

THE CONFLICT OF LAWS OF GERMANY— CONTRACTS

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I. IN GENERAL

A. *Capacity*

THE validity of contracts is not governed in Germany by a unitary rule. With respect to capacity and formalities the Introductory Law to the Civil Code lays down general provisions which are applicable to contracts. Article 7, paragraph 1, of this law provides that the capacity to do juristic acts shall be governed by the national law. The capacity to contract is to be determined, therefore, with reference to the national law of each of the contracting parties. The rule is laid down generally and controls irrespective of whether the party in question is a German or a foreigner.

The national law determines whether a person is a minor¹ and whether a married woman can contract without authorization from her husband. It determines also the method, if any, by which the capacity of a person under disability can be supplemented, as, for example, by authorization from his legal representative or a court of guardianship.² The national law applies likewise to disabilities resulting from judicial action, such as the appointment of a guardian for a spendthrift; for, contrary to Anglo-American law, the effect of such an appointment is ubiquitous in its operation in continental countries. This assumes, of course, that the appointment of the guardian was validly made in accordance with the German principles of the conflict of laws.

If a person is not a subject of any country at the time, the laws of the country of which he was last a subject control; if he was not previously a subject of any country, the law of his domicile will govern capacity; and, in the absence of a domicile, the law of his residence is consulted.³ In case of double nationality the German law will no doubt control if one of the na-

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¹ It has been held, however, that the acts necessary for the ratification of a contract entered into by a minor are determined not by his personal law, but by the law of the place of performance. RG, May 24, 1892, 29 RG 137. (For explanation of the abbreviations used herein, see (1929) 39 YALE L. J. 804).

² See RG, Feb. 9, 1925, 110 RG 173.

³ INTRODUCTORY LAW, art. 29.

tionalities in question is the German. If both are foreign, it is uncertain what the German courts will decide.

If a person is a citizen of a country whose law is not unified, the law applicable will be the one prescribed by the national legislation. In the event that the national legislation is silent on the subject, the law of the domicil or of the last domicil in the country will be applied.⁴

When an alien who is of full age according to his national law, or has the legal status of a person of full age, becomes the subject of the German Republic, he retains the legal status of a person of full age, even though he would not be of full age under German law.⁵ The Code refers only to the acquisition of a German nationality; it is not certain whether the courts will interpret the provision as embodying a general rule which will be applicable when a German acquires a foreign nationality or a foreigner acquires the nationality of another foreign country. It has been suggested that the question might depend upon the new national law, at least where a foreigner acquires another foreign nationality.

An important qualification of the rule that the national law governs capacity is to be found in paragraph 3 of Article 7 of the Introductory Law. This paragraph provides that if an alien enters into a juristic act within the Republic for which he is incapable or of limited capacity under his national law, he shall be deemed capable of entering into the juristic act in so far as he would be capable under the local German law. Article 84 of the Bills of Exchange Act of 1848 had already contained a similar provision. According to this qualification, a foreign minor whose national law makes him of age at 25 would be bound by his contracts in Germany after he is 21, and a foreign married woman who cannot contract under her national law without the authorization of her husband would have capacity to bind herself by contract in Germany in the absence of any such authorization. In the same manner, if the local German law should give to a person placed under guardianship on account of prodigality greater contractual power than the national law, the extent of the foreigner's capacity to contract in Germany would be subject to the local German law. The qualification exists only when the foreigner is under a disability by his national law; if he has full legal capacity he will be bound by any contract made in Germany, notwithstanding the fact that under the local German law he would have no such capacity. This

⁴ In the absence of such a domicil or former domicil it has been suggested that it might be the law of the territorial division in which the capitol of the country is located. If the party in question is an actual resident of the country, the law of the place of his residence may be chosen.

⁵ INTRODUCTORY LAW, art. 7, par. 2.

departure from the law of nationality in determining capacity was adopted in the interest of German commercial security. It is not limited in its application, however, by these requirements, for the local German law will control even though the incapacity of the other party under the foreign law is known or the contract is made between two foreigners having the same nationality.

The German law understands Article 7, paragraph 1, of the Introductory Law to the Civil Code in the *renvoi* sense.⁶ Hence, the capacity of a Dane domiciled in Germany and entering into a contract in some other country will be determined with reference to Danish law inclusive of its rules of the conflict of laws, and, as the Danish courts would apply German law as the *lex domicilii*, the German courts would do so.

If the application of a foreign disability existing under the national law should be deemed *contra bonos mores*, or contrary to the object of a German law, such disability would, of course, be disregarded.

B. Formalities

Article 11 of the Introductory Law to the Civil Code provides:

“The form of a juristic act is determined by the laws which govern the legal relation forming the object of the juristic act. However, compliance with the laws of the place where the juristic act is entered into is sufficient.

The provision of paragraph one, sentence two, does not apply to a juristic act whereby a right to a thing is created or whereby such a right is disposed of.”

In continental countries a legal transaction is generally regarded as well executed as to formalities if it satisfies the requirements of the state where the transaction took place. This rule—often expressed as *locus regit actum*—was established on grounds of convenience in the early centuries during which the rules of the conflict of laws developed. In the absence of a positive legislative provision it is often a debatable question whether the rule has become mandatory or whether it has retained its original optional character. If considered optional, dispute exists also with respect to the other alternative or alternatives. In Germany the matter has been set at rest by the article above quoted, according to which a legal transaction is valid as to formalities if it satisfies either the law governing the validity of the transaction in other respects, or the law of the place where the transaction was entered into.

It is not always easy to draw the line of demarcation between “formalities” within the meaning of Article 11 and “capacity”

⁶ See INTRODUCTORY LAW, art. 27.

or some other substantive requirement. Within the field of contracts, however, this problem is not apt to arise in a serious manner. The formal requirement will generally be either a written or a notarial or judicial act. It may have reference also to the matter of witnesses or to the proper method of signing.⁷

The provision that the law of the place of execution may be satisfied gives rise to no serious difficulty. When the contract is made by correspondence, the Imperial Court has held that it is valid if it satisfies the law of the place where the offer was accepted.⁸ When the law of the place of execution is not satisfied, the contract will be valid if it complies with the law of the state governing the validity of contracts in general. In German law the courts generally hold such law to be that of the place of performance, unless the parties have expressly agreed upon some other law, or the intention to submit the contract to a particular law appears from the surrounding circumstances of the case.⁹

The German law of contracts has no provisions corresponding to the English Statute of Frauds. If a contract were made in England without satisfying the English statute, it would be valid, of course, if from the point of view of the German conflict of laws the law governing the validity of the contract apart from capacity and formalities did not require a writing. Suppose, however, that such law regarded the contract as invalid in the absence of a writing; would the German courts enforce it on the theory accepted by the English courts, that the requirement of a written memorandum is procedural? There is no decision on this point by the German courts, but it may be doubted whether they would sustain the contract under such circumstances.

According to Section 313 of the German Civil Code, a contract whereby one party binds itself to transfer ownership of a piece of land requires judicial or notarial authentication, but a contract concluded without the observance of this form becomes valid in its entirety if conveyance by agreement and entry in the land registry have taken place. Suppose that a contract is made in Germany to convey land in a foreign country, or that a contract is made in a foreign country to convey land situated in Germany; must the contract be authenticated before a notary or judge before it will have binding effect? The German law makes a sharp distinction between "real" (in the sense of "prop-

⁷ OLG Hamburg, Oct. 21, 1904, HGZ 1904, Hptbl. no. 141.

⁸ RG, Feb. 12, 1906, 62 RG 379. It has been urged, however, that the contract should satisfy the form requirements of both the law of the offeror and that of the offeree. WALKER, INTERNATIONALES PRIVATRECHT (4th ed. 1926) 202.

⁹ RG, Apr. 19, 1910, 73 RG 379; Nov. 27, 1908, Recht 1909, No. 295.

erty") rights and "obligatory" (in the sense of "contract") rights. Paragraph 2 of Article 11 of the Introductory Law to the German Civil Code, to the effect that the law of the place of execution shall not apply to contracts "whereby a right to a thing is created or whereby such a right is disposed of," has been held by the Imperial Court to have reference to "property" rights only. Hence a contract for the sale of land is subject to the ordinary rules governing the validity of contracts in formal respects. A contract made in Germany for the sale of land in a foreign country will create, therefore, obligatory rights if it is executed either in the form prescribed by Section 313 of the German Civil Code or by that prescribed by the law of the country in which the property is situated.¹⁰ Similarly, a contract executed abroad for the sale of German land is valid if it meets the requirements of the law of the place of execution or those of Section 133 of the German Civil Code.¹¹ In accordance with this view the Kammergericht of Berlin has concluded that an oral power of attorney, executed in a country in which contracts relating to land need not be in writing, is sufficient as to land in Germany to enable an agent to bind his principal by a contract of sale.¹²

A special provision relating to the formal requirements of contracts is to be found in Article 85 of the Bills of Exchange Act of 1848, which will be discussed in connection with the subject of Bills and Notes.

C. Law Governing Contracts Apart from Capacity and Formalities

(1) *Historical Background.* The prevailing view in Germany, prior to the adoption of the German Civil Code, supported the view that in the absence of an express or implied declaration of intention of the parties the law of the place of performance should control the contract. In so doing they followed the view of Savigny who regarded the place of performance as the "seat" of the obligation and thus the proper forum.¹³

¹⁰ RG, Mar. 3, 1906, 63 RG 18.

¹¹ RG, March 13, 1911, 79 RG 78.

¹² KG, Mar. 19, 1925, 44 OLG 152. The power of attorney was actually authenticated by a notary.

¹³ Savigny suggested the application of the following rules as establishing the law of the place of performance: (1) The law of the designated place of performance. (2) In the absence of a designated place of performance, and if the obligation arose from a continuous business on the debtor's part, the law of the place where such business has its permanent seat. (3) If the obligation arose out of a single transaction on the part of the debtor at the debtor's domicile, the law of such domicile. A subsequent change of domicile would not affect the place of performance or the law applicable. (4) If the obligation arose out of a single transaction on the

The First Draft of the provisions concerning the conflict of laws submitted in connection with the preparation of the Civil Code by the Reporter, Gebhard, provided as follows:

"Obligations arising out of contracts are governed by the law of the place at which the debtor at the time of the conclusion of the contract had his domicile, if it does not appear from the circumstances that the contracting parties must have reasonably presupposed the application of some other law. If both contracting parties are debtors, each may demand that his obligation shall be governed by the law determining the obligation of the other."¹⁴

In the Second Draft is found the following provision:

"Obligations arising out of juristic acts *inter vivos* are governed by the law of the place at which the debtor had his domicile at the time of such acts, and in the absence of a domicile, his residence. If the circumstances under which a contract was made disclose the fact that the contracting parties must have presupposed the application of some other law, the law of such place shall control.

If obligations arise out of a contract with respect to both parties, and if they are governed by different laws, each may demand that his obligation shall be determined with reference to the law governing the obligation of the other."¹⁵

In its final form the proposed provision read as follows:

"The obligation arising out of a juristic act *inter vivos* is governed by the law of the state in which the juristic act took place.

If it appears from the circumstances that the parties must have had in view the application of the laws of another state, the laws of such state shall apply."¹⁶

This provision, however, was dropped in the end and the matter left to the courts without any legislative guidance.

(2) *Meaning of the Place of Performance.* Where the parties have not agreed expressly or by implication upon a place of performance, the law must step in to define that term. The German courts regard it as a question preliminary to the application of the rules of the conflict of laws with respect to which only the

part of the debtor away from his domicile but under circumstances which raise the presumption that it is to be performed there, the law of such place.

(5) If the case does not fall within any of the above classes, the law of the debtor's domicile. SAVIGNY, CONFLICT OF LAWS (Guthrie's transl. 1869) 154, 157-161.

¹⁴ § 11. 1 MUGDAN, DIE GESAMMTEN MATERIALIEN ZUM BÜRGERLICHEN GESETZBUCH FÜR DAS DEUTSCHE REICH (1899) 275-276n.

¹⁵ § 11. 1 MUGDAN, *op. cit. supra* note 14, at 276n.

¹⁶ CIVIL CODE, § 2366 (Second Revised Draft); 1 MUGDAN, *op. cit. supra* note 14, at xlvi.

law of the forum can control.¹⁷ Section 269 of the Civil Code provides:

"If a place for performance is neither fixed nor to be inferred from the circumstances, for example, from the nature of the obligation, performance shall be effected in the place where the debtor had his domicile at the time the obligation arose.

If the obligation arose in the conduct of the debtor's industrial operations, and if the debtor's industry is located in another place, such place is substituted for the domicile.

It is not to be inferred from the mere circumstance that the debtor has assumed the expense of transmittal, that the place to which transmittal is required to be made is the place of performance."

In Wang's translation of the German Code the following note to Section 269 may be found:

"The place of performance is determined: first, according to the intention of the parties (*cf.* Sections 133, 157, 242); secondly, according to the special provisions of law which are applicable to the particular case (for example, Sections 697, 700 811, 1194, Article 92 of the Introductory Act); thirdly, according to the circumstances, especially according to the nature of the obligation (*cf.* Sections 133, 157, 242); and lastly, according to Section 269."

(3) *Formation of Contracts. (a) Offer and Acceptance.*

Questions as to whether a contract is concluded by offer and acceptance, whether it is void or can be avoided on account of mistake, or whether it is void because of illegality, have given rise to many different opinions not only among writers on the conflict of laws but also in the decisions. As regards the state courts, there is no substantial unanimity of view. One has ruled that the personal law of the debtor should control the question whether a sale contract had been concluded;¹⁸ another has adopted Meili's view, which would apply concurrently the law of the domicile of each contracting party;¹⁹ still another has looked to the law of the place of contracting.²⁰ Others have applied the law governing the effect of contracts in general. The Appellate Court of Hamburg, for example, in a case in which the parties agreed that claims on an insurance policy should be "settled and paid in Hamburg" and that the parties should "submit to Hamburg jurisdiction," held that the parties had submitted to German law, which law should determine also whether a binding contract of insurance or merely a preliminary

¹⁷ RG, March 11, 1919, 95 RG 164; Oct. 3, 1923, 108 RG 241.

¹⁸ OLG Jena, Oct. 14, 1908, DJZ 1910, 151.

¹⁹ OLG Augsburg, Apr. 22, 1914, Leipz. Z. 1914, 1138.

²⁰ OLG Bamberg, March 14, 1908, Bayr. Z. 1909, 29.

contract had been concluded.²¹ The highest court of Prussia has likewise applied the law governing the effect of contracts,²² and the Imperial Court has consistently adhered to the same point of view. In one case in the latter court the contract arose through correspondence between England and Germany. The lower court having found that the parties had contracted with reference to German law, the Imperial Court held that German law would therefore determine also the question whether a contract had been formed.²³ In another case the parties had agreed that Zurich should be the place of performance for both contracting parties. The Imperial Court held that the lower court was justified in inferring from such facts an intention of the parties that Swiss law should control the contract and concluded therefrom that Swiss law should determine whether a contract had been concluded.²⁴

In a case decided in 1925 the facts were as follows: A Swedish company, then dissolved, had been agent for a number of insurance companies, including the defendant. The plaintiff alleged that it had entered into various contracts for reinsurance with the defendant in 1920 through the Swedish company as agent. The defendant denied that it had entered into contractual relations with the plaintiff. The lower court dismissed the suit, having found that no contract had been concluded. On this issue the Imperial Court stated:

"The lower court did not have to examine the question whether Swedish law should have been applied by the court below. Plaintiff alleged that it entered into a contract with the defendant. If this contract had come into existence, German law would have been applicable because it would have been a contract by a German insurance company to be performed in Germany. The court below was therefore right in basing its decision on German law."²⁵

In a still later case the Imperial Court decided that the question whether a contract had been *concluded* was to be determined by German law in accordance with the presumed intention of the parties, the negotiation between the plaintiff acting for an English firm and the German insurance company having taken place in Germany through a German insurance broker. The insurance policy stated: "Co-insurance of £9000 at the Standard Marine Insurance Company, Ltd., Liverpool, part of £18,000 limit on any steamer. Being a co-insurance applying to policy or policies of the Standard Marine Insurance Com-

²¹ OLG Hamburg, June 14, 1901, 11 Niemeyer 262.

²² 3 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT (1929) 775, n. 2.

²³ RG, Jan. 3, 1911, 55 Gruchot 880.

²⁴ RG, May 15, 1917, Warneyer 1917, No. 173.

²⁵ RG, Jan. 16, 1925, 34 Niemeyer 427.

pany, Ltd., Liverpool, subject to the same clauses and conditions as same and to pay as may be paid thereon." The court concluded, however, that inasmuch as the German contract was dependent upon an English contract, its *meaning* and *effect* should be governed by English law.²⁶

(b) *Mistake*. In like manner it has been held that the question whether a German buyer could rescind his contract on the ground of mistake was governed by the law of Austria, he having agreed to perform in Vienna.²⁷ Here again the law of the place of performance of an alleged contract was chosen before it was certain that a contract had been formed.

(c) *Duress*. Sections 123 and 124 of the German Civil Code, relating to the effect of unlawful threats inducing the formation of contracts, are regarded as so fundamental that no foreign law giving less effect to such threats will be enforced, it being contrary to the object of a German law.²⁸

(d) *Illegality*. The illegality of a contract is governed by the law of the place of performance. If the transaction is valid by that law, it will not be enforced in Germany if the application of the foreign law would be *contra bonos mores* or contrary to the object of a German law.²⁹

D. Refusal to Enforce Contracts Valid by the Proper Law

In addition to the cases falling under "duress" and "illegality," the following situations have occurred in which a contract valid by the proper foreign law will not be enforced if deemed *contra bonos mores* or contrary to the object of a German law.³⁰ Where a check was given in England for a stock exchange transaction in Liverpool, which was regarded as a gambling transaction from the standpoint of German law, it was held that recovery on the check must be denied, even if the transaction were valid according to English law.³¹ Again, where a claim arose out of a con-

²⁶ RG, Dec. 4, 1926, JW 1927, 693. The attitude of the Imperial Court with respect to this problem has been severely criticized. Much stress has been laid upon the anomaly of determining the existence and validity of a contract by the law of the place where it is to be performed, when by that law no contract may have come into existence. Furthermore, difficulties will arise where a contract is to be performed in several places. Which place of performance is to decide in such case whether there was an offer and an acceptance or whether the agreement had reference to a lawful object? The decisions of the courts leave this question undecided. An older decision of the Imperial Court applied the law of the domicile of the parties. RG, July 1, 1887, 5 Bolze, No. 5.

²⁷ RG, Mar. 11, 1919, 95 RG 164; see also Dec. 15, 1911, 78 RG 55; Dec. 5, 1902, 53 RG 138; Dec. 4, 1926, JW 1927, 693.

²⁸ Art. 30. RG, Oct. 30, 1926, 39 Niemeyer 276.

²⁹ RG, Dec. 19, 1923, JW 1924, 672.

³⁰ INTRODUCTORY LAW, art. 30.

³¹ OLG Dresden, Mar. 31, 1913; Sächs. Arch. 1914, 37. To the same effect,

tract governed by Swiss law and was not subject to any statute of limitations by that law, enforcement was denied under Article 30 of the Introductory Law to the Civil Code as being contrary to the object of a German law.³² Similarly, a stipulation for a penal liability contrary to Section 343 of the German Civil Code will not be enforced.³³ The courts admit that no general test can be given to determine whether Article 30 may be invoked, it being necessary to examine each case in the light of its facts.³⁴

E. *Nature of Obligation*

Here the actual intention of the parties, expressed or derived from the facts of the case, has, of course, full sway. In the absence of proof concerning actual intention the courts often apply the law of the place with reference to which the parties, as reasonable men, would have contracted had their attention been called to the question. In a very large number of cases, however, the law of the place of performance has been applied. In bilateral contracts the duties of each party have been determined with reference to the law of the place where his individual obligation was to be performed. Nevertheless, insofar as a sufficient basis for the application of a unitary law can be found, that law will govern the obligations of all parties.

F. *Interpretation*

To the extent that the intention of the parties can be ascertained, such intention controls. In the absence of evidence of intention, the law governing the obligations arising out of contracts in general, *i.e.*, the law of the place of performance, is said to govern.³⁵

RG, Apr. 1, 1896, 37 RG 266. The same has likewise been held with respect to obligations arising out of the sale of lottery tickets, the contract being valid by the law of the place where it was made and to be performed. RG, July 12, 1881, 5 RG 124.

³² RG, Dec. 19, 1922, 106 RG 82.

³³ OLG Hamburg, Dec. 23, 1902, 59 SA 63.

CIVIL CODE, § 343 reads: "If a forfeited penalty is disproportionately high, it may be reduced to a reasonable amount by judicial decree obtained by the debtor. In the determination of reasonableness every legitimate interest of the creditor, not merely his property interest, shall be taken into consideration. After payment of the penalty the claim for reduction is barred.

The same rule applies also, apart from the cases provided for by §§ 339, 342, if a person promises a penalty for the case of his doing or forbearing to do some act."

³⁴ RG, Dec. 14, 1927, 119 RG 259. Before the adoption of the Civil Code a foreign law was said to be inapplicable if it conflicted with a law of public order or with a German law having a mandatory character. In the decision of the Imperial Court just cited it is stated, however, that Article 30 is not the equivalent of either of these two phrases.

³⁵ RG, Apr. 6, 1911, 24 Niemeyer 305.

G. *Matters Relating to Performance*

In view of the fact that in the absence of an intention of the parties to the contrary the law of the place of performance governs contractual obligations in general, it naturally controls everything relating to performance, whether or not concerning the mode of performance. The law of the place where a particular party agreed to perform determines, therefore, both whether he is in default and the legal consequences resulting from his default, so far as they affect his obligation.³⁶ So far as they concern the obligation of the other contracting party, the law of the place of performance of that party's obligation controls.³⁷

H. *Assignment of Contracts*

Whether an obligation is assignable depends upon the law governing the obligation to be assigned, *i.e.*, the law of the place where the debtor agreed to perform.³⁸ The same law controls the question whether the assignment is binding upon a debtor without notification or other formality.³⁹ As between the assignor and the assignee the formalities required are governed by the general rule laid down in Article 11 of the Introductory Law to the Civil Code, according to which it is sufficient that either the law governing the legal transaction or that of the place where the assignment was made is satisfied.⁴⁰

I. *Discharge of Contracts*

(1) *Rescission.* Substantial breach of a contract by one party does not as a rule excuse the other from performance. Under certain conditions, however, such other party is privileged to "rescind" the contract. In Germany this may be done by a mere declaration to the party guilty of the breach, whereas under French law a judicial decree is necessary. Whether or not such a decree is required is determined by the law governing the obligation of him who seeks to rescind, *i.e.*, by the law of the place where he has agreed to perform.⁴¹

(2) *Release and Novation.* Whether an obligation has been discharged by release or novation is determined by the law of the

³⁶ ROHG, Dec. 6, 1878, 24 ROHG 388 (moratory interest).

³⁷ RG, Sept. 20, 1910, 55 Gruchot 110 (seller's obligation to pay damages); Apr. 19, 1910, 73 RG 379 (seller's obligation to pay damages); Dec. 7, 1921, 30 Niemeyer 253 (mode of payment); Sept. 29, 1919, 96 RG 270.

³⁸ OLG Hamburg, Dec. 15, 1900, 56 SA 260; RG, June 2, 1908, 18 Niemeyer 449.

³⁹ RG, Mar. 19, 1907, 65 RG 357; Dec. 19, 1902, 53 RG 198. KG, June 22, 1906, 13 OLG 182.

⁴⁰ RG, June 2, 1908, 18 Niemeyer 449.

⁴¹ OLG Karlsruhe, Apr. 15, 1903, 13 Niemeyer 412.

place of performance of the obligation. The requirements of form are controlled by Article 11 of the Introductory Law to the Civil Code.⁴² Whether the novation is valid in other respects is determined by the ordinary rules governing contracts.

(3) *Judicial Deposit*. In some countries a debt may be discharged by payment into court. The question as to what constitutes a judicial deposit and under what circumstances such a deposit is a valid discharge is controlled by the law of the place where the obligation was to be performed.⁴³

(4) *Set-Off*. Compensation or set-off is regarded as an institution of the civil law and not of procedure. From the standpoint of the conflict of laws it is controlled, therefore, not by the *lex fori*, but by the law governing obligations, *i.e.*, the law of the place of performance of the defendant's obligation.⁴⁴

(5) *Statutes of Limitation*. Statutes of limitation are held to go to the substance rather than to procedure; hence the law of the forum is not applicable. In the absence of a declaration of intention to the contrary, the law of the place of performance controls.⁴⁵ As stated above, if the law governing a foreign obligation does not bar the action at all by any statute of limitation, the German courts will decline to apply the foreign law on the ground that its application would be contrary to the object of the German law.⁴⁶

(6) *Bankruptcy*. A foreign discharge in bankruptcy or a foreign composition requiring confirmation by the bankruptcy court has no effect in Germany, even though the creditor participated in the foreign bankruptcy proceedings and perhaps voted for the discharge.⁴⁷ A bankruptcy proceeding can be instituted in Germany with respect to a debtor who is a foreigner only if he is domiciled in Germany or has an independent branch

⁴² Concerning the law prior to the adoption of the Civil Code, see RG, Mar. 15, 1900, 46 RG 230.

⁴³ OLG Stettin, Dec. 1, 1925, JW 1926, 385.

⁴⁴ RG, Nov. 27, 1906, 18 Niemeyer 549; OLG Augsburg, Nov. 6, 1917, 36 OLG 105 (both of which decisions speak of the "personal" law of the defendant); OLG Frankfurt a/M, Apr. 27, 1923, JW 1924, 715; RG, Mar. 17, 1914, Leipz. Z. 1914, 1106.

⁴⁵ RG, July 5, 1910, 74 RG 171; Nov. 21, 1910, JW 1911, 148; OLG Hamburg, July 1, 1912, HGZ 1912 Hptbl., No. 114. In accordance with Article 12 of the Introductory Law to the Civil Code a foreign law will not be applied in a matter of torts to the prejudice of a German. Hence a foreign tort action will not be enforced if it would be barred by the German statute of limitation. But if the facts also give rise to some other cause of action from the standpoint of the German law, which claim is not barred by the German statute, an action will lie. RG, Sept. 29, 1927, 38 Niemeyer 382.

⁴⁶ RG, Dec. 19, 1922, 106 RG 82.

⁴⁷ RG, July 11, 1902, 52 RG 155; OLG Cologne, Nov. 26, 1891, 4 Niemeyer 359. The earlier cases held that the creditor was barred if he assented to the foreign composition. RG, May 18, 1889, 24 RG 383; Mar. 20, 1888, 21 RG 7.

establishment there (*gewerbliche Niederlassung*).⁴⁸ The release of a debtor resulting from a composition which is confirmed by the court is binding upon all creditors, irrespective of whether they participated in the proceedings or voted for the composition.⁴⁹

II. CONTRACTS THROUGH AGENTS

Most cases cited by the German courts have involved the question of the power of the agent to bind the principal, a problem which cannot be discussed here.⁵⁰ Generally speaking, the law of the place where the agent is to act determines the extent of his powers.⁵¹

Assuming the agent has authority to act, the effect of the transaction entered into between the agent and third parties is determined by the ordinary rules governing contracts. The intention of the parties will thus control,⁵² and, in the absence of evidence thereof, the law of the place of performance. Where a third party has sought to rescind the contract on the ground of mistake, it has been held that the law governing the performance of his obligation, in this case Austrian law, would control.⁵³ Austria, however, was also the law of the place where the agreement was made. In another case, the defendant, a German, bought cotton on margin through an agent in Germany from a firm in England. In a suit by the latter, the defendant pleaded that the deal was a gambling transaction. The Imperial Court held that the extent of an agent's power with respect to third parties was governed by the law of the state where the transaction with such third person took place, and concluded that in view of the fact that the agent in Germany must have known that the transaction was a gambling transaction the effect of such knowledge on his part must be determined with reference to German law.⁵⁴ Such knowledge made it a gambling transaction under German law.⁵⁵

⁴⁸ See BANKRUPTCY LAW (1898) § 238, par. 2; 2 JAEGER, KOMMENTAR ZUR KONKURSORDNUNG (5th ed. 1914) 561.

⁴⁹ See BANKRUPTCY LAW (1898) § 193.

⁵⁰ For a discussion of the German cases see Rabel, *Vertretungsmacht für obligatorische Rechtsgeschäfte* (1929) 3 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 807.

⁵¹ RG, Mar. 23, 1929, Leipz. Z. 1929, 1268.

⁵² RG, Feb. 25, 1919, 95 RG 41, at 42.

⁵³ RG, Dec. 5, 1911, 78 RG 55.

⁵⁴ CIVIL CODE § 764.

⁵⁵ RG, Mar. 23, 1929, Leipz. Z. 1929, 1268.

III. PARTICULAR CONTRACTS

A. *Sales*

The rule that the law of the place where each party agrees to perform determines the obligations of such party has found innumerable applications in the law of sales when the court has been unable to find an intention that a unitary law should apply. The obligations of the seller are, therefore, subject to the law of the place where he has agreed to perform; those of the buyer, to the law of his place of performance. At times, however, much difficulty has been experienced in determining whether the obligation of the seller or that of the buyer was involved. Not infrequently the obligations of both may be affected.

In general it may be said that the law of the place of performance of the seller determines what he has to deliver⁵⁶ and whether he is liable for the cost of delivery. It has been held also that the same law decides whether the risk has passed to the buyer.⁵⁷ The law of the place where the buyer has agreed to perform determines when and where he must pay the price,⁵⁸ whether and where he must accept the goods, the place where and the time when examination must be made, the duty to notify the seller of any defects in the goods,⁵⁹ and the sufficiency of the notice, and whether he can rescind on the ground of mistake.⁶⁰ The steps necessary to put a party in default are likewise controlled by the law of the place of performance of such party's obligation. If the default of a party is established by the law governing his obligation, the effect of such default will not necessarily be subject to the same law; for the law controlling in that regard will depend upon the relief sought, which may be considered as affecting either his obligation, that of the other contracting party, or both.

Let us suppose that the seller has sent defective goods to the buyer. Whether the buyer is privileged to refuse acceptance of such goods is determined by the law of the place where he agreed to accept them. If he accepts and seeks to recoup in a suit for the purchase price,⁶¹ or if he has paid the price in advance and seeks to recover a portion of such price by way of reduction,⁶² the law of the state where he has agreed to perform controls. In both instances the question is regarded as one af-

⁵⁶ For example, whether the delivery is defective. RG, Oct. 21, 1899, 55 SA 129; OLG Hamburg, Apr. 14, 1905, 16 Niemeyer 322.

⁵⁷ OLG Hamburg, Oct. 24, 1907, HGZ 1907 Hptbl. No. 131.

⁵⁸ RG, Dec. 18, 1906, Leipz. Z. 1907, 282.

⁵⁹ RG, Oct. 21, 1899, 55 SA 129; Feb. 4, 1913, 81 RG 273.

⁶⁰ RG, Mar. 11, 1919, 95 RG 164.

⁶¹ RG, Apr. 26, 1907, 66 RG 73.

⁶² RG, Apr. 26, 1907, 66 RG 73; Apr. 7, 1911, 22 Niemeyer 181.

fecting the buyer's duty to pay. That law determines also the question whether the buyer can rescind the contract.⁶³ But if the buyer seeks damages for defective performance on the seller's part, the law of the place of performance of the seller's obligation will control.⁶⁴ Upon learning that the buyer has refused to accept the goods because of defects therein, the seller may offer to supply goods free from defects. What are the rights of the parties now? The answer will depend upon whose obligation is involved. Does the question affect the seller's obligation to deliver or the buyer's obligation to accept? The decisions are in conflict on this point.⁶⁵

If the buyer is in default by the law governing his obligation, the seller's rights will depend likewise upon the law governing the obligation that is being affected. If he seeks specific performance or damages it is the buyer's obligation that he seeks to enforce, and the law governing is, therefore, the law of the buyer's place of performance. On the other hand, if as a result of the buyer's default the seller seeks to withdraw from the contract, the action involves his own obligation, so the law of his own place of performance controls.⁶⁶ Whether he can withdraw by mere notice to the seller, or whether, as under French law, a judicial proceeding is necessary, will be determined by the same law.

B. *Contracts Relating to Land*

The question concerning the law governing executory contracts relating to land situated in another state or country has come before the Imperial Court in only a few instances. In one, decided before the adoption of the Civil Code, a husband entered into a contract and the question presented was whether his wife's consent should have been obtained. Not the law of the situs but the law governing capacity in general, at that time the law of the domicile, was deemed applicable.⁶⁷ In another case the question related to the formalities applicable to an executory contract for the sale of land. The contract was made in Germany and the land was in a foreign country. The question at issue was whether the contract required judicial or notarial authentication, as prescribed by Section 313 of the German Civil

⁶³ RG, Apr. 28, 1900, 46 RG 193; May 27, 1924, Warneyer 1925, 46; OLG Hamburg, Apr. 14, 1905, 16 Niemeyer 322.

⁶⁴ RG, Jan. 21, 1908, JW 1908, 192; Sept. 20, 1910, 20 Niemeyer 559; Oct. 11, 1910, 24 Niemeyer 320.

⁶⁵ In favor of the law of the place of performance of the seller's obligation: RG, Apr. 19, 1910, 73 RG 379. In favor of the law of the place of performance of the buyer's obligation: RG, Oct. 13, 1894, 34 RG 191.

⁶⁶ RG, Sept. 16, 1910, 20 Niemeyer 558.

⁶⁷ RG, Jan. 26, 1892, 3 Niemeyer 295.

Code. It was held that Article 30 of the Introductory Law to the Civil Code did not impose this requirement, and that the question must be decided in accordance with the law of the situs. Article 11, paragraph 2, of the Introductory Law to the Civil Code prescribes that the ordinary rules governing the requirements of form shall not be applicable in the conflict of laws to juristic acts whereby a right to a thing is created or whereby such a right is disposed of. Although the passage refers specifically only to conveyances and not to executory contracts relating to land, the court concluded, without going into the matter fully, that it applied equally to executory contracts.⁶⁸

In a subsequent decision the Imperial Court held that paragraph 2 of Article 11 of the Introductory Law did not refer to executory contracts relating to land, and that such contracts would create valid legal obligations if they satisfied either the law of the place where the contract was made or the law governing the transaction in other respects, *i.e.*, the law of the situs.⁶⁹ In a still more recent case damages were asked for the breach of an executory contract entered into in Austria and relating to Austrian realty. In the light of the surrounding circumstances, the court concluded that the parties had contracted with reference to German law.⁷⁰

C. Leases

A lease of land creates only contract rights in German law, and is therefore governed by the rules of the conflict of laws relating to contracts. The intention of the parties controls in the first instance. In a case decided before the Civil Code went into effect, the Imperial Court affirmed the decision of a lower court applying the law of the place of contracting, which was also the domicile of both parties. The assumption of the lower court that the parties had contracted with reference to their native Bavarian law rather than with reference to the foreign Austrian law, in which state the property was situated, was deemed to be not without foundation.⁷¹

In another case, where the property leased was located in the island of Sylt, the court stated: "It is a general rule of private international law that in a case in which the place of performance is determined by the nature of the performance, the determination is ordinarily made according to the law of the place where the immovable is situated." The fact that the contracting parties were domiciled in Prussia was not considered sufficient

⁶⁸ RG, Mar. 3, 1906, 63 RG 18.

⁶⁹ RG, Mar. 13, 1911, 79 RG 78; see also KG, Mar. 19, 1925, 44 OLG, 152.

⁷⁰ RG, July 9, 1919, Leipz. Z. 1920, 301.

⁷¹ RG, Oct. 19, 1891, 3 Niemeyer 157.

evidence of an intention to contract with reference to Prussian law. The place where the contract was made did not appear.⁷² This rule was also applied by the same court in a decision rendered in 1901.⁷³ In this case, however, as well as in the preceding ones, the precise nature of the matter in controversy did not appear. In a subsequent suit for rent, it was held that the rules applicable to ordinary contracts would control.⁷⁴

D. *Contracts for Services*

The law governing the legal relations arising out of contracts for services will depend in the first place upon the intention of the parties. If not expressed, intention may be presumed from the circumstances.⁷⁵ Where the facts are not indicative of a submission to a particular law, the courts are disposed to apply the law of the place where the party rendering the services is to act.⁷⁶ This is especially true in case such party is a commission agent⁷⁷ or a stock broker.⁷⁸ As to the obligations of a mandatary, there is agreement to the effect that the law of the place where he acts will control.⁷⁹ With respect to the obligations of a mandator the law is not clearly settled. There is some suggestion in the decisions that in all cases of mandate performance by the mandatary constitutes the principal thing, and that the mandator must be deemed to have submitted to the law of the state where the mandatary is to act. But the Imperial Court has never laid down the rule in categorical terms.⁸⁰ The mandatary's claim for reimbursement of expenses has generally been determined with reference to the law of the place where he

⁷² RG, Oct. 14, 1897, JW 1897, 581.

⁷³ RG, Apr. 29, 1901, JW 1901, 452.

⁷⁴ RG, Dec. 11, 1902, JW 1903, 45.

⁷⁵ RG, Dec. 1, 1911, 22 Niemeyer 311. The defendant was a traveling salesman for a German concern in Italy. The contract specified that the German courts should have jurisdiction over disputes arising out of the contract. It was held that the facts showed an intention that the obligations of both parties should be governed by German law. RG, Mar. 16, 1895, 5 Niemeyer 507. The plaintiff became manager of the defendant's branch business in Brazil, the contract having been made in England. Both parties were Germans domiciled in England and the contract was written in English. It was held that the parties contracted with reference to English law. See also OLG Hamburg, June 26, 1909, 21 OLG 385; Oct. 30, 1902, 6 OLG 5; OLG Munich, Apr. 5, 1909, 23 Niemeyer 245.

⁷⁶ RG, Dec. 12, 1898, JW 1899, 146 (suit for recovery of commissions); KG, Nov. 23, 1913, 23 OLG 61.

⁷⁷ RG, Nov. 21, 1910, 21 Niemeyer 62, 24 Niemeyer 324; RG, Nov. 30, 1899, 10 Niemeyer 289 (suit for reimbursement).

⁷⁸ RG, May 10, 1884, 12 RG 34.

⁷⁹ RG, Nov. 21, 1910, 21 Niemeyer 62 (duty with respect to property sent on commission).

⁸⁰ RG, Nov. 30, 1899, 10 Niemeyer 289.

was to act.⁸¹ So far as a particular court holds that the mandator's duties are to be performed at his domicile, in the absence of facts showing a contrary intention, the law of such place will be held to govern his obligations.⁸²

E. *Contracts of Carriage*

(1) *Carriers by Land.* The law as to international transportation of goods by rail has been unified on the continent since the Convention of Berne of October 14th, 1890. This Convention left to the application of the principles of the conflict of laws of individual states only those points not covered by it. Such differences as there are have given rise to little litigation.⁸³ The subject is covered today by the Convention of Berne of October 23, 1924.⁸⁴

(2) *Carriers by Sea.* (a) *Carriage of Goods.* As to capacity and form, the general rules contained in Article 7 and 11 of the Introductory Law to the Civil Code apply.⁸⁵ The law governing the validity of contracts of carriage in other respects is not clearly defined but what has been stated above relative to the validity of contracts in general applies equally to contracts of carriage.

Assuming the contract to be valid, the legal relations arising therefrom are governed by the ordinary rules, so that in the first instance the intention of the parties, expressed or implied, will control.⁸⁶ If there is no expressed declaration of intention, as is usually the case, the courts will ascertain from all the facts whether the parties must be deemed to have contracted with reference to a particular law.⁸⁷ Where, for example, a person in Germany applied to an English broker to charter an English vessel for a voyage from Spain to Granville and Dunkirk, France, and goods shipped to Dunkirk had to be sold at Granville, it was held that the right of the English carrier to recover freight was to be governed by English law, which denied the right unless the goods were carried to their destination. In this case the court, trying to ascertain a single law with reference to which

⁸¹ RG, Oct. 3, 1883, 10 RG 89; May 10, 1884, 12 RG 34; May 29, 1889, 23 RG 413.

⁸² See OLG Hamburg, Jan. 22, 1895, 51 SA No. 16; OLG Braunschweig, Oct. 18, 1901, 15 Niemeyer 339 (seeking to distinguish between a mandate and a broker's contract, holding that the latter is essentially bilateral, the obligations arising on both sides being subject to the law of the state where such obligations are to be performed).

⁸³ See RG, Feb. 25, 1904, 57 RG 142.

⁸⁴ See 77 LEAGUE OF NATIONS SERIES (1928) 367.

⁸⁵ RG, Sept. 24, 1910, 74 RG 193 (form of signature on bill of lading); OLG Hamburg, May 28, 1909, 65 SA No. 103.

⁸⁶ LG Hamburg, Jan. 2, 1903, HGZ 1903, Hptbl. No. 31.

⁸⁷ See RG, Apr. 4, 1908, 68 RG 203, and cases discussed therein.

both parties had contracted, concluded that it was English law. Of special weight was the fact that the charter contained clauses which were peculiar to English law.⁸⁸ The lower court (the Court of Appeal of Hamburg) had applied German law on the ground that the obligation sued upon was that of the German party to pay freight, which should be governed, it felt, by the law of the place where he had agreed to perform—that is, Germany.⁸⁹ Likewise an earlier decision of the Imperial Court had allowed part freight in accordance with the law of Portugal where the vessel had to be sold, although the charter party had been entered into in New York between an alleged citizen of the United States and a German steamship company for a voyage from the United States to England, and although it contained a provision that the charter was to be subject to the maritime rules of the New York Produce Exchange.⁹⁰ This case the Imperial Court distinguished on the ground that the intention of the parties could be ascertained from the facts stated therein.

Where, in the estimation of the court, the intention of the parties does not appear, the law of the place of destination generally applies to contracts of carriage by sea. In the earlier decision of the Imperial Court referred to above, it was held to be the law of the port where the voyage actually terminated and not the law of the destination of the vessel under the charter party. Another case, decided by the Appellate Court of Luebeck, where the parties were deemed to have contracted with reference to the law of the place of destination (New York), held that the question of part freight for goods sold in a port of refuge was to be governed by New York law, the entire contract of affreightment not having come to an end at the intermediate port.⁹¹

Other decisions by the Imperial Court with reference to charter parties are of interest. In one case a charter party was executed in Hamburg, between an English vessel and a person domiciled in Hamburg, for a voyage between Warnemuende, Germany, and London. The charter party was in English and contained clauses peculiar to English law. One of them was: "Indemnity for non-performance of this agreement shall be estimated by the amount of freight." The charterer having cancelled the charter party on account of delay in the delivery of the vessel, the owner of the vessel sued for the freight. It was held that the obligation of the charterer to furnish cargo was governed by German law, that he was not justified in rescinding the contract, and that the amount of recovery was governed by

⁸⁸ RG, Apr. 4, 1908, 68 RG 203.

⁸⁹ OLG Hamburg, Mar. 7, 1906, HGZ 1906, Hptbl. No. 61.

⁹⁰ RG, Jan. 23, 1897, 38 RG 140.

⁹¹ OLG Lübeck, Mar. 26, 1861, 15 SA No. 183.

the charter clause, which, being peculiarly English, should be interpreted in accordance with the English decisions.⁹² A similar result, with reference to the meaning of the "Cesser Clause," was reached in a more recent case.⁹³ Here the charter was executed in Hamburg between two Hamburg merchants, concerning a vessel carrying the Norwegian flag, for a voyage from Morocco to Hamburg. It was held that the contract was governed by German law. The "Cesser Clause," however, which is peculiar to English law, was interpreted in accordance with the English decisions. In another case a charter party containing a "Penalty Clause" was executed in London by London brokers representing foreign parties for a voyage by a German steamer from Galatz or Braila to Stettin. It was held that the effect of the "Penalty Clause" was to be determined with reference to English law, not because the contract was made in England, but because the brokers had English law in view.⁹⁴ When, however, two Germans, knowing the nationality of each other and having their commercial establishment in Germany, entered into a contract of affreightment in London through agents who were Englishmen, the bills of lading having been printed in Hamburg in English but containing no clauses that were peculiarly English, it was ruled that they must be deemed to have contracted with reference to German law.⁹⁵

Although the contract of affreightment may be subject in general to a particular law, it does not follow that the parties intended all matters connected therewith to be submitted to such law. For example, matters relating to loading⁹⁶ are governed by the law of the place of loading, and matters to be performed at the place of destination, such as unloading,⁹⁷ by the law of the place of destination.

Bills of lading may or may not incorporate the terms of the charter party. Differing from a charter party, a bill of lading is looked upon mainly as containing unilateral obligations on the part of the carrier. Moreover, it is deemed to regulate the relations between the carrier and the consignee rather than those between the shipper and the carrier.⁹⁸ As these duties are to be performed at the place of delivery, the law of that state controls

⁹² RG, May 22, 1897, 39 RG 65.

⁹³ RG, Dec. 14, 1910, 22 Niemeyer 182.

⁹⁴ RG, Jan. 5, 1887, 19 RG 33.

⁹⁵ RG, Oct. 29, 1904, 15 Niemeyer 293. Generally speaking, neither the nationality of the vessel nor the language in which the contract is written is deemed proof of an intention to subject the contract to the law of such state.

⁹⁶ OLG Hamburg, June 24, 1891, HGZ 1892, Hptbl. No. 1; June 11, 1888, HGZ 1889, Hptbl. No. 103; Mar. 27, 1913, HGZ 1913, Hptbl. No. 86.

⁹⁷ OLG Hamburg, Sept. 28, 1889, HGZ 1889, Hptbl. No. 108.

⁹⁸ RG, Oct. 24, 1891, 49 SA No. 36.

in the absence of special circumstances showing a different intention.⁹⁹ The validity of a stipulation against negligence contained in a bill of lading issued for goods transported from Galveston to Bremen was held, in accordance with the general rule, to be subject to the law of the place of destination.¹⁰⁰ This law governs also as to statutes of limitation.¹⁰¹ The validity of a bill of lading in formal respects is governed by the general rule contained in Article 11 of the Introductory Law to the German Civil Code.¹⁰²

(b) *Carriage of Passengers.* The courts have had scarcely any occasion to deal with this question. In the absence of facts showing a contrary intention, the law of the place of destination would control the liability of a carrier for loss of or injury to baggage. The matter is regulated today by the International Convention concerning the Transport of Passengers and Baggage by Rail, signed at Berne, October 23, 1924.¹⁰³

F. Suretyship

A contract of suretyship is regarded as accessory to the principal obligation. The law governing the principal obligation determines, therefore, the extent of a surety's liability.¹⁰⁴ The question whether the surety is bound, however, and the conditions upon which he becomes bound, are subject to the law governing the contract of suretyship. In the absence of an intention of the parties to the contrary,¹⁰⁵ such contract is controlled by the law of the state where he agrees to pay, *i.e.*, at the place of his commercial establishment,¹⁰⁶ or, in the absence thereof, at his domicile.¹⁰⁷ As he generally does not agree to pay at the place of payment for the principal debtor, his obligation may be subject to a different law from that governing the duty of the principal debtor.¹⁰⁸

⁹⁹ RG Oct. 24, 1891, HGZ 1892, Hptbl. No. 47 (at least as regards duties arising out of contract of affreightment which are to be performed at the place of destination); May 2, 1894, 34 RG 72; Apr. 29, 1903, HGZ 1903, Hptbl. No. 102; Feb. 10, 1900, 46 RG 3; Jan. 1, 1903, 15 Niemeyer 305; June 1, 1908, 69 RG 23; Sept. 24, 1910, 74 RG 193; OLG Hamburg, Dec. 10, 1903, 14 Niemeyer 488; Feb. 29, 1904, 14 Niemeyer 408; April 23, 1907, HGZ 1907, Hptbl. No. 65; May 28, 1909, 65 SA No. 103.

¹⁰⁰ RG, May 25, 1889, 25 RG 104.

¹⁰¹ OLG Hamburg, Mar. 21, 1906, HGZ, 1906, Hptbl. No. 105.

¹⁰² OLG Hamburg, Oct. 21, 1904, HGZ, 1904, Hptbl. No. 141.

¹⁰³ 78 LEAGUE OF NATIONS TREATY SERIES (1928) 17.

¹⁰⁴ RG, Apr. 23, 1905, 54 RG 311.

¹⁰⁵ OLG Stuttgart, Jan. 25, 1900, 11 Niemeyer 287.

¹⁰⁶ OLG Hamburg, Feb. 12, 1903, 6 OLG 365.

¹⁰⁷ RG, Oct. 5, 1883, 10 RG 282; Feb. 15, 1894, 4 Niemeyer 575; Oct. 4, 1894, 34 RG 15.

¹⁰⁸ The preliminary question as to the meaning of a contract of surety-

The validity of a contract of suretyship depends, therefore, upon the ordinary rules. As regards capacity, Article 7 of the Introductory Law to the Civil Code will control, and as to formalities, Article 11 of the Introductory Law. Thus, whether a writing is required will depend upon the law of the place where the surety agrees to pay, or upon the law of the place where the contract is entered into. As, according to German law, a contract is not concluded until the acceptance reaches the offeror, one would expect that a suretyship contract made by correspondence would be deemed entered into at the place of acceptance. The Imperial Court has held, however, that the contract was concluded at the place from which the acceptance was sent.¹⁰⁹

The liability of the surety and the conditions upon which he has agreed to pay are determined by the law governing his contract.¹¹⁰ Thus questions as to whether the creditor is obliged to sue the principal debtor before proceeding against the surety,¹¹¹ whether all co-sureties must be joined in the action,¹¹² whether upon payment of the debt the surety is entitled to an assignment of the debt or whether he is ipso facto subrogated to such claim, depend upon this law. This law will govern also all questions relating to the discharge of the surety, such as whether he is discharged if the creditor takes other security.

G. Bills and Notes

The unification of the German law of Bills and Notes dates back to the Uniform Bills of Exchange Act of 1848. This act, which is in force in Germany today, contains three articles devoted to the conflict of laws: Article 84 relating to capacity, Article 85 relating to formalities, and Article 86 relating to the mode of presentment, protest, and notice.

(1) Capacity. Article 84 provides:

"The capacity of a foreigner to incur liability under exchange law is to be decided according to the law of the state to which he belongs. Nevertheless, a foreigner incapable of contracting by exchange law according to the law of his own country, is liable, with respect to obligations incurred within the Empire, so far as he is so capable by German law."

ship is determined by local German law. Letzgas (1929) 3 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 844. The *lex fori*, i.e., § 269 of the Civil Code, controls likewise in determining where the place of performance is. See RG Mar. 11, 1919, 95 RG 164; Oct. 3, 1923, 108 RG 241.

¹⁰⁹ RG, Feb. 12, 1906, 62 RG 379; see also RG, Apr. 20, 1883, 9 RG 176.

¹¹⁰ RG, Apr. 23, 1903, 13 Niemeyer 423; OLG Hamburg, Feb. 12, 1903, 6 OLG 365.

¹¹¹ RG, May 23, 1883, 9 RG 185; Apr. 23, 1905, 54 RG 311.

¹¹² RG, Feb. 11, 1896, 7 Niemeyer 262.

This provision corresponds substantially to Article 7 of the Introductory Law to the German Civil Code, so that the discussion above relating to capacity in general is applicable equally to bills of exchange.¹¹³ A special provision relating to the capacity of a married woman carrying on an independent business in Germany, whose matrimonial property régime is subjected to a foreign law, is to be found in Section 11a of the Industrial Law. According to this Section, the capacity of such a married woman is not to be affected, as regards any transactions relating to such business in Germany, by the fact that she is married.

(2) *Formalities.* Article 85 of the Bills of Exchange Act contains the following provision:

"The essential requirements of a bill of exchange drawn abroad, as well as all other contracts placed on such a bill, are to be decided according to the law of the place at which each of such contracts is made. If, however, the contracts placed abroad on the bill satisfy the requirements of the German law, no objection can be taken against the legal liability incurred under contracts subsequently made within the Empire on the ground that the contracts made abroad do not satisfy the foreign law. Contracts on bills by which one German citizen becomes bound to another German citizen in a foreign country are also valid, although such contracts comply only with the requirements of the German law."

The term "essential requisites" signifies matters of form.¹¹⁴ It will be noted that Article 85 contains a mandatory provision, whereas Article 11 of the Introductory Law to the German Civil Code has an optional requirement which allows, in the matter of formal requirements, compliance with the law of the place where the contract was made or with the law governing the transaction in other respects. It would appear that this optional requirement of the Civil Code is not applicable to bills and notes.¹¹⁵ A bill or note executed in a foreign country in accordance with the local requirements is, therefore, valid in Germany, and an acceptance or indorsement of such a bill or note in a foreign country which is invalid according to the local law will not be binding in Germany.

The place of execution mentioned in a bill or note is presumed to be the place where the contract was actually made. In the absence of such an indication the presumption has been raised that the contract was made at the domicile of the party in ques-

¹¹³ See STAUB, KOMMENTAR ZUR WECHSELORDNUNG (10th ed. by Stranz and Stranz 1923) 292-293. See RG, Oct. 16, 1885, 15 RG 11; ROHG, May 3, 1878, 34 SA No. 237 (*lex domicilii* under former law).

¹¹⁴ RG, Nov. 5, 1889, 24 RG 112.

¹¹⁵ STAUB, *op. cit. supra* note 113, at 27.

tion.¹¹⁶ If the place of execution appearing on the instrument is a foreign country, it is not clear whether the law of that country controls or the law of the country in which the contract was actually made.¹¹⁷

Article 85 recognizes two exceptions: (1) If a bill or note is invalid in form according to the law of a foreign place of issue, its acceptance or indorsement in Germany is binding, provided such bill or note satisfies the requirements of the local German law of bills of exchange. This provision has been applied only with respect to subsequent contracts in Germany and is not applicable to an acceptance or indorsement in a foreign country. As to these, the law of the place where the contract is made controls. (2) A bill or note executed in a foreign country and invalid by the law of such country, or the acceptance or indorsement of such an instrument, is binding as between German subjects if the contract satisfies the provisions of the German law of bills of exchange.

Aside from questions of capacity and form, the legal relations arising from bills and notes are controlled first by the intention of the parties as may appear from the surrounding circumstances.¹¹⁸ If the intention cannot be ascertained, the law of the place of performance controls. In this connection it should be noted that the contracts of the drawer, acceptor, and indorser of a bill of exchange, and those of the maker and indorser of a note, are separate contracts, each of which is subject to the rule just stated. With respect to the maker of a note or acceptor of a bill,¹¹⁹ the place of payment will be the place where the instrument is payable, whereas in the case of a drawer¹²⁰ or indorser it will generally be the place where he is domiciled or where he has his commercial establishment.¹²¹ The necessity of protest is thus governed by this law, without reference to the fact whether it is required by the law of the place where the

¹¹⁶ RG, Mar. 28, 1883, 9 RG 431 (indorsement); Mar. 5, 1889, 23 RG 49 (indorsement).

¹¹⁷ See RG, Jan. 15, 1894, 32 RG 115. Cf. RG, Nov. 20, 1917, 91 RG 127; STAUB, *op. cit. supra* note 113, at 294.

¹¹⁸ RG, Nov. 5, 1889, 24 RG 112. The bill was drawn by a German sea captain on Germany. It was held that the contract was governed by German law in accordance with the intention of the parties.

¹¹⁹ RG, Jan. 17, 1882, 6 RG 24; OLG Hamburg; Apr. 11, 1922, 77 SA No. 194.

¹²⁰ ROHG, Feb. 1, 1876, 19 ROHG 203; Dec. 4, 1876, 21 ROHG 151 (time of maturity cannot be modified as to drawer by law of place upon which bill was drawn); RG, Nov. 5, 1889, 24 RG 112.

¹²¹ In KG, May 22, 1916, 35 OLG 2, it was held that a foreigner who indorsed in Germany a bill drawn and payable in Germany had contracted with reference to German law.

bill is presented for acceptance or payment.¹²² If the law governing the drawer's or the indorser's contract requires a protest, a failure to protest will not be excused even if it should be impossible to make such protest at the place of presentment.¹²³

In an earlier case, however, the Appellate Court of Kiel held that the failure to give proper notice of protest for non-acceptance was to be governed with respect to the drawer, not by the law of the place from which the bill is drawn, but by the law of the place upon which the bill was drawn. This was on the theory that the drawer had submitted to the law at the drawee's domicil.¹²⁴ The Imperial Court came to the same conclusion where a German sea captain drew a bill upon a town in Germany. The lower court had found as a fact that the drawer and the other contracting party intended to contract with reference to German law, and the Imperial Court affirmed the decision on the ground that the intention of the parties governed the effect of obligations arising from bills and notes.¹²⁵

That the different contracts on a bill or note are independent of each other and are not necessarily governed by the law of the place where the bill or note is payable appears by implication from Article 52 of the Bills of Exchange Act. This article provides that the provisions of Articles 50 and 51 of the Act, which specify the amount of recovery on a bill or note, do not exclude "in cases of recourse on a foreign place. . . the higher rates permissible at such place." Although the Article referred to the application of foreign law only where it prescribed higher rates than those laid down by the German act, it is generally regarded as laying down a general rule.¹²⁶ The damages recoverable are determined, therefore, with respect to each party to a bill or note by the law governing his particular contract.

Article 86 of the Bills of Exchange Act provides, on the other hand, that the formalities of presentment, protest, and notice are to be determined with reference to the law of the place where such act must be done. Compliance with the law of this place is binding upon all parties to the instrument.¹²⁷ This law determines also the existence of days of grace. With respect to the date of maturity it has been held that the presentment and protest of a bill which was drawn in Germany on August 16th upon Portugal, payable three months after date, and which was pro-

¹²² ROHG, Feb. 1, 1876, 19 ROHG 203 (notice of protest as regards drawer); Dec. 4, 1876, 21 ROHG 151; RG, March 23, 1883, 9 RG 438.

¹²³ ROHG, Feb. 21, 1871, 1 ROHG 286; Feb. 9, 1872, 5 ROHG 101.

¹²⁴ OAG Kiel, Feb. 5, 1848, 6 SA No. 129.

¹²⁵ RG, Nov. 5, 1889, 24 RG 112.

¹²⁶ STAUB, *op. cit. supra* note 113, at 184.

¹²⁷ So as regards the time within which protest may be made. RG, Jan. 15, 1894, 32 RG 115; Obertribunal Berlin, May 9, 1857, 12 SA No. 299.

tested on November 15th in accordance with Portuguese law (where a month is equivalent to 30 days) were not premature.¹²⁸ Moratory legislation of the country upon which a German bill of exchange was drawn, however, was not recognized as extending the time during which the German drawee remained obligated.¹²⁹

The effect of an indorsement after maturity in cutting off personal defenses has been determined with reference to the law of the place governing the indorsement.¹³⁰

H. Checks

The continental law of checks differs in many respects from the law governing bills and notes. In Germany it is regulated by the law of March 11, 1908, which contains no provision analogous to Article 84 of the Bills of Exchange Act. Hence, the capacity to draw a check is governed by Article 7 of the Introductory Law to the Civil Code. In addition, Section 11a of the Industrial Law is applicable, with respect to married women engaged in business, to the drawing of checks in connection with such business. Checks payable in a foreign country may be drawn upon persons designated by such foreign law.¹³¹

The formal requirements of a check are laid down in Section 26, paragraph 1, of the Check Law. It provides:

"The essential requisites of a check drawn abroad, as well as all other contracts placed on such checks abroad, are governed by the law of the place at which the check is drawn or the contract is made.

However, if the check drawn abroad or the contract based on such check abroad, satisfies the requirements of German law, no objection can be taken against the legal liability incurred on contracts subsequently placed upon such check in Germany, that it is defective according to the foreign law. A check drawn abroad on Germany and any contract placed thereon abroad is valid if it complies with German law only."

On principle, the law of the place of contracting governs matters of form (*locus regit actum*). Thus, if drawn in Germany, a check must contain the designation "check" and must be drawn upon funds belonging to the drawer. The actual place where the check is drawn controls and not the place indicated on the check as the place of issue, though it raises a presumption that it was drawn there.¹³²

The first exception stated in the Section has reference to

¹²⁸ RG, Dec. 11, 1895, 36 RG 126.

¹²⁹ ROHG, Feb. 21, 1871, 1 ROHG 286; Feb. 9, 1872, 5 ROHG 101.

¹³⁰ RG, May 27, 1913, Leipz. Z. 1913, 674.

¹³¹ CHECK LAW, § 25.

¹³² OLG Nuremberg, May 6, 1925, JW 1926, 385.

foreign checks which are invalid under the foreign law,¹³³ or to invalid foreign indorsements on valid foreign checks.¹³⁴ In these instances a subsequent indorser in Germany cannot rely upon the invalidity of the foreign check or indorsement. The second exception relates to checks drawn abroad but payable in Germany. If the check is invalid under the foreign law, or the check is good but its indorsement is invalid, such check or indorsement is nevertheless effective in Germany if it satisfies the requirements of German law. The converse of this latter rule is not true. Hence, a check drawn in Germany and not labeled as a "check" in conformity with Section 7 of the Check Law, is invalid, though drawn on a foreign country under the law of which such a designation is not necessary.¹³⁵

The time within which a check must be presented for payment is governed by the law of the place upon which it is drawn. If a check is drawn in Germany upon foreign countries in which there is no provision regarding the time for the presentment of checks, the time allowed is that prescribed by the Imperial Council of Germany.¹³⁶ With respect to the United States the period has been fixed at two months,¹³⁷ but it has been held by the Imperial court that the American requirement of a "reasonable time" is sufficiently definite to be applicable.¹³⁸

While there is no specific provision in the Check Law, corresponding to Article 86 of the Bills of Exchange Act, to the effect that the law of the place where an act is to be done is to govern the mode of performance, the rule laid down in the Bills of Exchange Act is also applicable to checks.¹³⁹ This rule is generally held to apply also to the form of protest,¹⁴⁰ and the time within which such protest must be made or notice of dishonor given.

As in the case of bills and notes, obligations arising from checks are governed by the intention of the parties, and, in the absence of proof thereof, by the law of the place of performance.

¹³³ For example, if drawn in England on a person in England who is not a banker.

¹³⁴ For example, if indorsement without recital of value is invalid under foreign law.

¹³⁵ KG, Sept. 8, 1924, 45 OLG 81.

¹³⁶ CHECK LAW, § 11.

¹³⁷ Declaration of Mar. 19, 1908, RGBI 1908, 85.

¹³⁸ RG, Jan. 4, 1927, 115 RG 195 (check drawn in Germany on New York; held that the New York law, according to which one month was a reasonable time for presentment, governed); Jan. 4, 1927, 37 Niemeyer 383 (presentment after three months held too late under New York law). Accord.: LG Cologne, June 30, 1924, JW 1924, 1552 (45 days held unreasonable). *Contra*: AG Hamburg, Apr. 25, 1924, JW 1924, 1382 (applying the period of two months fixed by the Federal Council).

¹³⁹ KG May 25, 1925, JW 1926, 382.

¹⁴⁰ KG, June 11, 1925, JW 1925, 1656.

The different contracts on a check are regarded as independent, being subject to the law of the place where each is to be performed.¹⁴¹ The conditions upon which the drawer or indorser contracts are governed, therefore, by the law of the place where he agreed to perform, *i.e.*, generally at his domicile rather than where the check is payable.¹⁴²

IV. CONCLUSION

No attempt has been made to discuss all the cases involving an application of the rules of the conflict of laws so far as they relate to contracts, or to include all the special contracts that have come before the German courts. In order to keep the discussion within the limits of a single article, it has been necessary to select the most important topics and the most representative cases.

If we now try to summarize the conclusions which the German courts have reached, the following may be suggested:

(1) If the existence or binding nature of the contract is not in dispute, the courts will attempt to apply first the law which the parties have by express declaration chosen as governing their legal relations. In the absence of an express declaration, the courts will try to ascertain whether an actual intention to contract with reference to a particular law may be discovered from the surrounding circumstances. For example, the use of bills of lading containing clauses which are typically English has been held to show an intention to contract with reference to English law. If there are no facts from which an actual intention of the parties relative to the law applicable may be derived, the courts refer the question to the presumed intention of the parties. But it is evident that the word "intention" in such a case is used in a fictitious sense. If the facts of the case are such as to attach the contract preponderatingly to the law of a particular state, the courts are inclined to say that the parties must have intended as reasonable men, had their attention been called to the problem, to contract with reference to the law of such place. On the other hand, if the facts are such as to leave the matter in a state of complete balance, the law of the place of performance will be applied.¹⁴³ Following Savigny, the place of performance, rather than the place of contracting, which may be accidental, is regarded as the "seat" of the obligation, and the application of the law of the place of performance is deemed,

¹⁴¹ RG, Oct. 4, 1899, 44 RG 153. According to § 269 of the Civil Code, in case of doubt the debtor's domicile is regarded as the place where he is to perform.

¹⁴² OLG Cologne, Oct. 21, 1925, JW 1926, 1354 (indorser; necessity of protest).

¹⁴³ RG, July 5, 1910, 74 RG 171; Nov. 21, 1910, JW 1911, 148; Nov. 20, 1919, 103 RG 259; Sept. 19, 1923, 107 RG 121; Jan. 27, 1928, 120 RG 70.

therefore, in the absence of facts pointing in a contrary direction, to correspond presumptively with the intention of the parties. This fiction is adhered to not only when the parties have agreed upon a place of performance, but also when they have not done so. The place of performance is determined, therefore, by rules of law.

In bilateral contracts the courts try to find a unitary law that is to govern the obligations of both parties arising from the contract.¹⁴⁴ Nevertheless, in the absence of an express declaration to that effect or of circumstances which are deemed to prove an intention that the entire contract be subject to one law, the courts will allow each particular obligation to be governed by the law of the state in which such obligation is to be performed. Many such cases may be found in the law of sales. Great difficulty has been experienced at times in determining whether a particular claim affected primarily the plaintiff's or the defendant's obligation. Another type of difficulty arises if the plaintiff asks for modes of relief which may affect in part his own and in part the defendant's obligation. Not only does it seem strange that the dependent promises should be governed by different laws, but it would often appear to be impossible in fact.¹⁴⁵

(2) If the existence or binding nature of the contract is in issue, the law governing will depend upon the particular claim that is asserted. If it is deemed to be one of "capacity" or "formalities" the rules are prescribed by the Introductory Law to the Civil Code. In the matter of capacity the national law of the parties in question governs. If the contract is made in Germany, however, a foreigner under a disability according to his national law will be bound if he has capacity under the local German law. The reverse of the proposition is not true, so that a foreigner contracting in Germany with full legal capacity under his national law cannot appeal to the local German law for the purpose of claiming a disability.

The formal requisites for a contract may, according to Article 11 of the Introductory Law of the German Civil Code, satisfy one of two rules. The contract is valid in this regard if it satisfies either the law of the place of execution or the law governing contracts in general. This means, of course, that an oral contract is valid if there is an express declaration that it shall be governed by the law of a state (having some connection with the contract) which has no formal requirement of writing. It is interesting to note that the German law thus allows the parties to choose their law in the matter of formal requirements.

¹⁴⁴ See RG Jan. 27, 1928, 120 RG 70.

¹⁴⁵ Many illustrations proving this may be found in an article by Professor Neuner, *Die Beurteilung gegenseitiger Verträge nach dem Recht des Schuldners* (1928) 2 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 108.

With respect to matters other than "capacity" or "formalities," no rule has been laid down by the Civil Code, so that the solution of the problem is left to the courts. What law will determine whether there has been a meeting of the minds so that a contract has resulted? If there was a meeting of the minds, what law will determine whether the contract can be attacked upon the ground of mistake, fraud, or duress? Suppose that there has been a meeting of the minds, that the declaration of will is not effected by mistake, fraud or duress, but that the contract seeks to accomplish an unlawful object; what law then governs? The Imperial Court has not announced any *special* rules with reference to these questions. Concerning the formation of contracts, it purports to look to the law of the place with reference to which the parties contracted, or must be deemed to have contracted. This appears to be equally true of legality, except that in this case the public policy of the forum may not permit effect to be given to a foreign law. In the matter of mistake, the court has shown some inclination in the case of bilateral contracts to apply the law of the place of performance of the party claiming to have acted under the mistake.

The German writers have invariably criticized this attitude on the part of the Imperial Court, but there is no agreement among them as to the law that should control.¹⁴⁶ As for the formation of contracts, it has been suggested that the law of the forum should govern. Occasionally it is contended that the law of both parties must concur in making it a binding contract, but what is meant by the law of both parties is not always clear. Does it mean, for example, their national law, the law of their domicil, or the law of the state in which each is to perform? A requirement of a concurrence of both laws would operate, of course, to invalidate contracts, a result that is undesirable from an international point of view. On the other hand, the attitude of the Imperial Court enables the parties to choose their own law, limited by the rules concerning public policy. This may, from a theoretical point of view, seem improper in matters going to the very existence or non-existence of a contract; but is it more objectionable from the standpoint of international business than the rule suggested by the writers? Moreover, as Article 11 of the Introductory Law to the Civil Code allows the parties such a choice as to formalities, may the Imperial Court not be justified in concluding that, apart from capacity, concerning which Article 7 of the Introductory Law controls, the same rule should be applied as well to other matters affecting the validity of contracts?

¹⁴⁶ See, for example, Görtz, *Der Parteiwille im internationalen Privatrecht*, 41 Niemeyer, 1, 43, who calls it a *Verlegenheitsausweg* in order to escape the difficulty of laying down a definite rule.