoring an objective approach is also, to a degree, applicable where there is an express choice; but it is counterbalanced by subjective intent dicta. Of these the most famous is Lord Atkin's statement in *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500, 529 (P.C.): "Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive."

even greater in the civil law systems, where codes ordinarily condition the applicability of other choice of law rules upon the absence of an expressed intention.⁷² But even in the United States it seems safe to conclude that the stipulation of the parties will be permitted to govern under certain circumstances.⁷³

The United States Supreme Court has long looked upon intention as the theoretical object of search for the conflicts principles of contracts.⁷⁴ In the Second Circuit, where alone in this country there has been a significant series of cases involving express stipulations of the governing law, the earlier intransigence of Learned Hand⁷⁵ has largely been displaced by the *Hal Roach Studios, Inc.*,⁷⁶ and *Siegel-*

In some of these cases, e.g. *Ocean Steamship Co. Ltd. v. Queensland State Wheat Board*, supra, the issue was whether the law of England was the proper law for purposes of justifying a writ conferring personal jurisdiction over an absent defendant (R.S.C. Order XI, 7, 1(e)), rather than the validity of the contract; but nobody has suggested that they are not authority on the latter question, and certainly the courts treated the problem as the same.

72. See footnote 46 supra.

73. See 2 Rabel, 384; Note, 56 Colum. L. Rev. 902, 904 n.13 (1956). Even Beale concedes that most courts permit some degree of autonomy, although he believes that it is almost always limited to the choice of either the place of contracting or the place of performance. 2 Beale, 1081, 1157-58. The Uniform Commercial Code expressly permits the parties to choose the law applicable to a contract, with certain qualifications, with no indication that it refers only to optional principles. See, e.g. Pa. Stat. Ann., tit. 12A, § 1-105, as amended by Act No. 426 of Oct. 2, 1959, P.L. 1037, § Pa. Leg. Serv. '59 (Purdon's).

74. *Prichard v. Norton*, 106 U.S. 124, 136 (1882) (lex loci solutionis held applicable on grounds of presumed intent, to validate surety bond which would have been void for lack of consideration under the lex loci contractus); *Hall v. Cordell*, 142 U.S. 116, 120 (1891) (dictum that nothing showed that the parties "had in view" any other law than that of the place of performance); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 48 (1825) (dictum by Chief Justice Marshall that "a contract is governed by the law with a view to which it was made.") See also, *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 407-08 (1927); *Andrews v. Pond*, 38 U.S. (13 Pet.) 65, 78 (1939) (usury cases holding that the parties can designate either the place of performance or the place of contracting).

75. *E. Gerli & Co., Inc. v. Cunard S.S. Co.*, 48 F.2d 115, 117 (1931). (Bill of Lading clause providing for limitation of carrier liability to £20 per package enforced, on grounds that the specific limitation was intended to prevail over the more general reference to English law, under which any limitation to less than £100 per package would have been void. Very strong dicta favoring absolute control of the law of Italy, as the lex loci contractus); *Louis Dreyfus v. Paterson Steamship Co., Ltd.*, 43 F.2d 824, 826-27 (2d Cir. 1930) (Canadian law, as lex loci solutionis held to apply to determine excuse for nonperformance, no express choice having been made. Dictum that imputation of intention is a fiction).

76. *Hal Roach Studios, Inc. v. Film Classics, Inc.*, 156 F.2d 596, 598 (2d Cir. 1946). (Choice of New York law given effect in films distribution contract made in California, to determine whether the defendant had grounds for rescission, which the court said was an issue going to the "essential validity" of the contract. Circuit Judge Chase said the ordinary rule was that the law of the place of performance governed this question, citing the Restatement, but that when there is no single place of performance, "there seems no reason, apart from the policy of the forum, why the parties cannot specify the law of one jurisdiction as controlling, so long as there is that suffi-

*man*⁷⁷ cases. Although the New York cases have utilized different rules at different times,⁷⁸ the fact that they have almost always been stated as presumptions of intent⁷⁹ and that the Court of Appeals has recently utilized a flexible approach⁸⁰ indicate an attitude of receptivity toward the parties' selection of the governing law.

Thus the focus of inquiry must be upon the permissible scope of autonomy, in terms of situations and of area. If a case were to be presented in which the intention of the parties was clear, no statute or treaty precluded the use of ordinary conflicts rules, no public policy barred enforcement in the particular court, no other major contact existed with the state of the forum, no third-party interests were affected, and the choice was bargained in good faith and was of either the *lex loci contractus* or the *lex loci solutionis*, it could confidently be expected that the stipulation of the parties would be given effect in all of these jurisdictions. Even if all of these factors were always essential, the choice-of-law clause would be a useful tool for

cient relationship to make it reasonable that the law chosen should apply." Because this was a diversity case and not within the admiralty jurisdiction, the court should have been applying the New York conflict rule. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1947). The court gave no indication that it was using a state theory and not its own, however; and it seems reasonable to conclude that the decision constitutes authority in the Second Circuit as well as in New York. See *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189, 195 (citing the *Hal Roach* case); Note, 62 *Harv. L. Rev.* 647, 654 (1949).

77. *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189, (2d Cir. 1955) 201. (Choice-of-law clause effectuated to select English law to govern the question of whether the defendant was estopped from asserting a contractual period of limitations in a passenger ticket covering a voyage from New York to France, which issue was said to be "more closely akin to a question of validity" than of construction. Dicta strongly favorable to party stipulation in general.)

78. See *Auten v. Auten*, 303 N.Y. 155, 124 N.E.2d 99 (1954). (Center of gravity approach adopted to select English law to govern the question of whether a separation agreement concluded in New York had been repudiated by the plaintiff's alimony suit in England. Authorities reviewed.); *Jones v. Metropolitan Life Ins. Co.*, 158 Misc. 466, 286 N.Y.S. 4 (App. Div. 1936). (Various rules employed by prior cases stated, and New York law held applicable under all four to issue of effect of oral waiver of condition in life insurance policy at time of contracting.)

79. See, e.g. *Union Nat. Bank of Chicago v. Chapman et al.*, 169 N.Y. 538, 545, 62 N.E. 672, 674 (1903). (Law of place of contracting applied to determine capacity of wife to be surety on a note, "unless it can fairly be said that she . . . clearly understood and intended that it should be governed by the law of another state.")

80. See cases cited in note 78 *supra*. For opinions expressly resting on grounds of implied intention, see *Wilson in Lewiston Mill Co.*, 150 N.Y. 314, 44 N.E. 959 (1896); *Stumpf v. Hallahan et al.*, 101 App. Div. 383, 91 N.Y.S. 1062 (1905) *aff'd* 185 N.Y. 550, 77 N.E. 1196 (1905). In addition, dicta favorable to a limited autonomy can be found in such cases as *Swift & Co., Inc. v. Bankers' Trust Co.*, 280 N.Y. 135, 140, 19 N.E.2d 992, 994-95 (1939). And the New York cases enforcing agreements to arbitrate in another country, where the court surely recognized that the foreign law would be applied, provide authority for the acceptance of a choice-of-governing-law clause. E.g. *Matter of Amtorg Trading Corp.*, 304 N.Y. 516, 109 N.E. 2d 606 (1952). See also 2 *Beale*, 1156-57.

providing certainty as to the governing legal system in international trading transactions. The extent to which each is required for legal success in various courts remains to be examined in section III below.

C. *The Legal Acceptability of Clauses Incorporating Foreign Laws as Contractual Terms*

The legal doubts and restrictions which surround the use of a choice-of-law clause to select the system by which validity shall be determined are almost non-existent when only questions of construction are in issue.⁸¹ This is the sphere of optional law. By definition the parties are free to structure the terms of their obligations as they wish, whatever body of law might be applicable to govern validity. There is no sound reason for preventing them from accomplishing this purpose by incorporating foreign law to define the contractual terms.

Except in rare instances of judicial error,⁸² this type of choice-of-law clause is freely accepted. The law of any jurisdiction may be incorporated to fulfill an interpretive function.⁸³ Indeed, the most commonly used device is a reference to trade custom rather than any territorial law.⁸⁴ The only limitations upon the effectiveness of this second class of clause are the more practical obstacles to certainty which are the topic of section IV of this discussion.

III. THE LEGAL LIMITATIONS UPON THE SCOPE AND EFFECTIVENESS OF CHOICE-OF-GOVERNING-LAW CLAUSES

There are four categories of factors which might be termed legal limitations upon the acceptability of an attempt by the parties to designate the governing law: (1) Principles of classification; (2) substantive statutes and treaties; (3) public policy; and (4) theoretical

81. E.g., *Burns v. Burns*, 190 N.Y. 211, 82 N.E. 1107 (1907); *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Olvera*, 119 F.2d 584 (9th Cir. 1941); *Boole v. Union Marine Ins. Co.*, 52 Cal. App. 207, 198 Pac. 416 (1921); *Ex Parte Dever*, 18 Q.B.D. 660 (1887); *G. E. Dobell & Co. v. The Steamship Rossmore Co., Ltd.*, [1895] 2 Q.B. 408 (C.A.). See *Goodrich*, 340 ("a wholly different point"); *Cheshire*, 238. The legal restrictions on the scope of the choice-of-governing-law type of clause are discussed in section III infra.

82. E.g., *Owens v. Hagenbeck-Wallace Shows Co.*, 58 R.I. 162, 192 Atl. 158 (1937) (choice of Florida law rejected for want of substantial connection. Compare the French doctrine of fraud à la loi as applied in matters of interpretation). See 2 *Rabel*, 400.

83. There is no substantial contacts limitation in this sphere, under the almost unanimous view of the authorities. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Olvera*, 119 F.2d 584 (9th Cir. 1941). See *Falconbridge*, "Contracts and Conveyance in the Conflict of Laws," 81 U. Pa. L. Rev. 661, 671 (1933); *Annot.* 112 A.L.R. 124, 133 (1941); *Note*, 62 *Harv. L. Rev.* 647-59 (1949).

84. *Boole v. Union Marine Ins. Co.*, 52 Cal. App. 207, 198 Pac. 416 (1921) (marine insurance custom, as well as law, of England). Cf. *Hurwitz v. Hurwitz*, 216 App. Civ. 362, 215 N.Y. 184 (1926) (religious law under antenuptial agreement).

qualifications upon the freedom of choice which are contained in the conflicts principles of the forum. Some of these obstacles effectively preclude the use of the choice-of-law clause for certain purposes in certain contracts, such as to validate a bill of lading provision exempting a carrier from liability for negligence. Others limit the scope of autonomy in the sense of the number of legal systems from which the parties may select.

These legal limitations, although perhaps great in terms of the hypotheticals of the lawyer, are not unduly severe in terms of the reasonable objectives of the businessman. They probably do preclude the use of the device for the calculated evasion of specific mandatory provisions, such as those determining the liability of a carrier for negligence. They may even limit the scope of autonomy, in some jurisdictions, to a choice between the law of the place of the making and that of the place of performance. Even if the more stringent limitations should prevail, however, the choice-of-law clause could significantly serve to promote commercial certainty in this sphere as well as in that of optional law.

The authorities tend to speak in terms of the good faith and substantial contacts qualifications of the intention theory, rather than to use this situational type of analysis.⁸⁵ A failure separately to consider the cases in which statutory and public policy obstacles are operative can cause misinterpretation of judicial decisions and thereby obscure the greater legal acceptability of a choice-of-law clause in cases in which the ordinary conflicts principles control.

A. *Limitations Arising from Principles of Classification*

The first legal obstacle needs little discussion. There are two ways in which the forum, in discharging the duty of classification which necessarily faces it, can preclude the application of a choice of governing law. One is in determining whether an issue before it is a matter of procedural or remedial law. If it is, the law of the forum will apply, and there will be no reference to foreign law at all. The manner in which the courts of New York treat the question of the validity of an agreement to arbitrate future disputes is an illustration of this practice.⁸⁶

The other important occasion for classification arises in cases which contain elements of tort, title, or status in addition to con-

85. See, e.g. 2 Beale, 1080-82. Graveson, 210-13, however, separately treats certain "overriding considerations" which preclude the operation of the ordinary conflicts rules.

86. Compare *Meacham v. Jamestown, Franklin and Clearfield R.R. Co.*, 211 N.Y. 346, 352, 105 N.E. 653, 655 (1914) (Cardozo, concurring opinion) with *Matter of Gantt*, 297 N.Y. 433, 79 N.E.2d 815 (1948). See Note, 56 Colum. L. Rev. 902 (1956). See also 2 Rabel, 498-503 for other examples.

tract.⁸⁷ The most frequent instance of this is the contractual limitation of liability. Unless the court initially classifies the problem as one of contract, there can be no operation of the conflicts principles designed to deal with that type of issue. Although absolute when it occurs, the classification obstacle does not appear to be severe.

B. *Limitations Arising from Displacement of Normal Conflicts Rules by Substantive Statutes and Treaties*

The second limitation of a legal character is the occasional phenomenon of statutory displacement of the common-law rules of conflicts in a particular substantive sphere. It can occur only when there exists between the transaction and the state of the forum a relationship upon which the local statute is expressly, or by clear implication, made applicable. When this situation occurs, the legislative direction must be obeyed. The parties are effectively precluded from stipulating away from the statutory control of the jurisdiction in which litigation is located.

Statutes which define the scope of their own applicability in this manner are almost always ones which contain an important public policy element. In the international trading sphere, the clearest example is provided by statutes which incorporate the Hague Rules for the determination of carrier liabilities and immunities.⁸⁸

The American Carriage of Goods by Sea Act is, by its terms, applicable to all shipments ". . . to or from ports of the United States, in foreign trade. . ." ⁸⁹ Clearly the courts of this country must apply the substantive provisions of the Act whenever that condition is fulfilled, regardless of the national character which ordinary conflicts principles might assign to the ocean bill of lading itself.⁹⁰ It would,

87. E.g. Compare *Lauritzen v. Larsen*, 345 U.S. 571 (1952) (tort) with *The Kensington*, 183 U.S. 263 (1902) (contract). See *Maguire v. Gorbaty Bros.*, 133 F.2d 675 (2d Cir. 1943) (Law of situs to govern validity of recording of title by conditional vendor, despite express stipulation that another law should govern the contract.) See also text at n.120 infra. Such classification is usually done implicitly.

88. Convention on the Unification of Certain Rules relating to Bills of Lading for the Carriage of Goods by Sea, signed at Brussels, August 25, 1924, TS No. 931, 51 U.S. Stat. 233 (1937). The purpose of this multilateral treaty was to provide for the application to all bills of lading of the definitions of carrier obligations and immunities which had been developed at the Hague. It was modeled largely on the American Harter Act of 1893, 27 Stat. 445, 46 U.S.C. §§ 88, 190-95 (1953). See, generally, Yiannopoulos, "Conflicts Problems in International Bills of Lading: Validity of 'Negligence' Clauses," 18 La. L. Rev. 609 (1958); Yiannopoulos, "Bills of Lading and the Conflict of Laws: Validity of 'Negligence' Clauses in France," 7 Am. J. Comp. L. 516 (1958); Knauth, *Ocean Bills of Lading*, 107-19 (3d ed. 1947).

89. 49 Stat. 1207 (1936), 46 U.S.C. §§ 88, 1300-15 (1953). This statute incorporates the Brussels Convention, supra n.88, and supersedes the Harter Act in the foreign commerce field.

90. E.g. *The Steel Inventor*, 35 F. Supp. 986, 997-98 (1940) (Stipulations making bills of lading subject to both Indian and American Acts; held, the latter applied as

therefore, be useless to argue in an American court that a clause exempting the carrier from liability for negligence should be held valid because the parties had stipulated that the agreement should be governed by the law of a country which permitted such exemptions.⁹¹ It would be equally vain to make the argument on the ground that the bill of lading was issued elsewhere.⁹²

Virtually all major commercial nations are parties to, or adherents of, the Brussels Convention and have passed statutes enacting the requirements of the Hague Rules into law.⁹³ Although most of the statutes are expressly applicable only to shipments from the state concerned,⁹⁴ the universality of their existence, coupled with the public policy character of their provisions, precludes the use of a choice-of-law clause to validate a contractual attempt to vary the relationships which the Hague Rules provide.⁹⁵

To a lesser degree the ordinary conflicts principles can be displaced even where the statute of the forum does not expressly define the scope of its application. Courts will always endeavor to interpret the legislative intention so as to conform to the principles of private international law. Nevertheless, if an intention to assert the regulatory jurisdiction of that state beyond the normal appears, the forum is bound to obey. Examples of this may be found in applications

matter of law); Yiannopoulos, "Conflicts Problems in International Bills of Lading: Validity of 'Negligence' Clause," 18 La. L. Rev. 609, 618-19 (1958).

91. Even prior to the Carriage of Goods by Sea Act, *supra* n.89, this would have been the result in American courts, because of the similar applicability of the Harter Act, *supra* n.88, and because of the strong public policy against such exemptions in this country. E.g. *Knott v. Botany Mills*, 179 U.S. 69 (1900) (Harter Act); cf. *The Kensington*, 183 U.S. 263 (1902) (passenger baggage: public policy). But see *The Oranmore*, 24 Fed. 922 (D. Md. 1885).

92. Cf. *The Kensington*, 183 U.S. 263 (1902).

93. For list see Knauth, *Ocean Bills of Lading* 80-86 (3d ed. 1947); 2 Rabel, 416-17, notes 98 & 99.

94. E.g. (English) *Carriage of Goods by Sea Act, 1924*, §§ 1, 3 (14 & 15 Geo. V. c. 22).

95. Although courts are not bound by the statutes of other countries and thus must use their conflicts rules and public policy and interpretive powers to determine whether such a foreign statute should be applied, it seems clear that at least the countries which have adopted the Hague Rules will not permit the avoidance of those provisions by means of a choice-of-governing-law clause. Compare *The Torni*, [1932] P. 78 (C.A.) with *Vita Food Products, Inc. v. Unus Shipping*, [1939] A.C. 277 (P.C.). See Rabel, 426-27; Note, 62 *Harv. L. Rev.* 647, 654-55 (1949). The various factors considered in this section, *infra*, will operate in this sphere to preclude the effective use of the stipulation in bills of lading. It should be noted, however, that there is now little need for the designation of the applicable law as a means of promoting certainty here. Moreover, the device can still be utilized to guarantee validity of other types of contracts of affreightment and with regard to issues which are not highly charged with public policy. See Yiannopoulos, "Conflicts Problems in International Bills of Lading: Validity of 'Negligence' Clauses," 18 La. L. Rev. 609, 614 (1958). Indeed, the statutory and public policy obstacles appear thus far to have been limited, in the main, to negligence exemption and unreasonable time limitations in such contracts.

of anti-trust and currency legislation to contractual relations which, under customary conflicts principles, would not have been deemed subject to the mandatory requirements of the local law of contracts.⁹⁶

C. *Limitations Arising from Public Policy*

The third set of legal limitations is composed of two applications of the public policy of the forum to alter the result which ordinary conflicts rules would provide.⁹⁷ In the first sense in which the public policy justification is employed, it is really a rationalization for the preference of the forum for the local substantive law. In the second it represents a refusal to enforce an admittedly valid, but nevertheless repugnant, foreign contractual obligation.

Where contacts exist with the state of the forum and the local substantive provision has a large public policy content, there is a discernible tendency for courts to emphasize the importance of the relevant connection and thus to hold that the law of that state shall control. In doing so they usually rely upon a general reference to public policy and do not articulate an evaluation of contacts.⁹⁸ The

96. E.g. *United States v. Aluminum Company of America*, 148 F.2d 416 (1945) (anti-trust); *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, 269 N.Y. 22, 198 N.E. 617, cert. denied 297 U.S. 705, remittitur amended 269 N.Y. 602, 199 N.E. 691 (1935) (American currency regulation); *Boissevain v. Weil*, [1949] 1 K.B. 482 (British currency regulation). Of course there is no clear line between such a case and one in which the statute can be said expressly to provide its own rule of applicability. Thus, *Knott v. Botany Mills*, 179 U.S. 69 (1900) could be classified here. Self-executing treaties presumably have the same effect.

97. This distinction is drawn by Paulsen & Sovern, "Public Policy" in the *Conflict of Laws*, 56 Colum. L. Rev. 969 (1956). It is seldom recognized by judges; in fact, the courts and other scholars tend to refer to all limitations upon autonomy, including the statutory obstacle discussed above, as public policy matters. See, e.g. *Cook*, 899.

98. The following carrier liability cases, in which the courts held various exemption clauses invalid—or unenforceable—as against the public policy of the forum, exemplify this situation. In all there was no expressly-governing statute. In all the importance of the public policy of the forum and the existence of a contact with that jurisdiction both appear to have been influential. *The Kensington*, 133 U.S. 263 (1902) (passenger baggage); *The Energia*, 66 Fed. 604 (2d Cir. 1895) (pre-Harter Act bill of lading); *F. A. Straus & Co., Inc. v. Canadian Pac. Ry. Co.*, 254 N.Y. 507, 173 N.E. 564 (1930) (bill of lading to N. Y.); *The Guildhall*, 58 F.2d 796, 799 (S.D.N.Y. 1893) (bill of lading to N.Y.); *The Brantford City*, 29 Fed. 373, 395-96 (S.D.N.Y. 1886 (cattle shipment, N.Y. to England)). A more extreme and less justifiable case was *Ocean Steam Navigation Co. v. Corcoran*, 9 F.2d 724 (2d Cir. 1925), in which the federal court policy against unreasonably short contractual periods of limitation was applied to invalidate a provision in a ticket for passage from Montreal to Liverpool, primarily because the ticket was issued in Boston. Fortunately, this decision has largely been displaced by *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955).

The importance of a strong public policy in this line of decisions is indicated by the willingness of courts to permit the foreign law to control in other situations. E.g., *Millikin v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241 (1879). The importance of a relevant contact is suggested by cases in which foreign rights have been enforced in entirely external transactions. E.g. *The Miguel di Larrinaga*, 217 Fed. 678 (S.D.N.Y. 1914).

Supreme Court has recognized this practice as a proper instance of protection of local citizens, even within the requirements of the full faith and credit clause.⁹⁹

The preference for local law under this dual circumstance probably does not merit being termed a legal principle. Because of the confusion it causes and of the failure to distinguish between conflicts principles and the proper role of the public policy of defense, it is an undesirable practice.¹⁰⁰ It is, nevertheless, an obstacle of which businessmen must be aware in considering the judicial reception which a choice-of-law clause is likely to meet.

In the narrower sense, the public policy of the forum is a limitation upon the enforceability of contractual rights which are admittedly valid under conflicts principles. Even if the jurisdiction in which the court sits has no other contact with the transaction, it will refuse to enforce provisions which it considers too objectionable on grounds such as immorality or judicial prerogative.¹⁰¹

This limited type of public policy is not a major obstacle. The mere fact that the contract would be invalid if the *lex fori* controlled will not call it into play.¹⁰² Courts are frequently admonished to utilize the principle with caution, and in general they appear to comply.¹⁰³ Moreover, the due process requirement limits the extent to which it can be employed by the courts of this country to invalidate a contractual defense.¹⁰⁴

D. *Limitations Arising from Theoretical Qualifications Imposed upon the Autonomy Doctrine*

If the choice-of-governing-law clause is not rendered inoperative by one of the above obstacles, its legal effectiveness is dependent upon the ordinary conflicts principles of the forum. Here there are four possible principles which might limit the scope of free choice. Two

To the extent that both conditions must coincide to cause the application of this form of the public policy defense, the obstacle is less severe than it might seem. Moreover, there is probably a corresponding tendency to accept a contractual stipulation to the *lex fori*. See 2 Rabel, 407-08.

99. *Union Trust Co. v. Grossman*, 245 U.S. 412 (1918).

100. Paulsen & Sovern, "Public Policy" in the Conflict of Laws," 56 Colum. L. Rev. 969, 981 (1956); 2 Rabel, 424-26. See also Haughm J., dissenting in *Ocean Steam Navigation Co. v. Corcoran*, 9 F.2d 724, 733 (2d Cir. 1925).

101. E.g. *Meacham v. Jamestown, Franklin and Clearfield R.R. Co.*, 211 N.Y. 346, 105 N.E. 653 (1915) (majority opinion); *E. Gerli & Co., Inc. v. Cunard S.S. Co.*, 48 F.2d 115, 118 (1931) (dictum: ". . . if we disapproved the result too much.")

102. See Goodrich, 304-05; Restatement, § 612, comment b.

103. E.g. *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 14 N.E.2d 798 (1938) (Nazi racist decree); *In re Claim by Helbert Wagg & Co., Ltd.*, [1956] Ch. 323 (German loan payment system). See 2 Rabel, 551-55; Restatement, § 612.

104. *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930).

are almost always stated in discussions of the intention theory: (1) The substantial contacts requirement; and (2) the good faith requirement. A third might render ineffective any stipulation which is not genuinely bargained. The fourth would prevent the parties from avoiding the control of closely connected states over matters of great interest to them.

The substantial contacts qualification would limit the scope of autonomy in a geographic sense. It would require the parties to select a law with which the contract is at least connected, and it might even restrict the choice to the place of contracting or place of performance in some jurisdictions.

In the United Kingdom there is a great deal of doubt as to whether any such limitation exists. Some decisions have given effect to stipulations to English law where the contacts with that country were very tenuous.¹⁰⁵ Moreover, in the famous *Vita Food Products* case, Lord Wright expressly and forcefully rejected the contention that any connection must exist.¹⁰⁶ This was not quite a holding, however; and the judicial and scholarly criticism which the statement has since received make it unwise to rely upon the absence of the limitation.¹⁰⁷

American courts, on the other hand, seem almost certain to require the choice of a closely connected law to govern validity. Indeed, the only freedom of choice upon which the businessman can count is the ability to determine whether the *lex loci solutionis* or the *lex loci contractus* shall apply.¹⁰⁸ This is especially true in the Second Circuit, where the acceptance of the basic concept of party autonomy has been recent and cautious. It is true also in New York, where competing theories can find judicial support, and where the legal effectiveness of intention presently rests upon dicta and negative implication. In a strong case these courts might well go further, but it would be wise to rely upon the two basic contacts if at all possible.

105. E.g. *N. V. Kwick Hoo Tong Handel Maatschappij v. James Finlay & Co., Ltd.*, [1927] A.C. 604; *Spurrier v. LaCloche*, [1902] A.C. 446 (P.C.).

106. *Vita Food Products, Inc. v. Unus Shipping Co.* [1939] A.C. 277, 290 (P.C.) ("... it is difficult to see what qualifications are possible. . . ." See also *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500, 529 (P.C.) (dictum that expressed intention is "conclusive."); *Schmitthoff, The Export Trade* 71 (1948); 2 Rabel, 402-08. Cheshire states that the prevailing opinion among merchants and solicitors in England is that no qualification exists. Cheshire, 215.

107. Dicta in recent cases, including that favoring an objective conception of the proper law, cause sufficient uncertainty on this point to warrant caution. In *re Claim by Helbert Wagg & Co., Ltd.*, [1956] Ch. 341; *The Assunzione*, [1954] P. 150, 175; *Boissevain v. Weil*, [1949] 1 K.B. 482, 491.

108. See 2 Beale, 1081; Greene, "The New York Law as to the Validity of Contracts," 12 Cornell L.Q. 286 (1927). See also 2 Rabel, 409. There is no strong American authority which would support an argument for a broader scope of choice.

The theoretical merit of this qualification is a matter of doubt. If the autonomy doctrine is a valid basis of decision, there is no logical reason for restricting the scope of alternatives in this way.¹⁰⁹ A practical justification has been urged, in that it will prevent the inconvenience of the forum's having to apply an exotic body of law;¹¹⁰ but the force of this argument is weak in view of the techniques available for dealing with problems of this sort. The requirement does make sense, however, if the theoretical basis for accepting the parties' choice of the governing law is that the stipulation is the paramount contact to be considered, under a grouping approach, in ascertaining the most closely connected jurisdiction.¹¹¹

In terms of judicial policy, the limitation can serve to prevent rigidity and distortion without causing real detriment to the utility of the choice-of-law clause. It is a source of some uncertainty only if the parties seek to subject the agreement to a law other than of the places of making and performance.

The second of the commonly-mentioned qualifications upon the intention theory is that of good faith. Its meaning is not clear. Perhaps it is merely another way of stating the substantial contacts requirement.¹¹² Perhaps it means only that the courts will ignore an express stipulation if all evidence indicates that the parties really contracted with reference to another legal system.¹¹³ Again, it may just be a vessel for public policy considerations, especially those against calculated avoidance of specific and known requirements.¹¹⁴

In any case the limitation seems to be innocuous. It could be utilized to preclude abuse of the freedom of choice, but it does not severely limit the ability of the device to promote certainty.

A third qualification has been suggested by Ehrenzweig¹¹⁵ and has received some judicial recognition.¹¹⁶ It is that a distinction should be drawn between genuinely bargained choices of law and

109. See Cook, 899, 915-16 (saying the question is one of judicial policy alone).

110. See 2 Beale, 1081; Cheshire, 214; Cook, 899, 915.

111. See pp. 13-14 *supra*.

112. *Andrews v. Pond*, 38 U.S. (13 Pet.) 65, 78 (1839) (dictum suggesting limitation of choice to *lex loci contractus* or *lex loci solutionis*). See also 2 Beale, 1080.

113. *Morris et al.*, *Dacey's Conflict of Laws* 727 (7th ed. 1958). See 2 Beale, 1082-83.

114. This factor has, of course, been operative in the field of exemption clauses in bills of lading and in similar contracts. 2 Beale, 1081, claims that the parties in general cannot employ a choice-of-law clause to escape a stringent rule of the place of performance. See also Note, 56 *Colum. L. Rev.* 902, 904 n.13 (1956).

115. Ehrenzweig, "Adhesion Contracts in the Conflict of Laws," 53 *Colum. L. Rev.* 1072 (1953).

116. E.g. *Frank, J.*, dissenting in *Siegelman v. Cunard White Star, Ltd.*, 22 F.2d 189, 204-06 (2d Cir. 1955).

"adhesion" contracts, and that only the former should be given effect. A party lacking bargaining equality cannot be said really to have agreed on the governing law.

On principle this view has significant merit. For unless the condition of bargaining and conscious agreement is met, the positive justification for effectuating the stipulation is weak, while the argument for independent judicial determination is strong. Although it has been argued that the law of contracts in general holds parties to their agreements regardless of this factor,¹¹⁷ the adhesion contract would seem to present a qualitatively different problem within the context of the choice of the governing law. Within particular legal systems the law has proceeded by means of the direct imposition of restrictions to prevent the worst abuses of bargaining inequality.¹¹⁸ It is because of such protective rules that the law can ordinarily insist with fairness upon a general principle that persons are bound by the agreements they make. When the issue is the choice of the law governing validity, however, it is the direct system of legal protection itself which is at stake.

Despite the appeal of its theory and policy, this distinction does not appear to be a fully-developed qualification. Its real impact is realized only by way of the public policy obstacle and the ability of courts to interpret the choice-of-law clause.¹¹⁹

A fourth possible limitation may be discerned in the cases. The willingness of courts to ignore the mandatory provisions of the law of connected states appears in part to depend upon the nature of the substantive provision and of the other country's interest in it. In a variety of situations, a greater-than-ordinary deference toward the law of a particular nation is required by considerations of international comity. Recognition of foreign currency regulations and enforcement of the law of the situs concerning title to property furnish examples.¹²⁰ So, too, does the at least verbal distinction which courts have made between contractual provisions which are illegal and those which are

117. *Ocean Steam Navigation Co. v. Corcoran*, 9 F.2d 724, 727 (2d Cir. 1925) (dictum).

118. The statutory provisions concerning the rights and duties of carriers furnish a graphic example, but a good many of the mandatory rules of contract law appear also to be intended fundamentally to protect the weak and the unwise against themselves.

119. See Sec. IV, part. A *infra*.

120. *Maguire v. Gorbaty Bros.*, 133 F.2d 675 (2d Cir. 1943) (conditional sales recording statute for the protection of creditors); *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland*, 269 N.Y. 22, 32, 198 N.E. 617, 621, cert. denied, 297 U.S. 105, remittitur amended 269 N.Y. 602, 199 N.E. 691 (1935) (dictum regarding foreign enforcement of currency regulations). See also *In Re Claim by Helbert Wagg & Co., Ltd.*, [1956] Ch. 323; *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500 (P.C.).

merely void under the law of the places of contracting and performance.¹²¹

In such situations the motivating purpose of the conflicts rules of the forum cannot be merely the achievement of a decision which is fair as between the immediate parties. To the extent to which other interests are involved, particularly those of the connected states themselves, the courts will probably be more hesitant to permit free rein to party autonomy.

Perhaps this is really a matter of the public policy of the forum. Perhaps it could better be considered an argument in favor of another theory than a qualification upon the principle of autonomy. As is true of all of these theoretical limitations within the conflicts rules of the forum, it should not be a problem of great concern in the ordinary commercial transaction.

IV. PRACTICAL LIMITATIONS UPON THE EFFECTIVENESS OF THE CHOICE-OF-LAW CLAUSE AS A MEANS OF PROMOTING CERTAINTY

Legal effectiveness is not enough. The utility of each type of choice-of-law clause as a means of promoting commercial certainty is further limited by a whole range of factors of a more practical nature. The operation of some—those arising from interpretive questions—can be minimized by careful draftsmanship. Others, however, are beyond the control of the parties.

There are three categories of practical limitations: (1) Interpretive issues arising upon the application of a choice-of-law clause; (2) diversities inherent in the judicial process; and (3) negative limitations upon effectiveness. Only a brief cataloguing of the second and third groups of these limitations will be useful. Because more amenable to good draftsmanship, the first set of factors warrants a somewhat more thorough exploration.

A. *Legal Issues Arising upon Application of a Choice-of-Law Clause*

If the court is generally willing to effectuate a choice-of-law clause of either type, it will face a variety of legal issues. These involve, almost exclusively, interpretation of the intent embodied in that clause. To the degree that the uniform resolution of these questions cannot confidently be anticipated, the use of the clause will be incapable of achieving the objective of certainty.

First there is the question of whether the parties intended a gen-

121. E.g. *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.*, [1939] A.C. 277, 289-95 (P.C.) (dictum); Note, 57 *Colum. L. Rev.* 553 n.6 (1957). But see Cheshire, 234-38, and 2 *Rabel*, 397-99, 427, 585, saying that no special rule exists as to illegality.

erally-worded choice-of-law clause to be utilized by the court in selecting the law governing mandatory matters, or merely to designate the principles applicable in the interpretation of valid contractual provisions. Incorporating a specific statute or custom by reference will not be construed as a general submission of the contract to the legal system of that jurisdiction.¹²² The use of "governed by" will be taken by most American courts as indicating an intent to use the first type of choice-of-law clause, whereas "construed by" will ordinarily cause a more limited construction.¹²³ Nevertheless, this distinction has been dismissed by the Privy Council as without substance,¹²⁴ and both forms of wording might be given a limited construction by a court which is hesitant to give legal effect to the selection of the parties on matters of validity in a particular case.¹²⁵

A closely related interpretive issue is whether the clause is intended to apply to collateral matters. The most important situation in which this question is presented lies in the area where tort and contract overlap. Where there is a contract which purports to govern all relations between the parties, the courts appear willing to apply the parties' choice of law to the full range of those relations. Thus, where the clause refers to disputes arising under the contract, they are likely to extend its effect to such questions as whether subsequent conduct amounted to the waiver of a contractual defense.¹²⁶ The merit of this approach of construction is that it is conducive to the certainty which is the object of the clause. If the parties intention can determine the governing law, there would seem to be no reason why it cannot do so with regard to later relations within the same general transaction as well as for the initial validity of the agreement.

It is, nevertheless, a question of the intention of the parties. To construe that purpose as applying to all subsequent relations as to which no contrary view was manifest is undoubtedly to go a long way. At least if the contract is of the adhesion class, the courts should, and perhaps ordinarily do, construe the choice-of-law clause

122. E.g. *G. E. Dobell & Co. v. The Steamship Rossmore Co., Ltd.*, [1895] 2 Q.B. 408, 413 (treating stipulation to Harter Act as mere incorporation of words).

123. See *Goodman v. Deutsche-Atlantische Telegraphen Gesellschaft*, 166 Misc. 509, 2 N.Y.S.2d 80 (Spec. Term, 1938) (distinguishing between "governed" and "covered.")

124. Lord Wright, in *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.* [1939] A.C. 277, 298-300 (P.C.), rejected this basis for distinguishing *The Torni*, [1932] P. 73 (C.A.). The reason probably lies in the absence of a clear difference between express and implied intention under the proper law approach as utilized by English courts.

125. *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115 (1931), could be narrowly read as holding merely that the parties did not intend English law to govern mandatory matters.

126. *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955) (201).

against the interest of the author.¹²⁷ A careful statement of the intended scope of the stipulation is essential.

Third, there may be uncertainty as to *what* law was intended. This issue arises, of course, in every case not involving an express choice-of-law clause in a court which follows the intention theory. It will exist also where an agreement to arbitrate future disputes in a particular place is included. In England a long line of cases establishes that such a provision is a choice of the legal system of the place of arbitration as the proper law of the contract. But a contrary intent will probably govern if expressed.¹²⁸

A variation of this form of uncertainty is that which exists when more than one body of law or custom is designated under a single contract. Although there can be only one governing law furnishing the mandatory requirements for validity, it is clearly permissible to incorporate different foreign principles for the construction of different obligations under the agreement.¹²⁹ Ordinarily this multiple designation will operate satisfactorily, with the more specific prevailing over the general. However, *Ocean Steamship Co., Ltd. v. Queensland State Wheat Board*¹³⁰ indicates that the use of several choice-of-law clauses can produce unexpected results.

The fifth issue which can arise upon application of the parties' stipulation is what should be the result if the contract is invalid under the selected law. This, of course, can be a problem only in the case of the first type of clause. Logic would seem to require the application of the unwisely designated system, because under the autonomy theory it is the governing law.¹³¹ The courts are likely to construe

127. See Frank, J., dissenting in id. at 201-02, 204-06; 69 Harv. L. Rev. 563, 564 (1956). See also *Chinchilla v. Foreign Tankship Corp.*, 195 Misc. 895, 91 N.Y.S. 2d 213 (City Ct., N.Y. 1949) (holding stipulation to law of Panama on "all cases of illness or injury" not intended to apply to question of seaman's re-employment rights after hospitalization).

128. See cases in footnote 71 supra. See also Schmitthoff, *Legal Aspects of the Export Trade* 5 (1953); 2 Rabel, 385.

129. See, e.g. Schmitthoff, *The Export Trade* 70 (1940). Only Rabel appears to assume that specific issues of validity can be exempted by choice-of-law clauses from the control of the generally applicable governing law of the contract. See 2 Rabel, 388-93.

130. [1941] 1 K.B. 402. The parties there provided that the bill of lading for a wheat shipment from Australia to the United Kingdom should be "governed by the law of England." By another clause they stated that the Australian Sea Carriage of Goods Act, 1924, should apply, and that any contrary provisions in the contract should be null and void. Because of the latter proviso and of a statement in the Australian Act that the parties to a bill of lading for any shipment from that country "shall be deemed to have intended to contract according to the laws in force at the place of shipment," the English court held that the general clause stipulating to English law was a nullity.

131. Cf. *Wilson v. Lewiston Mill Co.*, 150 N.Y. 314, 44 N.E. 959 (1896) (holding oral contract invalid under the statute of frauds of the impliedly-intended jurisdiction).

the parties' intention not to be to submit the contract to a law which holds it invalid, however, so long as there is room for this interpretation.¹³² To the extent to which they follow this practice, the court's power to interpret can be a cure, rather than a cause of uncertainty.

Sixth, there may be a similar question of the effect to be given to a choice-of-law clause where the selected law has subsequently been altered. In the incorporating type of clause, the normal interpretation is that the original version was intended to be made a part of the contract, although there is no reason why the parties could not otherwise provide at the outset.¹³³ In the case of a designation of the governing law, however, the problem is not one solely of interpretation.

When the parties' choice of the governing law is given effect, it should logically subject the contract, assuming no *renvoi* principle is applied, to the control of the designated legal system just as if it were an internal contract.¹³⁴ Thus, if a subsequent change having retroactive effect is made in that body of law, the altered form should be applicable. And, unless the contract law of the country permits, the original version would seem no more capable of governing validity than would be a fraternal moral code. Whatever merit there may be in this line of argument, however, it may not impress the courts when its result would be to invalidate the agreement. The approach of interpreting the clause as not intended to apply if such a change should occur might be utilized. This would require the choice of law to be made by the forum under its ordinary conflicts rules.

The final interpretive issue of importance is whether the choice-of-law clause should be construed to call for the application of the conflict-of-laws rules of the selected legal system. The authorities are almost unanimous in contending that the internal law alone should apply, because the presumed motive of the parties in using the choice-

2 Rabel, 337, states that this is the "victorious," as well as the proper, opinion even where there is an express choice.

132. Cf. *Goodman v. Deutsch-Atlantische Telegraphen Gesellschaft*, 166 Misc. 509, 2 N.Y.S.2d 80 (1938) (holding "covered by" not intended to submit duty of repaying dollar bonds to German law); *Ex Parte Dever*, 18 Q.E.D. 660 (1887) (assuming reference to New York law not intended to incorporate provisions for benefit of creditors). An argument is often made in implied intention cases that the parties should be presumed not to have intended to submit their agreement to a law under which it is invalid. E.g. *Prichard v. Norton*, 106 U.S. 124, 137 (1882) (dictum). This seems spurious as a matter of construction; and the good faith qualification should logically preclude the parties from expressly stipulating to the law of the country on condition that it upholds the contract.

133. See 2 Rabel, 392; Cheshire, 220-21.

134. In *re Claim by Helbert Wagg & Co., Ltd.*, [1956] Ch. 323; *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 14 N.E.2d 798 (1938). Once designated, the governing law should apply as "a living and changing body of law." Wolff, 424. See also Cheshire, 221; 2 Rabel, 546-48.

of-law clause is completely to escape conflicts questions.¹³⁵ Some courts have referred instead to the whole law, but these opinions have contained little explanation and have been widely criticized.¹³⁶

It does ordinarily seem reasonable to presume that the parties contemplated the application of the internal law of the country, rather than its conflicts rules. This is especially so with regard to the issues of validity and interpretation. But the question deserves more analysis than it has received. To treat an international contract just as if it were entirely internal to the designated nation could well cause some distortions, particularly with regard to matters of performance which are to occur elsewhere. It seems doubtful that any one law could satisfactorily control all aspects of a transaction which covers several countries. It seems even more doubtful that the parties have decided that it should.

Thus, it should not too quickly be assumed that the parties have contemplated and provided for the resolution of all issues under the law of the country to which they have referred as the generally governing system. The prevention of distortions requires at least the avoidance of too broad an interpretation of the scope of the clause. The courts should also be willing to follow a reference to the conflicts rules of another country if the parties have so provided, because such a technique might legitimately be utilized to guarantee a uniformity among the potential loci of litigation without causing the rigidity which could result were the internal law of that country necessarily to apply.¹³⁷ In any event, the parties can maximize their certainty only if they clearly state their intentions regarding this and the other interpretive issues.

135. *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189, 194 (2d Cir. 1955); 69 Harv. L. Rev. 563, 564 (1956), is one of the few cases which has expressly so held; but almost all have applied the internal law automatically. See also 2 Rabel, 387; Restatement, § 7.

136. *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.*, [1939] A.C. 277 (P.C.); *Dushkin v. Pennsylvania-Central Airlines Corp.*, 167 F.2d 727 (6th Cir. 1948) (employment contract). See Falconbridge, *Essays on the Conflict of Laws*, 213, 341-44, 400 (1947); Note, 16 U. Chi. L. Rev. 157, 161-63 (1948).

137. One requisite of certainty is the prevention of forum-shopping potentialities. See Griswold, "Renvoi Revisited," 51 Harv. L. Rev. 1165, 1180-81 (1938). This might be as important to the international businessman as the knowledge that all disputes will be settled by the internal rules of one country. This is not an argument for the principle of renvoi in the field of contracts generally. (Despite occasional dicta such as that in *Mason v. Rose*, 176 F.2d 486, 488-89 (2d Cir. 1948), there is no significant authority for such a principle in the United States; and it appears surely to have been rejected in England. In *re United Railways of Havana and Regla Warehouses, Ltd.*, [1959] 2 W.L.R. 251, 277 (C.A.) (dictum). What is called for is simply caution to prevent the rule of construction from becoming a fixed rule of law in the case of an express stipulation. See also 2 Rabel, 480.

B. *Limitations Inherent in the Diversity of Judicial Processes Where More than One Potential Forum Exists*

Assuming that legal acceptability and uniformity of interpretation could everywhere be assured by the parties, the choice-of-law clause would still not be capable of promoting the same degree of certainty as exists under a contract having no international aspects. So long as there is more than one available forum, certainty of rights and obligations must remain subject to variations in the manner in which different courts would operate in applying the selected law. Italian law as applied by an American court might amount to an entirely different law, in effect, from that which is applied in the courts of Italy.

Of the many possible factors of this character, probably the most important ones arise from the difficulties of proving foreign law. At least in the Anglo-American system, the ability of the judge to ascertain and apply foreign principles is dependent upon the effective presentation of them by counsel and expert witnesses.¹³⁸ In a surprising percentage of cases, the materials of decision do not appear adequately to be provided. In their absence the court must rely upon presumptions,¹³⁹ the burden of proof,¹⁴⁰ or the internal law of the forum itself.¹⁴¹

Even given sufficient evidence, the forum will not be capable of applying the designated law in precisely the same manner as would the courts of that country. Subtle differences in the meanings of terms, for example, may well cause the misapplication of foreign law.¹⁴² Moreover, the procedural rules of the forum can determine the out-

138. Restatement, sec. 621. Although judicial notice statutes now exist in many American states, they are often limited to the law of sister states, see 1 Morgan, *Basic Problems of Evidence* 6-7 (1957), and their effective use remains dependent upon the references furnished by counsel. See, e.g. *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955); Nussbaum, "Problems of Proving Foreign Law," 50 *Yale L.J.* 1018, 1023 (1941).

139. The presumption that the applicable law corresponds to that of the forum is probably the most common. It will ordinarily be employed only when the relevant state is a common-law jurisdiction. See 1 Morgan, *Basic Problems of Evidence* 7, n.9 (1957). But certain fundamental principles will be presumed to exist in all civilized countries. See, e.g. *E. Gerli & Co., v. Cunard S.S. Co.*, 48 F.2d 115, 117 (1931). For a discussion of available alternative presumptions, see *Leary v. Gledhill*, 8 N.J. 260, 266-69, 84 A. 2d 725, 728-29 (1951).

140. E.g. *E. Gerli & Co., Inc. v. Cunard S.S. Co.*, 48 F.2d 115, 117 (1931).

141. This technique may be employed not only when there is an absence of proof, but also when the forum merely does not seek or find sufficient justification for referring to a particular foreign law. See *Robertson v. National Steamship Co., Ltd.*, 1 App. Div. 61, 37 N.Y.S. 69 (1896); *Chinchilla v. Foreign Tankship Corp.*, 195 Misc. 895, 91 N.Y.S. 2d 213 (City Ct., N.Y. 1949).

142. E.g. *Comptoir D'Achat et de Vente du Borenbond Belge, S.A. v. Louis de Ridder, Limitada*, 81 Ll. L. Rep. 270 (1949) (misinterpreting the French term, "delivery order," under Belgian law).

come of litigation.¹⁴³ Innumerable dissimilarities, such as that which relates to the requirements of establishing commercial custom, exist even between courts in the common law tradition. To the extent to which such forum-shopping potentialities exist, the effectiveness of the choice-of-law clause as a tool of certainty is restricted.

C. *Negative Limitations—Factors Diminishing the Significance of Successful Stipulation*

A further set of limitations must be considered in evaluating the choice-of-law clause as a means of promoting commercial certainty. These are not positive obstacles to the effectuation of the device or even to the achievement of certainty; rather, they operate negatively, to make less significant whatever degree of success is achieved.

The first factor of this type is the substantial uniformity which exists in the commercial law among the various trading jurisdictions. This is especially true within the United States, but it applies also in the broader community. The common background furnished by the law merchant, and the modern treaty efforts toward accommodation, make the area of substantive conflict in commercial contracts *relatively* small.¹⁴⁴ One result of this is to limit the alternatives available for choice. Another is to diminish somewhat the need for a prospective designation of the applicable laws.

Secondly, there is the possibility that the conflicts principles of the forum would have produced the same selection even in the absence of a choice-of-governing law clause. To maximize the acceptability of a choice-of-governing law clause, the parties will ordinarily want to choose a system which is already at least closely connected. In most cases they will also intend matters of construction to be determined also by such a system. Moreover, there is no clear line between express and implied intention evident in the approaches of courts which utilize the autonomy theory in the conflict of laws. Even where another theory prevails, there will be many cases in which the result will be in accordance with the intent of the parties.

The final factor of this sort is the availability of other means of private ordering by which the parties can promote certainty. One is

143. The local statute of frauds, when construed as procedural, is a severe example. See *Emery v. Burbank*, 163 Mass. 326, 39 N.E. 1026 (1895).

144. This is particularly true in the fields of international transportation agreements and of negotiable instruments. See footnote 88 *supra*; Note, 62 Harv. L. Rev. 647, 648, 654 (1949); Cheshire, 10-14. More limited and recent progress by treaty has been made concerning the law of the sale of goods. See footnote 46, *supra*. This is not to say, of course, that sufficient disparities do not exist to warrant private efforts to promote certainty. See Schmitthoff, *The Export Trade* 68-69 (1943).

the use of trade terms having a substantially uniform meaning for businessmen everywhere.¹⁴⁵ Another is the detailed definition of obligations and rights in the written contract itself.¹⁴⁶ A third is the widely employed technique of providing for the resolution of disputes by arbitrators familiar with the custom and needs of the particular trade.¹⁴⁷ A stipulation for exclusive jurisdiction in a particular court might also be included within this class of tools.¹⁴⁸

All of these negative limitations warrant consideration in assessing the utility of the choice-of-law clause. Such factors go far to provide the certainty necessary to the facilitation of commerce. There is a great deal, however, which they cannot reach. Indeed, there are uncertainties which can be said to be created by reliance upon some of these devices, such as commercial arbitration and the ordinary conflicts rules.

V. MEANS OF INCREASING THE EFFECTIVENESS OF THE CHOICE-OF-LAW CLAUSE

In spite of the many limitations, the choice-of-law clause can significantly serve to promote certainty in commercial transactions. In view of them, care should be taken to maximize the effectiveness of the device. Certain techniques can be employed to enhance the legal acceptability of a private selection of the governing law and to increase the utility of both types of clauses in application.

The possibility that the forum will reject the parties' choice of the law under which validity is to be judged can be minimized by the use of care in (1) selection, (2) drafting, and (3) combination with other techniques. Probably the most important of these is a careful selection of the governing law. If at all adequate to the needs of the parties, the law of the place of contracting or that of the place of performance should be designated. Ordinarily these will be the systems with which the parties are most familiar. Where the entire performance is to occur in one place, the law of that country would probably be the wisest choice. Where it is not, the *lex loci contractus* would have the greatest merit. Following such a practice where possible would assure the acceptance of the choice-of-law clause in jurisdictions which are willing to give them effect and would even prevent the application of an unexpected law by courts which permit little or no free choice.

Of course, other considerations might properly warrant the selec-

145. See Schmitthoff, *Legal Aspects of the Export Trade* 75 (1953).

146. See Devlin, "The Relation Between Commercial Law and Practice," 14 *Mod. L. Rev.* 249 (1951).

147. See Schmitthoff, *Legal Aspects of the Export Trade* 75 (1953).

148. See footnote 155, *infra*.

tion of another system as the governing law. For example, success in designating the governing law beforehand will little contribute to certainty if that legal system is not itself sufficiently developed or familiar to the parties. It is wise also to utilize the law of the country in which litigation is most likely to occur, if acceptable on other grounds.¹⁴⁹

Having selected the law by which they desire the validity of the contract to be judged, the parties can increase the likelihood of its acceptance by means of careful drafting. A technique which would be helpful, especially in grouping of contacts jurisdictions, would be to list and emphasize the contacts with the selected country.¹⁵⁰ One which might prove helpful in courts favoring the *lex loci contractus* theory would be to state that the contract is being formed in the desired country, or perhaps even that it is "deemed" to have been entered there.¹⁵¹ If the contract is concluded by correspondence, the parties can easily specify the state in which it is to take effect. Where the intended place of performance is not known, the parties might do well to state an expectation or presumption that it is to be the country the law of which is intended to govern.¹⁵² Most important, the business reasons for the choice should be carefully explained.¹⁵³

The third direction in which efforts may usefully be made to assure the legal acceptance of the choice-of-law clause involves the possibility of combining this device with other means of private ordering. The addition of a clause providing for arbitration of disputes in the selected country can help a great deal, although other considerations might warrant reliance upon judicial determination. It is possible that English courts, at least, will permit a broader scope of choice in arbitration cases than in others.¹⁵⁴ Moreover, arbitrators

149. In the case of a contract in which an arbitration provision is to be incorporated, the benefit of legal acceptability might best be secured by selecting the law of the country in which enforcement of the award is most likely to be sought. See Mezger, "The Arbitrator and Private International Law," in *International Trade Arbitration* 229-30 (Domke, ed. 1958). But the problem of a lack of familiarity with that system on the part of the arbitrators might override this consideration.

150. A listing would not only prevent the relevant contacts from being ignored, but would probably influence the attribution of weight to them, even if the court conceived of its task as one requiring independent judgment rather than one of seeking the probable intention of the parties.

151. See *Montreal Cotton & Wool Waste Co. v. Fidelity & Deposit Co. of Maryland*, 261 Mass. 385, 158 N.E. 795 (1927); *Cook*, 399, 916; 2 *Rabel*, 368; Note, 62 *Harv. L. Rev.* 647, 656 (1949).

152. See 2 *Rabel*, 380.

153. See *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189, 195 (2d Cir. 1955) (dictum emphasizing imputed good motive). This is especially important where there is little apparent connection with the selected system. See also Note, 62 *Harv. L. Rev.* 647, 656 (1949).

154. See *Cheshire*, 216-17. Even in other jurisdictions, the courts do not ordinarily

might be expected to be more favorably disposed toward the intention of the parties than are some courts.

If the parties prefer not to agree to commercial arbitration, they might increase the possibilities for the acceptance of their choice of the governing law by providing for exclusive jurisdiction in the courts of the designated country. There is doubt as to whether it can succeed in precluding action in other courts; but, if reasonable, the exclusive aspect of the provision stands a good chance of being effectuated.¹⁵⁵ For the immediate purpose, the advantage of an exclusive jurisdiction provision lies in the greater propensity of courts, when actually deciding on the merits, to give effect to a stipulation to, rather than from, the law of the forum.

Assuming the choice-of-law clause will be accepted, regardless of the type, its effectiveness should be promoted by careful efforts to avoid the more mechanical obstacles to the achievement of certainty. This requires an unambiguous specification of the intention of the parties as to the interpretive issues which will arise.¹⁵⁶ Whether the selected law is intended to govern validity as well as construction, whether the conflicts rules of the designated state are to apply, what contractual issues are to be decided under the one or more incorporated bodies of law, whether subsequent changes should be applicable, and similar uncertainties should be resolved in advance by the parties. Care is especially necessary to preclude the forum from construing the clause as not intended to apply on the issue of validity or to collateral questions. But it is also essential to make certain that

appear to be concerned about the law which the arbitrators will be likely to apply, when they enforce an agreement to arbitrate. See *Matter of Amtorg Trading Corp.*, 304 N.Y. 516, 109 N.E.2d 606 (1952); *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931) (award enforced).

155. There is no doubt that an exclusive jurisdiction provision will confer upon the foreign court personal jurisdiction over an absent defendant. *Copin v. Adamson*, L.R. 9 Ex. 345 (1874); *Tambro Fabrics Corp. v. Hyman*, 341 Ill. App. 396, 94 N.E. 2d 93 (1950); cf. *Gilbert v. Burnstine* 255 N.Y. 348, 174 N.E. 706 (1931) (arbitration award). There is, however, some doubt as to whether it will preclude other courts from exercising jurisdiction, at least when the enforcement of a strong public policy statute, such as one embodying the Hague Rules, is at stake. See *Yiannopoulos*, "Conflicts Problems in International Bills of Lading: Validity of 'Negligence' Clause," 18 *La. L. Rev.* 609, 619-22 (1958); "Bills of Lading and the Conflict of Laws: Validity of 'Negligence' Clauses in France," 2 *Am. J. Comp. L.* 516, 533-35 (1958). Such a provision was held not to constitute an attempt to exempt a carrier from liability and was, therefore, enforced in *Wm. H. Muller Co. v. Swedish American Line, Ltd.*, 224 F.2d 806 (2d Cir.), cert. denied, 350 U.S. 903 (1955). But see *The Feharn*, [1958] 1 *W.L.R.* 159, 162 (C.A.). The Supreme Court has recently declined to pass on the issue in *S.S. Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183, 84, reh. denied, 359 U.S. 999 (1959). Perhaps an arbitration clause is a more certain means of assuring the tribunal which will decide future disputes. See *Matter of Amtorg Trading Corp.*, 304 N.Y. 516, 109 N.E. 2d 606 (1952).

156. See Sec. IV, part A, *supra*.

particular clauses will not be construed to cover more than the parties desire.

Although the problems which arise from diversities inherent in the judicial processes of different courts are not amenable to the choice-of-law clause itself, even they can perhaps be minimized. If the arbitration device is acceptable, its use will largely eliminate the possibility of several potential tribunals and will even permit the parties to designate the applicable procedural law.¹⁵⁷ If the advantages of judicial settlement are preferred, the desirability of attempting to confer exclusive jurisdiction upon the court of the law which is selected should be considered. In addition to enhancing the chances for the acceptance of the parties' choice of the governing law, this device would, if successful, avoid the problem of procedural diversity and of the forum's having to apply what is, to it, a foreign body of law.

V. CONCLUSION

The various forms of choice-of-law clauses constitute useful tools for the businessman in his search for certainty. They can be employed (1) to designate the legal system under which validity and related issues will be determined, or (2) merely to elaborate the agreement by incorporating specific provisions or more general bodies of interpretive rules. Those engaged in international commerce would be well advised to make a more extensive and more careful use of the technique than presently appears to be their practice.

The legal acceptability of the incorporating type of choice-of-law clause is almost universally conceded. That of the choice of the governing law, while energetically denied by many respected scholars, appears also to be firmly supported by both principle and authority. The arguments for a conflict-of-laws principle which permits businessmen to eliminate a source of uncertainty by designating the governing legal system are convincing. The contentions of those who endeavor to answer the question, "Why not?" seem illogical and doctrinaire by contrast.

The courts appear basically to agree. Overriding considerations of statutory and judicial policy preclude the effectuation of choice-of-law clauses in certain types of agreements, especially negotiable instruments and bills of lading. Even in other contracts the authorities in this country permit a confident reliance upon the device only to select between the *lex loci contractus* and the *lex loci solutionis*. But such legal limitations leave open a wide area of permissible autonomy,

157. See Mezger, "The Arbitrator and Private International Law," in *International Trade Arbitration* 229, 236 (Domke, ed., 1958).

which should be adequate for the needs of the businessman in most situations.

Additional problems limit the utility of both types of choice-of-law clause as a means of promoting certainty, even if given legal effect. Interpretive issues which can largely be avoided by careful drafting constitute one set of obstacles. Other causes of uncertainty and factors limiting the need for the device must also be considered in evaluating the choice-of-law clause. In the last analysis, perhaps the inability of the parties adequately to foresee problems and to select the law by which various contractual issues should be decided could be considered the most severe limitation upon the effectiveness of the legal technique. The concentration of this discussion upon limitations, however, should not be permitted to obscure the basic conclusion that choice-of-law clauses are definitely worth including in international commercial contracts.