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CHOICE OF LAW FOR COMMERCIAL CONTRACTS

LEONARD F. MANNING*

The doctrine of *stare decisis*, it has been said, is of minor moment as it touches upon tort liability. But *stare decisis* is rooted in a settled and sensible policy with relation to the construction of a contract. That is so, we are told, because we do not, normally, premeditate and plan our tortious conduct. But we do—lawyers and businessmen alike—plan our contracts in reliance on precedents. Thus, stability and certainty, which the law of contracts demands, are of greater concern to the commercial lawyer than they are to the negligence practitioner.

Isn't it odd, then, and unfortunate too, that choice-of-law rules in tort cases, where certainty is not an essential virtue, should be so certain while choice-of-law rules in contract cases, where uncertainty is a vice, should be so uncertain? The Restatement tells us with monotonous regularity that the law of the *locus delicti* determines tort liability,¹ and it is a rare court which would dare disagree.² In contract cases, however, the courts have sounded discordant notes and the Restatement's rules for choice of law³ are certainly not gospel and probably do not represent prevailing law.

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¹ Restatement, Conflict of Laws §§ 377-90 (1934).

² See, e.g., *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 Atl. 163 (1928), where a Connecticut statute (imposing upon any person, renting or leasing a motor vehicle to another, liability for any damages caused by the operation of such motor vehicle while so rented or leased) was found applicable to an accident which occurred in Massachusetts. Judge Goodrich finds this case at odds with the prevailing rule which would require that Massachusetts law determine the defendant's liability. Goodrich, *Conflict of Laws* 279 (3rd ed. 1949). See also, *Dyke v. Erie Ry. Co.*, 45 N.Y. 113 (1871) where a contract approach was taken in a tort case and the law of New York, where the contract of passage was made and was substantially to be performed, measured the defendant's liability although the accident took place in Pennsylvania.

³ Restatement, Conflict of Laws § 332 (1934) provides:

The law of the place of contracting determines the validity and effect of a promise with respect to

- (a) capacity to make the contract;
- (b) the necessary form, if any, in which the promise must be made;
- (c) the mutual consent or consideration, if any, required to make a promise binding;
- (d) any other requirements for making a promise binding;
- (e) fraud, illegality, or any other circumstances which make a promise void or voidable;
- (f) except as stated in § 358, the nature and extent of the duty for the performance of which a party becomes bound;

That this should be is not surprising. A contract involves a "meeting of the minds" of the contracting parties or, more accurately, a unity of expressed intent. The "intention of the parties" has always been the cornerstone of the contract. But "intention" is not easily ascertained and reasonable judges reasonably find the same words and acts indicate different and often contradictory intents. A contract, even a very simple one, is generally a multi-faceted document. In a tort case a single issue is usually presented: was the defendant's conduct actionable under the law of the place where the conduct occurred or the injury was inflicted? In contract litigation the issues may be multiple and varied. They may relate to the capacity of the parties, the form of the contract, its interpretation, its essential validity, or performance under it. A simple promissory note or an innocuous looking bill of exchange may produce many-towered problems. Historically, and logically enough, the "intention of the parties" was, as noted, the main road which the courts travelled to meet these problems, the main road which "ran by to many-towered Camelot."

In searching for intention we seek a manifestation of something subjective. Motives move into contemplation; vague concepts of "substantial justice" may have influence; as often as not, we find the court by a process of *post hoc* presumptions finding intention as a result of items which the parties themselves may never have considered but which it is now felt should have been considered by them. In contract choice-of-law cases identical facts never did, and do not today, guarantee identical results. Even where the intention of the parties is expressed with sufficient clarity, judges have frequently been unable to agree as to applicable presumptions, supposedly founded on that intention, which would assign with inflexibility a particular law to determine a particular issue. The consequence has been considerable confusion and conflict.⁴

(g) the time when and the place where the promise is by its terms to be performed;

(h) the absolute or conditional character of the promise.

§ 358 provides:

The duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to:

(a) the manner of performance;

(b) the time and locality of performance;

(c) the person or persons by whom or to whom performance shall be made or rendered;

(d) the sufficiency of performance;

(e) excuse for non-performance.

⁴ To the effect that the law of the "place of making" is the law which the parties are presumed to have intended and that, therefore, such law determines the essential

The situation with regard to commercial contracts is no different.⁵ If certainty, not only to determine the content of a contract but also to fix the choice of law governing both its content and validity, is of importance to contracts generally, it is a prime necessity for commercial contracts. It is hackneyed to note that such contracts are made in the market place, often quickly, sometimes informally and occasionally orally. The order to purchase shares of stock on an exchange, for example, might be of such a nature, and if variations in applicable law should be possible, buyer and seller alike would undoubtedly prefer to have a specific law apply and would be more at ease if it were fixed and absolute. On the other hand a commercial contract is frequently the result of extended negotiations and careful draftsmanship and words chosen with care, e.g., the contract or commitment made by a bank to make a mortgage loan which, no doubt, is formulated, at least by the bank, with a specific governing law in mind. Whatever law it might be, the selection should have the stamp of certainty on it.

Indeed, when the commercial transaction touches two states, two countries, or two jurisdictions, uniformity in the determination of applicable law might very well be an end in itself. The "rolling English drunkard" may have made the "rolling English road" but the road to Camelot should be paved not with good intentions but with uniformity in choice of law, a uniformity which will give stability to the planned commercial contract and at the same time permit

validity of a contract, see, Goodrich, op. cit. supra note 2, § 110; *Brown v. Ford Motor Co.*, 48 F.2d 732 (10th Cir. 1931); but see *Zerratello v. Hammerstein*, 231 Pa. 56, 79 Atl. 922 (1911) (the law of the place of performance, being in the contemplation of the parties, governs essential validity); even where the place of performance is said to govern essential validity, we have been told that the law of the place of making should determine the formal validity of the contract, Story, *Conflict of Laws*, § 260 (8th ed. 1883); Goodrich, supra, § 109 and cases cited therein. The law of the place of performance controls performance, including allowable excuses for non-performance, *Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft*, 15 F. Supp. 927 (S.D.N.Y. 1936).

With a lapse into Latin, it has been said that the *lex loci contractus* is the law to consider, Goodrich, supra, § 110, pp. 321-22; but in *Pritchard v. Norton*, 106 U.S. 124 (1882), *lex loci contractus* was identified with the *lex loci solutionis* although the contract was made in New York and was to be performed in Louisiana. So, we might ask, what is meant by the *lex loci contractus*? Is the Latin to be translated literally to mean the place where the contract is made or is it to be given the Greeks' Homeric sweep and taken to mean the seat of the obligation, or the law in the contemplation of the parties when the contract was made?

⁵ For a determination of the law governing the question of whether a promissory note is negotiable or whether a particular writing is a promissory note or a bill of exchange, compare *Carnegie v. Morrison*, 43 Mass. (2 Met.) 381 (1841) (the law of the place where the bill or note is issued controls) with *Sykes v. Citizens Nat'l Bank of Des Moines*, 78 Kan. 688, 98 Pac. 206 (1908) (the law of the place of payment controls).

easy recognition of the validity and negotiability of, or in general, the obligations inherent in, the contract which passes over the counter or from hand to hand.

The compilers of the Commercial Code were concerned with the problem in 1950, as were the formulators of the Restatement, many years before. The Code originally proposed rules for choice of law which were accepted when Pennsylvania passed the enactment.⁶ But Judge Goodrich and his colleagues retreated thereafter under a fusillade of forceful criticism⁷ as a result of which amendments eliminated, with one exception, the new proposals. The early attempts by the Code draftsmen to bring harmony from the discord which surrounded contract choice-of-law rules resulted in the veiled approval of the "contacts" theory, which was thought to be of the great catalyst, which would not only achieve justice but which would reconcile all prior cases.

This theory was not a new concept when it was enacted by the New York Court of Appeals in *Auten v. Auten*,⁸ but the case, representing as it did a significant decision by a respected Court in a very influential state, gave great impetus to the theory. This decision, at least insofar as it relates to commercial contracts or more specifically to negotiable instruments (or, in the language of the Code, commercial paper) is somewhat the burden of this article. Is the contacts approach, as formulated in *Auten*, worthy of emulation or is *Auten*, in commercial cases, doomed to beat a lonesome drum?

THE CODE'S CHOICE

Assuming a formal contract for the sale of machinery signed in Michigan by Michigan residents, with all or substantially all of the performance to take place in Massachusetts, what law would be applicable under the Commercial Code for the resolution of all questions saving only interpretation?

The Code first recognizes that the contract involves a consensual relationship⁹ and permits the parties to stipulate that the law of any

⁶ Pa. Stat. Ann. tit. 12A, § 1-105 (1953, April 6, P.L. 3, § 1-105). This section has since been revised to conform to the present version of the Code discussed later in this article.

⁷ See, e.g., 1 Report of New York State Law Revision Commission, Hearings on the Uniform Commercial Code, especially the bibliography p. 37 (1954). See also, 9 New York County Lawyers Association Bar Bulletin 30 (1951).

⁸ 308 N.Y. 155, 124 N.E.2d 99 (1954).

⁹ UCC § 1-105, Comment (1) states: "an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen."

jurisdiction, bearing a reasonable relation to the transaction, shall govern their rights and duties.¹⁰ But what is a reasonable relation? The comments state that both the places of execution and of performance bear a reasonable relation to the transaction, leaving the impression that only these two locales bear such relation. The test we are expressly told,¹¹ however, is similar to that laid down by the United States Supreme Court in *Seeman v. Philadelphia Warehouse Co.*¹² In this case the agreement executed in New York between a New York resident and a Pennsylvania corporation contemplated performance in Pennsylvania. As such, the transaction was valid under Pennsylvania law but void in New York law. There was no express stipulation that Pennsylvania law should be applicable but there was the stipulation for payment or performance in Pennsylvania. Mr. Justice Stone in regarding this as the equivalent states:

“But, in the view we take, we think it immaterial whether the contract was entered into in New York or Pennsylvania, . . . Respondent, a Pennsylvania corporation having its place of business in Philadelphia, could legitimately lend funds outside the state, and stipulate for repayment in Pennsylvania in accordance with its laws, and at the rate of interest there lawful, even though the agreement for the loan were entered into in another state, where a different law and a different rate of interest prevailed

“Here respondent, organized and conducting its business in Pennsylvania, was subject to laws of that state, and had a legitimate interest in seeking their benefit. The loan contract which stipulated for repayment there, and which thus chose that law as governing its validity, cannot be condemned as an evasion of the law of New York, which might otherwise be deemed applicable. . . .”¹³

Obviously the parties intended a binding contract. Were New York law to be applied there would have been no enforceable contract, for under that law the agreement would be usurious. The ultimate choice-of-law in *Seeman* was a reasonable one. Reasonableness can however be a hydra-headed monster and it is questionable whether the Code has performed a Herculean task. “Ordinarily,” says the Code, “the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract

¹⁰ UCC § 1-105(1).

¹¹ UCC § 1-105, Comment 1.

¹² 274 U.S. 403 (1927).

¹³ *Id.* at 407-09.

is to occur or occurs."¹⁴ That was so in *Seeman* and that is "ordinarily" the case, but the place of execution and the place of performance do not present an inexorable dilemma.

There might be other jurisdictions which have, in the language of Justice Stone, a "normal" connection with the transaction. If A and B, Massachusetts residents, were to execute, while on vacation in Vermont, a contract requiring performance in Connecticut, might they not reasonably stipulate that Massachusetts law shall fix their mutual obligations? Put in the abstract, does the domicile of both or even of one of the parties have a reasonable relation to the transaction? There is no answer in *Seeman*. There is no answer in the Code. And what is a court to do if the parties stipulate that the law of the place of performance shall determine their rights and duties and that law is found to void the contract otherwise valid under the law of the place of execution? Are we to permit a stipulation to nullify a contract between parties who in good faith believed, at least until a dispute arose and they consulted their lawyers, that they had a valid and enforceable agreement? Again no answer is forthcoming either from *Seeman* or from the Code.

What law—again assuming the transaction has contacts with two or more states—applies in the absence of a stipulation? Originally, the authors of the Code seemed of a mind to have the Code applied whenever any state having a relation to the transaction had adopted the Code.¹⁵ That was the Code's ill concealed attempt, in its early drafts, at coercion by choice of law. It encountered Constitutional criticism.¹⁶ The authors were not so revolutionary in the final version. Failing a stipulation as to choice of law, the Code now adds, "this Act applies to transactions bearing an appropriate relation to this state."¹⁷ There is more than a wisp of a suggestion that the Code shall be applied whenever Constitutionally possible. But Comments (2) and (3) to § 1-105 do a kind of Lambeth Walk on this bold suggestion. Comment (2) states:

"Where there is no agreement as to the governing law, the Act is applicable to any transaction having an appropriate relation to any state which enacts it. Of course the Act applies to any transaction which takes place in its entirety in a state which has enacted the Act. But the mere fact that suit is brought in a state does not make it appro-

¹⁴ Supra note 11.

¹⁵ UCC § 1-105 (Final Text Edition 1951).

¹⁶ See note 7 supra, and the articles cited therein.

¹⁷ UCC § 1-105.

priate to apply the substantive law of that state. Cases where a relation to the enacting state is not appropriate include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code."

Comment (3) adds that "where a transaction has significant contacts with a state which has enacted the Act and also with other jurisdictions, the question what relation is appropriate is left to judicial decision."

There are contrary views, no doubt, but I take this to mean that we are back where we started. Choice of law, under the Code, is left almost in its entirety to judicial decision. The intention of the parties is underscored, to be sure, but it is not beatified or made a *sine qua non* and a subdued note is sounded in Comment (3) on behalf of the "contacts" theory. One conclusion is certain: the Restatement's rather rigid rules are rejected—unless returned by judicial decision—and now, we may ask, should the fixed rules of the Restatement give way completely to this "intention" test or to the "contacts" approach or to both? In that connection consider the contacts contemplated by the New York court in *Auten v. Auten*.

THE PRELUDE AND ELUDE OF AUTEN

Mr. and Mrs. Auten were citizens and domiciliaries of England at the time of their marriage in England in 1917. Both remained British subjects. Mrs. Auten, as well as two children of the marriage, remained, at all times pertinent to the subsequent litigation, domiciled and resident in England. It was not found as a fact but it was evident enough that Mr. Auten retained his English domicil although in 1931 he deserted his wife and children and came to New York. The following year he obtained a Mexican divorce and thereafter went through the formalities of "marrying" another woman. Hoping to adjust their differences, Mrs. Auten came to New York in 1933. In June of that year, a separation agreement was executed in New York whereunder Mr. Auten undertook to pay a New York trustee £50 a month for "the account of" Mrs. Auten to provide for her support and for that of the children. The trustee's only duty was to forward the amounts paid by Mr. Auten to Mrs. Auten who had, immediately after executing the agreement, returned to England.

The separation agreement stipulated that Mrs. Auten would not

institute any suit for separation and that she would not cause any complaint to be lodged against him by reason of his Mexican divorce. Nevertheless, Mrs. Auten did, in 1934, file a petition in an English court for judicial separation. Mr. Auten was served in New York with process relating to the English action and an order was entered requiring him to pay alimony pendente lite. The English action never proceeded to trial. Eventually, when Mr. Auten discontinued the support payments required by the separation agreement, Mrs. Auten instituted a New York action for installments due under the separation agreement and it was that action which reached the Court of Appeals in 1954.

The decision turned on choice of law. It was assumed, as the lower court had held, that under New York law the institution of the English suit for judicial separation operated as a repudiation of the separation agreement and that Mrs. Auten could not, therefore, recover thereon. It was conceded that under the law of England the suit for judicial separation did not operate as a repudiation of the separation agreement.

The court held that the English law controlled. It counted off the innumerable English contacts and noted the dearth of New York contacts. The parties were married in England; they were English domiciliaries and English citizens; the children resided in England; the agreement was ultimately to be performed in England; it called for payment in English pounds rather than U.S. dollars. Quite obviously the English contacts far outnumbered the New York contacts.

Auten recognized the prevailing confusion which surrounded contract cases involving choice of law. It suggested that the contacts theory might bring harmony from the discord and that, at least, it offered a definite medium for rationalizing results of prior cases. It rejected the Restatement's fixed rules and announced that thereafter the contacts approach, the "center of gravity" test, would in New York determine choice of law in contract litigation. But, because *Auten* was bent on formulating a unitary universal rule, because it was bent on being all things to all cases, *Auten*, I would suggest, failed.

In non-commercial contracts, should the contacts test be only an exercise in counting? If not, if we are to consider the quality of the contacts, should our ultimate concern be the discovery of the state with the superior interest or the fashioning of the intention of the parties?

The *Auten* court, although in the end it simply counted the contacts, talked from both sides of the mouth. It first stated:

“Although this ‘grouping of contacts’ theory may, perhaps, afford less certainty and predictability than the rigid general rules, the merit of its approach is that it gives to the place ‘having the most interest in the problem’ paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction ‘most intimately concerned with the outcome of [the] particular litigation.’”¹⁸

but followed this immediately with the thought that,

“. . . Moreover, by stressing the significant contacts, it enables the court, not only to reflect the relative interests of the several jurisdictions involved, but also to give effect to the probable intention of the parties and consideration to ‘whether one rule or the other produces the best practical result.’”¹⁹

It is to be noted that the issue here, repudiation, related to performance and, as the place of ultimate performance, English law would, under the Restatement’s rule, apply.²⁰ But *Auten* made it clear that English law was chosen not because England was the place of performance but because England had the greater number of contacts.

Auten did not involve a commercial contract. Nor was *Auten* unannounced in New York. Only a year before, the New York Court of Appeals had espoused the contacts test in a very strong dictum in *Rubin v. Irving Trust Co.*²¹ In *Rubin* it appeared that plaintiff and defendant’s testator, while in Florida, had made an oral contract under which defendant’s testator agreed that he would change his will. The court treated this as an oral contract to make a will, which was at odds with the New York statute of frauds but valid and enforceable under the law of Florida. Defendant’s testator was domiciled in New York at the time the contract was made. He died domiciled in New York and his estate was being administered in the New York courts. The case was strikingly identical to the Massachusetts case of *Emery v. Burbank.*²²

¹⁸ Supra note 8, at 161, 124 N.E.2d at 102.

¹⁹ Ibid.

²⁰ Restatement, Conflict of Laws §§ 355, 358 (1934).

²¹ 305 N.Y. 288, 113 N.E.2d 424 (1953).

²² 163 Mass. 326, 39 N.E. 1026 (1895).

The precise question posed by the *Rubin* court was whether the New York statute of frauds was a matter of substance or a matter of procedure. It found it unnecessary to answer the question. Briefly put, it reasoned that the New York statute of frauds would apply, if procedural, because New York was the forum and that the New York statute of frauds would also apply, if substantive, because New York was the domicile of the decedent at death. It came close to saying, but did not, that this was a commercial contract and that, therefore, there was no reason to apply Florida law as the place of execution. It finally added by way of dictum, as noted, that New York had the greater number of contacts with the transaction and that New York law was, therefore, the appropriate choice of governing substantive law as well as procedural law.

The *Rubin* court sounded like a court with a desire but not the daring to make new law. It posed "iffy" questions and gave "iffy" answers. It relied in great detail on Justice Holmes decision in *Emery v. Burbank* but it carried the Holmes reasoning beyond its logical conclusion and beyond its logical extreme. *Emery v. Burbank* was a carefully and thoroughly reasoned decision. It recognized that the domicile of a testator has the principal interest in his personal estate and that it has the predominant interest to protect the estate against fraudulent and fictitious claims. For that reason alone Holmes applied the Massachusetts statute of frauds to an oral contract made in Maine by a Massachusetts domiciliary. In other words, Massachusetts law applied because Massachusetts had the superior governmental concern. There was no question of intent. No ritual of counting contacts. *Rubin* recognized that, too, but the *Rubin* court went on to clutter up an otherwise discerning decision with talk about contacts. It has the same fault I find with *Auten v. Auten*.

Rubin was correct in applying New York law as *Auten* was correct in applying English law. But *Rubin* was correct only because New York was the decedent's last domicile, the jurisdiction wherein his estate was being administered, and *Auten* was correct only because England was the domicile of the parties, the jurisdiction wherein the wife and children would have become a charge upon the state. England had the paramount interest in the support of its own domiciliaries. If we are to consider contacts, our concern should be for quality rather than the quantity of the contacts. We should—in a case like *Rubin* or *Auten* or *Emery v. Burbank*—look to the jurisdiction which has the greater concern for the parties, the greater governmental interest in the transaction. This is so because neither *Auten* nor *Rubin* nor *Emery* involved a commercial contract and there

is lesser reason to ascertain the intention of the parties. To be sure, the contacts test produces some evidence of the intention of the parties. But is the intention we ultimately construct a fictitious intention or is it actual and genuine? Do the parties to an ordinary contract ever think—aside from cases where we have an express stipulation—in terms of choice of law?

Now if we assume that with regard to commercial contracts the intention of the parties should be a prime consideration, does it follow that the contacts test is the answer? Putting this question aside for the moment, let us consider three older cases which illustrate a sensible attempt to apply what we may call a discovery-of-intention approach.

TRADITIONAL RULES OF INTENTION

*Hyatt v. Bank of Kentucky*²³ involved a suit by the indorsee against the indorser of a promissory note issued in Louisiana but indorsed and delivered by the indorser to the indorsee in Kentucky. The court held that the legal effect of the indorsement so far as it applies to indorser and indorsee must be determined by Kentucky law. It said:

“The assignment of a note, as has been often adjudged, is of itself a contract, by which the party making the assignment assumes certain liabilities, to be regulated and determined by the law of the place where the assignment is made, in the absence of a contract or agreement upon his part by which he assumes liabilities created by the laws of another state or place different from the law of the place where the contract or assignment is made.”²⁴

In *Badger Machinery Co. v. United States Bank & Trust Co. of Santa Fe, N.M.*,²⁵ certain bondholders to whom the bonds were negotiated in New Mexico sought to collect against the corporation which had executed and issued the bonds in Wisconsin. The corporate maker asserted two defenses: fraud on the part of the payee and absence of consideration for the issuing of the bonds. These defenses were sufficient, under Wisconsin law, against any party not a holder in due course. The bondholders were not holders in due course under Wisconsin law but it was assumed that they would be under New Mexico law. Here, then, the indorsee, a subsequent party, was suing

²³ 71 Ky. (8 Bush.) 193 (1871).

²⁴ *Id.* at 197.

²⁵ 166 Wis. 18, 163 N.W. 188 (1917).

the maker, and not, as in *Hyatt*, his immediate indorser. The court applied Wisconsin law and stated:

"... In the instant case the bonds were Wisconsin contracts, payable in Wisconsin; the maker of them, the Columbia County Electric Light & Power Company, is a Wisconsin corporation; and the appellant, the United States Bank & Trust Company, is enforcing its claim in a Wisconsin court. True, the contract between Bridge, who sold the bonds to appellant, and appellant may be considered as made outside of Wisconsin, and if the action here were between appellant and Bridge, a different question would be presented. The issues involved in the case at bar are between the maker of the paper involved and the appellant, who purchased the paper and claims to be a holder for value in due course.

"The laws of Wisconsin became a part of the contract of the maker in the instant case, and determine whether the holder is a bona fide holder for value in due course or not."²⁶

Like *Badger*, and unlike *Hyatt*, *United States v. Guaranty Trust Company of New York*²⁷ also involved rights as between the original maker or drawer and a subsequent indorsee. There the U.S. Veterans Bureau drew a check on the Treasurer of the United States to the order of a Yugoslavian gentleman named Louis Macakanja. His address in Yugoslavia was given on the face of the check and it was mailed to him in Yugoslavia. The check never reached Mr. Macakanja. It did arrive at the Slavenska Bank in Yugoslavia which took the instrument in good faith and without knowledge that Mr. Macakanja's indorsement had been forged. Slavenska indorsed it to the Guaranty Trust Company which in turn collected the face amount through the Federal Reserve Bank. The Treasurer of the United States on learning of the forgery sued Guaranty Trust to recover the proceeds of the check. Under the law of the District of Columbia, where the check was both drawn and payable, the forged indorsement was wholly inoperative. The law of Yugoslavia provided that the transferee in due course acquires, despite the forgery, not only a good title to the instrument but also the right to collect and retain the proceeds. The court applied Yugoslavian law. Justice Brandeis observed that:

"... under settled principles of conflict of laws, adopted by both federal and state courts, the validity of a transfer

²⁶ Id. at 20-21, 163 N.W. at 189.

²⁷ 293 U.S. 340 (1934).

of a chattel brought into a country by the consent of the owner is governed by its law; and that rule applies to negotiable instruments. . . . Here, the rule is particularly applicable; for the Government, having made the check payable to one therein described as resident in Yugoslavia and having mailed it to his Yugoslavian address, must be deemed to have intended that it should be negotiated there, according to the law of that country. It was thereby given something of the quality of a foreign bill; although technically the check was delivered within the District when mailed there."²⁸

Are these cases consistent? There have been varying views expressed by eminent authorities which suggest some inconsistency and which, in relation to each other, are difficult to harmonize.²⁹ It is interesting to note that each court talked in terms of the intention of the parties, what law the indorser, the drawer or maker contemplated or must have contemplated. The Kentucky court in *Hyatt* spoke of the justice of the presumption "that the party intended to be bound by the law of the place or state where the contract was made." The court in *Badger Machinery Co.* spoke of the laws of Wisconsin becoming "a part of the contract of the maker" and Justice Brandeis' opinion in the *Guaranty Trust Co.* case is instinct with intention. But in each case it is an "intention" which is poured into fixed and specific moulds to produce distinct but conforming rules.

Hyatt involved an action exclusively between indorser and indorsee. They contemplated the law of the "place of indorsement" and that law fixed their rights and liabilities. In the *Badger* and *Guaranty Trust* cases the rights existing as between drawer or maker and subsequent holder were put in issue—but with an important and critical distinction. In *Badger* the defense which the maker asserted related to the issuance of the instrument. It alleged that there was a fraud, with a resulting failure of consideration, imposed upon it in Wisconsin at the time the bonds were originally delivered to the payee. In the *Guaranty Trust* case the defense raised did not pertain to the original issuance of the check but to the transfer which had taken place in Yugoslavia. There is, therefore, a sustained consistency in the three cases. It would seem, also, that they are in harmony with the Restatement's position.³⁰

²⁸ *Id.* at 345-46.

²⁹ Compare Leflar, *Conflict of Laws* 252 (1947), with Stumberg, *Conflict of Laws* 250-51 (2d ed. 1951), and Goodrich, *Conflict of Laws* 343 n.132 (3d ed. 1949).

³⁰ Restatement, *Conflict of Laws* § 349 (1934), states: "The validity and effect of

What result would the contacts test produce in each of these cases? The balance of contacts is weighted in favor of Louisiana in *Hyatt* and, as obviously absurd as the result might be, it would not be inconceivable for a court employing the contacts test to determine the indorser's liability to his indorsee in accordance with the law of the place where the note was originally issued. It should also be noted that in *Badger*, New Mexico's contacts were almost equal to those found in Wisconsin and that in the *Guaranty Trust* case the District's contacts outnumbered those of Yugoslavia. The commercial lawyer who must counsel his client might just as well as let the client count the contacts and choose the applicable law—assuming the client can add and subtract. The lawyer is left to whirl in the core of a crude analogy, the "center of gravity."

At the same time, it must be noted, the rubric and result of each case harmonizes with considerations of "governmental interests" if "governmental interests" are concerned at all with commercial contracts. Assuming such concern, certainly Kentucky had an interest in the Kentucky contract between indorser and indorsee superior to that of Louisiana; Wisconsin's concern for the fraud there practiced upon the maker was superior to that of New Mexico; and the District of Columbia had no reason to be concerned with a transfer which took place in Yugoslavia.

CONCLUSION

We were told over one hundred years ago that the negotiable instrument was a "courier without luggage."³¹ The courier rule—aimed at excluding oral modifications—was aimed at putting some certainty into negotiable instruments. It is quite unreasonable, then, to let conflicting choice-of-law rules destroy the certainty just as soon as the instrument crosses state lines. Because of conflicts within conflict-of-laws rules, the courier has become an Argus and the lawyer who drafts such an instrument must also be "Panoptes" with an eye on the law of every jurisdiction in which the bill or note may wander.

Auten v. Auten found two sources to justify its contacts concept. It spoke of reaching the intention of the parties; it spoke of satisfying the legitimate concerns of the states which had a relation

a transfer of a negotiable instrument are determined by the law of the place where the instrument is at the time of its transfer." Comment e to this section states: "While any defense which grows out of the original making or discounting of a negotiable instrument is governed by the law of the place of contracting, a defense which grows out of the circumstances of the transfer is determined by the law of the place of transfer."

³¹ *Overton v. Tyler*, 3 Pa. 346-47 (1846).

to the controversy. These are not only bases for choice-of-law rules. In the case of commercial transactions particularly, certainty is an essential consideration and uniformity in choice-of-law rules, if not an end in itself, is in itself of sufficient weight to counterbalance the ballast of both intention and governmental interests. "It is to the interest of trade and commerce," said the court in the *Hyatt* case,³² "that there should be some fixed and permanent rule governing contracts of this character."

Putting aside for the moment an express stipulation for governing law, the intention of the parties is at best a speculative thing. It is more often than not a complete fiction—fabricated by the court out of the parties' *presumed* knowledge of the law. If we must presume that a person is familiar with the law of a particular forum then the law of his domicil is a more plausible choice than the law of a place where he may happen to sign a contract or where the contract may happen to require delivery. Yet domicil is rarely permitted to govern contractual relationships.

The Commercial Code has accepted "intention" absolutely in only one particular instance—where the parties stipulate for the law of a particular jurisdiction. With that there can be no quarrel. It is in fact a major step forward. There we can be reasonably certain that we are dealing with the actual intention of the parties. But in implying or, at least, in leaving open the possibility that a stipulation will be limited to the place of making or the place of performance, the Code is not a little unrealistic. A stipulation for the law of the domicil of either party is equally reasonable and should receive equal sanction. The intention of the parties, let us again note, is not the Code's "compleat reader" for choice-of-law rules.

The second gloss for choice-of-law rules, governmental interest, is, in the case of commercial contracts, shallow and ephemeral. Public policy and governmental concern may play a legitimate part in personal relationships; the state is legitimately concerned with the welfare of its dependents, with the support of its domiciliaries; it is concerned with the separation agreement and the contract to create a trust for dependents, for example, but certainly the state has no such intimate concern for the negotiability or non-negotiability of a promissory note issued there or for determining whether a subsequent holder acquires a valid title despite a prior theft of the instrument and a prior forgery of an indorsement.

The parties themselves are, however, intimately and intensely

³² 71 Ky. (8 Bush.) at 199.

concerned with those issues and with knowing with reasonable certainty their respective rights and obligations. The Restatement took measured strides to stabilize choice-of-law rules in contract cases. It did so by offering fixed and permanent rules. That they are not harsh rules is illustrated by the *Hyatt, Badger* and *Guaranty Trust Co.* cases. That they are sufficiently at peace with considerations of governmental interests and the intention of the parties is illustrated by the same cases. This is not to suggest that the rationale which runs through those cases or the rigid rules of the Restatement will give complete certainty. They can give no more than uniformity. This is so because the negotiable instrument is a traveler by nature. Only a unitary choice-of-law rule would approach complete certainty. If, for example, we should fix all obligations which inhere in commercial paper in accordance with the law of the place of payment and adhere to that rule regardless of where the "courier" might wander, we would then find for the commercial instrument perhaps not the "center of gravity" but a home to which the obligations of all parties to the instrument will eventually come and we would thereby reduce immeasurably the shifting obligations which spring from shiftless choice-of-law rules.

It would be folly to expect any substantial acceptance of a unitary choice-of-law rule for commercial transactions generally or for commercial paper specifically. The Restatement's imprint is on the law of too many of the non-Code states. The mark of the Restatement, we can be sure, will not be readily erased. But it remains to be seen whether courts in the Code states will take the Code's sanction of "judicial decision"³³ to prescribe, if not a unitary rule, then uniform, overriding rules of choice of law or whether we shall be left to "dusk and shiver" with the vagaries of contacts, intention and governmental interests.

³³ UCC § 1-105 Comment 3.