Conflict of Laws -- Contract -- Proper Law -- Foreign Exchange Control Regulations

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admission of statements of this kind." 47 "The inconsistency may relate only to matters not in issue or to such minor or irrelevant matters that it would be unfair to the witness and the opposite party to allow cross-examination and the trial Judge could only decide this if he had before him evidence as to the content of the alleged inconsistent statement; . . ." 48

(3) If the judge exercises his discretion in favour of allowing the inconsistent statement to be proven, he should, in the presence of the jury, direct that the circumstances of the making of the statement be put to the witness and that he be asked whether he made the statement. If the witness admits making the statement that, of course, obviates having to prove this by other evidence. If the witness further admits that the facts in the statement are true then it becomes admissible evidence in the action.

(4) If the witness denies making the former statement then this can be proved by other evidence.

(5) The judge should instruct the jury that unless the witness admits that the former statement is true, the making of it is not evidence of the facts contained therein but is solely for the purpose of proving that the witness made the statement. The jury then must decide to what extent this new piece of evidence neutralizes the testimony given in the witness box.

J. W. MORDEN*

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CONFlict OF LAWS—CONTRACT—PROPER LAW—FOREIGN EXCHANGE CONTROL REGULATIONS.—In Etler v. Kertesz,1 the evidence disclosed that the plaintiff and the defendant had both lived in Hungary and "now and then resided and worked in Vienna" where they met in 1949. At that time, the defendant, who was contemplating departure to the United States of America, needed five hundred dollars for the journey. He borrowed the money from the plaintiff who had in his possession some American dollars he had brought with him from Hungary, and agreed to repay him in Zurich, Switzerland, in the same currency. The loan not having been repaid, the plaintiff obtained a judgment in his favour in the Province of Quebec which he then sought to enforce against the defendant in Ontario. The Ontario Court of Appeal

1 [1960] O.R. 672, per Porter C.J.O.

*J. W. Morden, of the Ontario Bar, Toronto.
refused to give effect to the Quebec judgment, on the ground that the defendant had not been personally served with the writ of summons in the Quebec action and had entered no defence.\(^2\) Thereupon, the court proceeded to hear argument on the merits.

The defendant maintained that the contract was unenforceable in Ontario, because, at the time when the loan was made, the law of Austria provided that contracts involving dealings in foreign currency, unless authorized by the Austrian National Bank or some special dealers, were "unenforceable, void, invalid and illegal. Such contracts were not allowed, they were prohibited and the offender was liable to punishment".\(^3\) The contract, if governed by the law of Austria, was illegal at its inception under the Austrian exchange control legislation.

The issue before the court was a simple one: "... whether the proper law of the contract is the law of Austria, the *lex loci contractus*, or the law of Switzerland, the *lex loci solutionis*?"\(^4\) In ascribing a meaning to the expression "proper law of a contract", the court quoted with approval Dicey's definition\(^5\) to the effect that:

> In this Digest the term "proper law of a contract" means the law, or laws, by which the parties intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended or may fairly be presumed to have intended to submit themselves.

The parties not having expressed their intention, the court also quoted Dicey's *prima facie* presumption in favour of the *lex loci contractus* or the *lex loci solutionis*.\(^6\) Great stress was placed on the often quoted remarks of Lord Simonds in *Kahler v. Midland Bank*\(^7\) and *Bonython v. Australia*\(^8\) and those of Lord Wright in...

\(^2\) Pursuant to ss. 52-54 of the Ontario Judicature Act, R.S.O., 1960, c. 197.

\(^3\) *Supra*, footnote 1, at p. 678.

\(^4\) *Ibid.*, at p. 680. Note that the law of Switzerland was not proved. The court said at p. 680, citing Dicey's Conflict of Laws (7th ed., 1958), p. 1116: "There being no evidence as to the Swiss law, the Court should, if the Swiss law were the proper law, apply the *lex fori*, which in this case would be the law of Ontario." *Quaere*: whether this presumption should apply to foreign statutory law?


\(^7\) [1950] A.C. 24, at p. 28: "The proper law of a contract means the law or laws which the parties intended, or may fairly be presumed to have intended, the contract to be governed."

\(^8\) [1951] A.C. 201, at p. 219: "The *mode of performance* of the obligation may, and probably will, be determined by English law; the substance of the obligation must be determined by the proper law of the contract, *i.e.*, the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection. In the consideration of the latter question, what is the proper law of the contract, and therefore what is the substance of the obligation created by...
Vita Foods Products v. Unus Shipping Co., and Mt. Albert B.C. v. Australasian M.L. Ass. Soc. Since, to paraphrase Lord Wright in the last case, in a situation where the parties have expressed no intention at all, the court has to impute an intention or to determine for the parties what is the proper law which, as just and reasonable persons, they ought to or would have intended if they had thought about the question when they made the contract, the Court of Appeal for Ontario came to the conclusion that it should apply the law with which the transaction had its closest and most real connection. In an excellent analysis of all the relevant authorities, the court attempted to reconcile Dicey's views with Westlake's objective approach. The court said:

The statement of Lord Simonds in the Bonython case follows Lord Wright as to contracts which expressly refer to the system of law to be applied and adopts the language of Westlake as appropriate to other contracts, presumably those where there was no expressed intention. There he adopted Dicey's rule as to intention, and presumed intention, and applied it to a contract in which there was no expressed intention.

I do not think, however, that Lord Simonds' statement in Bonython is in any sense a departure from his statement in Kahler. At most, it is a refinement. It is not inconsistent with the proposition that the ultimate test is the presumed intention. A presumed intention is as it, it is a factor, and sometimes a decisive one, that a particular place is chosen for performance."

9 [1939] A.C. 277, at p. 290: "It is true that in questions relating to the conflict of laws, rules cannot generally be stated in absolute terms but rather as prima facie presumptions. But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy."

10 [1938] A.C. 224, at p. 240: "The proper law of the contract means that law which the English or other Court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary, criteria such as lex loci contractus or lex loci solutionis, and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts. It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case prima facie their intention will be effectuated by the Court. But in most cases, they do not do so. The parties may not have thought of the matter at all. Then the Court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract. No doubt there are certain prima facie rules to which a Court in deciding on any particular contract may turn for assistance, but they are not conclusive. In this branch of law the particular rules can only be stated as prima facie presumptions."

11 Private International Law (7th ed., 1925), s. 212.

12 Supra, footnote 1, at p. 682.
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"how a just and reasonable person would have regarded the problem." Dicey, p. 719, suggests as the most satisfactory formulation of the presumed intention that the proper law is the one with which the transaction has its closest and most real connection. See Falconbridge, Conflict of Laws, 2nd ed., p. 378, where it is pointed out that the:

"'intention' theory seems on its face to be purely subjective in character, but in effect, if the parties to a contract have not expressly selected the proper law, the practice of English Courts has been to ascertain the proper law objectively in the light of the facts and circumstances of each case, including the place of contracting, the place of performance, the places of residence or business of the parties respectively, and the nature and subject matter of the contract."

The most important part of the court's opinion from the point of view of juridical science, and one that will have a great influence on the development of conflict of laws in Canada, or at least in Ontario, deals with the test to be adopted in the field of contracts:13

In seeking to ascertain the intention of the parties as to the proper law of the contract in the case at bar, in the absence of any expressed intention, and in the light of these authorities [English cases, Dicey, Westlake], I think that it should be determined as the one with which the transaction has its closest and most real connection.

At last, judicial approval is given in Canada to a sensible formula for determining, in the absence of expressed intention, the proper law. After placing much reliance on the Kahler case,14 the

13 Ibid., at p. 683.
14 Supra, footnote 7. The court said, supra, footnote 1, at p. 688:

"After considering all the authorities above mentioned, I would regard the Kahler case as the one most closely approximating in its facts the case at bar, for here the parties were both personally present in Austria, entered into the contract there, and performed a substantial part of the contract there. I am of the opinion that upon these facts, the system of law with which the transaction has its closest and most real connection is the law of Austria."

It is surprising to note that in determining whether the contract had its closest and most real connection with the law of Austria or Switzerland, the court found it necessary to rely on precedent. This determination would appear to be a question of fact — and no two factual situations are alike. A contract may have factual links with several countries, each of which has some claim to be considered. There exists such a multiplicity of connecting factors, several of which are usually present in the same case (place where the contract was made, place of performance, domicile, residence or nationality of the parties, situs of the subject matter of the contract, and so on) that it is often difficult to select the most significant, the one which, in turn, will determine the proper law, let alone find a precedent on all fours with the case at bar. This is particularly true when a subjective approach is taken by the court.

The court could as well have relied on many other cases where the law of the place of contracting was held to be the proper law. Actually, although in both cases the law of the place of contracting contained exchange control regulations, the facts giving rise to litigation and the problems involved were quite different. Also, on the whole, there were more factors pointing to the law of Czechoslovakia in the Kahler case than pointing to the law of Austria in Etter v. Kertesz. As to whether the
The court came to the conclusion that the contract had its closest and most real connection with the law of Austria. Dicey's rule that "a contractual obligation may be invalidated or discharged by exchange control legislation if (a) such legislation is part of the proper law of the contract" was applied and the court held in favour of the defendant:

Since by the law of Austria the contract was invalid, void, and being prohibited by positive law, illegal and the promise to repay was thus an illegal consideration, the plaintiff is not entitled to recover upon the contract.

The Ontario Court of Appeal distinguished the *Torni* the *Vita Food* and the *Missouri* cases, to reject the plaintiff's contention that the proper law of the contract was that of Switzerland, where the loan was to be repaid. *Handel v. English Exporter Ltd.* and *Chatenay v. Brazilian Submarine Tel. Co.* were also held to be distinguishable from the present case, as the court refused to

proper law was correctly ascertained in the *Kahler* case, see (1950), 3 Int. & Comp. L.Q. Rev. 255 and Mann, Nazi Spoliation in Czechoslovakia (1950), 13 Mod. L. Rev. 206.

It is submitted that the passage quoted from Lord Simonds' speech and relied upon by the court:

"What then is the proper law of the contract that was made with the Zivnostenska Bk., and that I have assumed to have been renewed with the Bohemian Bk? In my opinion, it was the law of Czechoslovakia. The contract was made in that country between an individual and a corporation both resident there. At the date of the contract and at the material times thereafter the law of Czechoslovakia included a law regulating transactions in foreign exchange substantially the same as that which prevailed at the date of the issue of the writ. At all material times it was illegal for the bank, Zivnostenska or Bohemian, to part with foreign securities in its custody without the consent of the National Bk. or other proper authority, whether those securities were at the date of the contract in fact situate in Czechoslovakia or in some other country. In these circumstances I cannot accede to the contention of the appellant that the proper law of the contract so far as it concerns the delivery of the securities is governed by the law of England or of any other country in which they may chance to be situate."

only shows the process his lordship followed in that case in order to reach the conclusion that the law of Czechoslovakia was the one most closely connected with the contract.

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16 Supra, footnote 1, at p. 688.
18 Supra, footnote 9.
19 *Re Missouri S.S. Co.* (1888), 42 Ch. D. 321.
20 Supra, footnote 1, at p. 685: "I think that the *Torni, Vita Foods* and *Missouri* cases are all distinguishable from the case at bar, first in that on the face of the contracts in question, the express or apparent intention of the parties was that the law of England should apply, and secondly, in that in each case by the foreign law under consideration, the contracts were invalid or void, but not illegal as being prohibited by a positive law,"
22 (1891), 1 Q.B. 79, per Esher M.R., at pp. 82-3.
give weight to a presumption that the parties to a contract would intend to make a valid one: 23

The last two mentioned authorities, in my opinion, are distinguishable from the case at bar on the facts. I do not think that either of these authorities laid down any general rule to the effect that the proper law of a contract as between the laws of two countries, by one of which it would be valid, and by the other it would be invalid, should be presumed to be in the country where the contract would be valid. Under certain circumstances such a consideration might have some weight viewed together with all the other evidence from which intention might be inferred.

Finally, the court was of the opinion that: 24

... the law of Austria relating to foreign exchange, under which the transaction, without the required consent would be illegal, is not in my opinion, a law of such a penal or confiscatory nature that it should be disregarded by the Courts of this country. This law is similar in its effect to the law in force in Canada in 1947, prohibiting dealings in foreign exchange except through certain authorized dealers. 25

The great merit of the decision of the Court of Appeal for Ontario is that it clarifies the doctrine of the proper law of a contract, a doctrine that has been applied on several occasions in Canada. 26 There is, unfortunately, no unanimity in the common-law provinces on the exact meaning of the expression "proper law", especially in the absence of expressed intention. Etler v. Kertesz 27 now stands for the proposition that, in the absence of expressed intention, the system of law with which a contract has its closest and most real connection determines the question whether an obligation has been validly created. 28

23 Supra, footnote 1, at p. 687. Although the court could be criticized for relying so heavily on English authority, this rather mechanical approach can readily be understood in a field that has been called "the most confused subject in the conflict of laws": Morris, The Eclipse of the Lex Solutionis—A Fallacy Exploded (1953), 6 Vand. L. Rev. 505. Breaking new ground should be done carefully.

24 Ibid., at p. 688.


27 Supra, footnote 1.

28 The parties are presumed to have selected the law most substantially connected.

Not all matters affecting a contract should necessarily be governed by one law, although this principle seems to be implied from the general language of the court. See also an earlier decision of the Ontario Court of Appeal, Charron v. Montreal Trust Co., [1958] O.R. 597, to the effect that capacity to contract is governed by the proper law. As Professor Cheshire, Private International Law (5th ed., 1957), p. 205, points out: "The correct inquiry is not—what law governs a contract? It is—What law governs the particular question raised in the instant proceedings? Different questions may well be determinable by different laws." Problems
An important step has been taken in Ontario, which accords with modern theories in the field of conflict of laws, and shows a complete departure from conceptualist theories. With one exception, the proper law of a contract is the law of the country in which it may be regarded as localized. This localization is indicated by the grouping of all the elements, factual or otherwise, in the transaction.

In this context the presumption in favour of the *lex loci contractus* or the *lex loci solutionis* is of little value. The contract must be regarded as a whole. "The proper course is not to begin with a presumption and then inquire whether there are rebutting circumstances, but to fall back on a presumption only when the circumstances, viewed as a whole, fail to reveal with reasonable certainty the law to which the contract naturally belongs." 29

It is unfortunate that the Court of Appeal expressed the doctrine of the proper law in terms of presumed intention, so as to appear to reconcile the subjective and objective tests. How can the court infer from the terms and circumstances of the contract what the common intention of the parties would have been, had they considered the matter at the time when the contract was made? In order to be able to rely on the opinion of Lord Simonds in the Kahler case 30 and that of Lord Wright in Mt. Albert, 41 to the effect that the proper law means the law by which the parties intended or may fairly be presumed to have intended the contract to be governed, the court was forced to impute to the parties an intention to stand by the legal system which, "having regard to the incidence of the connecting factors and of the circumstances generally, the contract appears most properly to belong", 32

It is a myth to regard the opinion of the court as the fulfillment of the common intention of the parties. 33 Reference to their pre-

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30 *Supra*, footnote 7.
31 *Supra*, footnote 10.
32 Cheshire, *op. cit.*, footnote 28, p. 211.
33 *Ibid.*, pp. 209-210. See also Lord Norman in the Kahler case, *supra*, footnote 7, at p. 37: "To ask what law the parties intended to govern the contracts is to ask a question that admits only one artificial answer."
sumed intention was not necessary and detracts from the persuasiveness and logical value of the principle laid down by the court. In most cases, the parties have not thought of the proper law at all. Why must the court, in the words of Lord Wright, impute an intention or determine for the parties what is the proper law which "as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract". A simpler formulation of this subjective approach is that adopted by Singleton L.J. in the Assunzione case, where he says that a presumed intention is "how a just and reasonable person would have regarded the problem".

Let us do away with the criterion of presumed intention and say forthwith that the proper law of a contract is the law which the parties expressly intended to apply (subjective test) or, in the absence of expressed intention, that with which the contract has the most substantial connection (objective test). A rule that combines the expressed intention theory with the law most substantially connected is logical and gives desirable flexibility to the proper law doctrine. It allows for adequate consideration and weighing of all the social and economic factors involved in the situations presented for adjudication. No greater certainty is needed. As Professor Cook points out, the presumed intention theory seems, on the whole, to be a somewhat cumbersome and misleading way of expressing a rule that the law to be applied is that of the place with which the agreement on the whole has a substantial or vital connection. Conflicts specialists will no doubt regret that the court did not discard the presumed intention theory.

What still remains in doubt in Ontario, as well as in the rest of Canada, is the extent to which the parties to a contract may express select as the proper law any law in the world, or whether their choice must be restricted to some law with which the contract is already factually connected. Several judicial dicta seem to admit unrestricted freedom of choice. In the celebrated Vita Food case, Lord Wright thought that it is sufficient for the intention expressed to be "bona fide and legal". He did not believe that con-

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36 Ibid., p. 418.
37 It is important to carefully distinguish the express selection of the proper law to govern a contract as a whole, from the quite different process of incorporation in the contract of certain domestic provisions of a foreign law.
38 Supra, footnote, 10, at p. 290.
connection with the law expressly selected is essential. On the other hand, especially with respect to illegality, it is questionable whether the parties may expressly select a law that makes the contract valid, when it would be invalid by the proper law ascertained objectively. Recently, Upjohn J., in re Claim of Helbert Wagg & Co. Ltd., seemed to have been of the opinion that the courts should not necessarily be bound by the expressed intention of the parties, where the system of law chosen has no real or substantial connection with the contract, looked upon as a whole. Of course, there is no problem if the law expressly selected is also the proper law by application of objective standards.

It has been argued with great force that the preliminary question whether the parties are contractually bound the one to the other must, in the nature of things, be governed by a law independent of their volition, that is, by the proper law ascertained objectively. The parties should not by any contractual provision render intrinsically valid a contract that is intrinsically invalid by its proper law ascertained objectively. The law expressly selected should have some connection with the agreement, otherwise "allowing the parties to choose the law in this regard involves a delegation of sovereign power to private individuals". In other words, the

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39 See also Lord Atkin, in Rex v. International Trustee, [1937] A.C. 500, at p. 529: "Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive."

40 [1956] Ch. 323, at p. 341.

41 Cheshire, op. cit., footnote 28, p. 216, citing Wharton, The Conflict of Laws (3rd ed. by Parmele 1905), Vol. II, p. 900, s. 427e and Boissevain v. Weil, [1949] 1 K.B. 82, at pp. 490-1 where Denning L.J. said: "Notwithstanding what was said in Vita Food Products v. Unus Shipping Co., I do not believe that parties are free to stipulate by what law the validity of their contract is to be determined. Their intention is only one of the factors to be taken into account."

42 See the new approach taken by the American Conflicts Restatement Second, ss. 332, 332a, 332b in Cavers, Re-Restating the Conflict of Laws: The Chapter on Contracts (XXth Century Comparative and Conflict of Laws (1961), p. 349). Also Batiffol, Traité élémentaire de droit international privé (3rd ed., 1959), s. 585, p. 638: "...la loi d'autonomie est celle qui se déduit de la localisation du contrat telle qu'elle résulte de la volonté des parties quant à la répartition territoriale et l'importance respective des différents éléments de leur opération." and s. 570, p. 618: "...Celle-ci [position traditionnelle] consiste à notre sens en ce que la loi applicable au contrat est déterminée par le juge, mais en raison de la volonté des parties quant à la localisation du contrat. L'explication de cette formule appelle le développement des deux propositions qu'elle implique, à savoir: 1° la localisation du contrat dépend de son économie donc de la volonté des parties; 2° l'objet propre de la volonté des parties est la localisation du contrat, non le choix de la loi." See also s. 574, p. 624, "Liberté des parties dans la désignation de la loi applicable"; and Batiffol, Public Policy and the Autonomy of the Parties: Interrelation Between Imperative Legislation and the Doctrine of Party Autonomy (The Conflict of Laws and International Contracts (1949), p. 69).

43 Lorenzen, Validity and Effect of Contracts in the Conflict of Laws
creation of an obligation should not be a matter to be left to the discretion of the parties.\(^{44}\)

In Canada, however, we are still bound by the decision of the Privy Council in the *Vita Food* case,\(^{45}\) and it would seem that the parties are free to submit the validity of their contract to any law of their own choosing, so long as this choice is "bona fide and legal" and there is no reason for avoiding the choice on the ground of public policy. More than twenty years later, it is still not clear what meaning is to be attached to the words "bona fide and legal". Although it could be argued that the choice of the parties is not in good faith, if the transaction in question has no real and substantial connection with the state whose law is selected, this does not appear to be the logical conclusion to be derived from the *Vita Food* case.\(^{46}\) Why should the parties be limited to choosing from the rules of decision found in the system of law in force in one of the legal units with which the agreement has a substantial or some connection?\(^{47}\)

The application of the rule of expressed intent is limited, of course, by the principle that the forum may refuse to apply the stipulated law on the ground that it infringes the forum’s public policy or because the parties could not have achieved the desired result under the foreign law applicable by the objective test. They must not try to evade the *imperative* provisions (that would make the contract illegal or void) of that legal system with which the contract has its most substantial connection and which, for this reason, the court would, in the absence of an expressed intention, have applied.\(^{48}\) Professor Cheshire goes a step further and maintains that "the courts will not allow it [*Vita Food* case] to disturb the principle that the parties are not free to choose the law by which the validity of their contract is to be determined".\(^{49}\) This attitude would seem reasonable if a distinction were made between

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\(^{45}\) Ibid. Although appeals to the Judicial Committee in civil matters were abolished in 1949, one must assume that this "does not affect the authority of its earlier decisions until and unless the Supreme Court of Canada, in its new role of sovereign and ultimate court of appeal for Canada, chooses to depart from them. . . ." Friedmann, *Stare-Decisis at Common Law and Under the Civil Code of Quebec* (1953), 31 Can. Bar Rev. 723, at p. 731.

\(^{46}\) Ibid.

\(^{47}\) In general, for an analysis of the intention theory, see *Cook, op. cit.*, footnote 35, Ch. XV, p. 388 *et seq*.

\(^{48}\) Dicey, *op. cit.*, footnote 4, rule 148, sub rule 1, p. 724 *et seq*

questions of validity and questions of performance or construction. If the modern unitary approach to the proper law of a contract is taken, it appears to be somewhat extreme to limit the parties’ express choice to a law having the most substantial or, for that matter, any contact with the case, when no evasion is contemplated.

That there must be some limits to the choice of law by the parties is admitted by all, including the Judicial Committee. The courts should not help the parties to evade the clear and strong public policy of any of the states connected with the agreement or at least that with which it is most substantially connected.50

It would seem reasonable to conclude that the contract should have some connection with the chosen law, and that the application of this law should not be contrary to a fundamental policy of the state that would be the state of the governing law in the absence of an express choice by the parties. Should the law chosen run counter to the law of another state which, but for the parties’ choice, would possess some colour of having the most significant relationship with the contract, the parties favoured by the latter law could always compel the court to decide whether the state’s colourable claim is valid and, if so, whether its law embodies a fundamental policy. Otherwise, there seems to be no theoretical or practical objection to giving effect to the expressed intention of the parties when the choice is limited to the law of some jurisdiction with which the agreement has some connection, whether substantial or not, and the public policy of the forum or that of the legal system most substantially connected does not indicate a contrary decision. To allow absolute freedom of choice would place a possibly inconvenient burden on the forum and perhaps too often lead to a clash with the public policy of the states having a direct interest in the agreement.51

The other point, deserving attention here, arises from a discussion by the court in Etler v. Kertesz of the Handel52 and Chatenay cases,53 which were cited by the plaintiff as supporting the view that “the proper law of a contract as between the laws of two coun-

50 For instance, where, by the law most substantially connected with the agreement entered into, the making of that kind of agreement is a criminal offence, the parties may not make it valid by choosing a law which does not forbid such an agreement. Note that in the Vita Food case, supra, footnote 9, the law of Newfoundland was said not to “... make the contract illegal so as to nullify the contract. There was no sufficient ground for refusing to give effect to the express or implied intention of the parties that the proper or substantive law of the contract, that is, the law by which it was to be enforced and governed should be English law.” Per Lord Wright, at p. 299.
51 Cook, op. cit., footnote 25, p. 418.
52 Supra, footnote 27.
53 Supra, footnote 28.
tries, by one of which it would be valid, and by the other it would be invalid, should be presumed to be in the country where the contract would be valid". The Court of Appeal was of the opinion that these cases did not lay down such a wide proposition and were distinguishable from the present case. Porter C.J.O. was careful, however, to point out that "under certain circumstances, such a consideration might have some weight viewed together with all the other evidence from which the intention might be inferred". In fact, one would be tempted to say that the circumstances were such as to make the *lex validitatis* (Switzerland) the proper law of the contract.

It has often been said that the courts may incline towards applying a system of law that validates the contract, on the ground that the parties cannot be assumed to have intended the contract to be governed by a law making it invalid. If one adopts the approach taken by the Ontario Court of Appeal, that it is the law presumably intended by the parties that must be ascertained and applied, one could not imagine the parties ever selecting a law that would make their contract illegal and void. How could the parties be presumed to have contemplated a law that would defeat their engagements? Only on a purely objective determination of the proper law would such a consideration be irrelevant.

The application of the *lex validitatis* is not without eminent supporters, both ancient and modern. In the United States of America, an example is given of the application of the *lex validitatis* in the Kahler case, supra, footnote 7, per Lord MacDermott, at p. 41: "Why should he intend that his right to deal with his securities abroad should be regulated by those restrictions? I can see no ground for attributing any such intention to him. On the contrary, it is I think but reasonable to assume that his confidence and hope in regard to these securities must have rested on the laws of the countries where they were placed and where as yet there was freedom and peace."

As early as 1879, Roger (American Interstate Law (1879), p. 50) wrote that when the validity of a contract involves the laws of two or more states, and it is not expressly apparent which the parties had in view, then that law which is most favourable to validity will be regarded as the law of the contract. See also Savigny to the effect that "... it is certainly not to be presumed that the parties intended to subject themselves to a local law entirely opposed to their purpose." The Conflict of Laws (2nd ed. rev., Guthrie trans., 1880), pp. 223-4.

Wharton was also of the opinion that: "It is always to be presumed that persons agree effectually to do that which they contract; and if so, this agreement becomes part of the contract, overriding such local law as does not rest on a ground distinctly moral or political. And when there is a conflict of possible applicatory laws, the parties are presumed to have made part of their agreement that law which is most favourable to its performance." (op. cit., footnote 41, p. 945, s. 429); and see Lorenzen, Selected Articles on the Conflict of Laws (1947), pp. 298-299; Stumberg, Conflict of Laws (2nd ed., 1951), pp. 225, 237-240; Cavers, A Critique of the Choice of Law Problem (1933), 47 Harv. L. Rev. 173, at p. 190.
America, Professor Ehrenzweig states:\textsuperscript{58}

The principle that a contract will be upheld whenever possible — the \textit{favor negocii} — is well established in the municipal laws of all countries. Whenever the court’s choice is between the application of an invalidating rule and a validating rule, it will apply the latter. The \textit{lex validitatis} in conflict cases is only an application of this almost self-evident postulate. . . .

and he adds:

Once it is conceded that a forum, in enforcing a foreign contract, is not limited to enforcing rights vested under the foreign law, and that courts will endeavour to give effect to the parties’ intention wherever possible, the invalidation of any foreign contract that is valid under the \textit{lex fori} should be expected to occur only in very exceptional circumstances.

Courts have often applied the \textit{lex validitatis} in an unorthodox fashion and without openly acknowledging the fact, by selecting that law, among the possible laws applicable, under which the contract could be held valid in accordance with the parties’ presumed intention. It is in this way that one could interpret the passages quoted from the two cases cited by the plaintiff in \textit{Eiter v. Kertesz}.\textsuperscript{69}

An examination of the facts of \textit{Eiter v. Kertesz} reveals the following points of contact with Austrian law: the loan was made in Vienna and was illegal there, and the parties “at times resided and worked in Vienna”.\textsuperscript{60} The claim to the application of Swiss law was based on the fact that the loan was to be repaid in Zurich and was valid by the law of that country. If we look at the other elements present, we find that the loan was in United States dollars to be repaid in the same currency. Austrian currency was never involved in the transaction,\textsuperscript{61} and the dollars had been obtained

\textsuperscript{58} Contracts in the Conflict of Laws. Part One Validity (1959), 59 Col. L. Rev. 973, at pp. 992, 1021, footnotes omitted.

\textsuperscript{59} \textit{Hendel v. English Exporters Ltd.}, supra, footnote 21, and \textit{Chatenay v. Brazilian Submarine Tel. Co.}, supra, footnote 22. The Missouri case, supra, footnote 19, could also be put in this category. And see \textit{Hamlyn v. Talisker Distillery}, [1894] A.C. 202. In the British Columbia case of \textit{Rosencrantz v. Union Contractors} (1960), 31 W.W.R. 597, 23 D.L.R. (2d) 473 (comment in (1961), 39 Can. Bar Rev. 93), the \textit{lex validitatis} seems to have been rejected. Perhaps cases involving illegality should be subject to considerations different from those obtaining when other problems are involved.

\textsuperscript{60} Dates are not disclosed, \textit{supra}, footnote 1, p. 675.

\textsuperscript{61} This fact could indicate that the parties intended the law of the United States to govern the contract.

It is interesting to note that no attempt was made to invoke the \textit{lex fori} (Canada) in order to prevent the enforcement of a contract made in violation of the law of a member of the International Monetary Fund. It is well established that, whatever their proper law and wherever they are to be performed, exchange contracts are unenforceable if they involve
by the plaintiff before coming to Austria. The opinion of the court does not disclose the nationality of the parties, which one may assume to be Hungarian, nor their actual residence and place of business at the time of the loan. Furthermore, the defendant was about to leave Austria for the United States of America. It seems, therefore, reasonable to conclude that the connection with the law of Austria is not as decisive as it might first appear to be. The result would have been just as convincing if the court had found that the proper law of the contract was that of Switzerland. In fact, what the court did was to apply the presumption in favour of the lex loci contractus and to justify it on the ground that it was most closely connected with the transaction. Support for the conclusion reached by the court rests on the fact that the validity of the contract was at stake. The court must also have felt disinclined to apply the law of Switzerland, which validated the contract, on the ground that, to do so, would condone the violation of the exchange control regulations of Austria, a friendly country, when these regulations were neither penal nor confiscatory, and thereby possibly jeopardize the good relations existing between Canada and Austria.

Professor Ehrenzweig is forced to recognize that, in practice, the currency of any member of the International Monetary Fund and if they are contrary to the exchange control regulations of any member. Dicey, op. cit., footnote 4, rule 178. Canada and Austria are members of the Fund and article VIII (2)(b) which provides that: "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member . . .", is part of the law of Canada (The Bretton Woods Agreement Act, S.C., 1945, c. 11, now R.S.C., 1952, c. 19).

Thus, as far as Canadian law is concerned, respect for foreign exchange control restrictions is statutory. Article VIII (2)(b) applies, however, only where the regulations are those of the member whose currency is "involved", which was not the case here. See "Interpretation of Art. VIII (2)(b) of the International Monetary Fund Agreement by the Board of Executive Directors of the International Monetary Fund (made pursuant to Art. XVIII)", Annual Report of the International Monetary Fund (1949), p. 82 et seq. See also (1954), 3 Int. & Comp. L. Q. Rev. 262: Are these rules of interpretation binding on Canadian courts asked to deal with a Canadian statute? By finding that the law of Austria was the proper law, the court avoided the difficulty. Austrian exchange control legislation was applied by virtue of a conflict-of-laws rule of the forum and not by reason of membership in the International Monetary Fund. It could be argued that the court should have regarded the Austrian restrictions creating illegality as a temporary expedient to deal with an emergency situation. Such restrictions would not affect the substantive obligations to pay but merely defer the date of payment.

The loan could not, therefore, have done any harm to the Austrian economy (except perhaps in the sense that, if the plaintiff had exchanged his dollars for Austrian currency, he would have strengthened the schilling).
the courts have been inclined to give effect to the invalidating policies of foreign countries. He says:

"Comity of nations" while nearly defunct as a general theory has been quite effective in this field with regard to certain kinds of contracts. Among the cases most frequently arising are those involving the currency laws of other nations, and Lord Mansfield's famous dictum that "foreign revenue laws" will not be noticed has been significantly counteracted. Whether because of a certain international solidarity in financial matters, or because of special international agreements, American courts seem to be willing to strike down contracts concluded in violation of the currency laws of foreign countries, even when the political relations with the foreign country are not conducive to comity. Similarly, many cases in which English courts have purported to apply the "proper law" for the purpose of invalidating a contract involved currency laws or similar regulatory measures of foreign countries . . .

Even in this field, however, the Rule of Validation prevails when governmental interests recede. This is true, for instance, when neither party owes allegiance to the invalidating law, or when a domestic contact with the transaction, such as the forum is being the place of performance, creates a competing domestic private interest. Principally, the forum will not permit a debtor to hide behind foreign currency laws to escape a morally cogent obligation.  

From the point of view of conflicts theory, there is no doubt that Etler v. Kertesz is of great importance. In spite of its deficiencies, mainly its nominal adherence to the fiction of presumed intent, it will certainly rank among the leading cases in the field, and it is hoped that, with some qualifications, it will be followed elsewhere in Canada.

J.-G.C.

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64 Italics mine.  
65 Supra, footnote 1.  
66 The court should be commended for its liberal attitude as to who may be a competent witness. The decision is also of value on the question of enforcement of Quebec judgments in Ontario, and the doctrine of identity where the foreign law has been alleged but not proved.  