

“Autonomy” in Choice of Law⁽¹⁾

- Principle and Prospective -

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1. Preliminary :-

A contract by its nature is a promise or set of promises intended to be enforceable by Law. (2)

The main difference which characterizes the contract from most other branches of the Law of obligations, is that generally speaking the parties themselves are free to make their own rules as to what shall and shall not bind them.

The Doctrine of “Freedom of contract” as it was established in the nineteenth century considered the will of the parties as an end in itself.

The parties were supposed to be the best judges of their own interests and if they freely and voluntarily entered into a contract the only function of the Law was to enforce it.

It has to a large extent lost its attraction today. Its principle is a reasonable social ideal, only to the extent that equality of bargaining power based on bilateral economic interests between parties can be assumed, and under condition that no injury is done to the economic stability of the community at large.

Considering the evolution of contractual techniques and sphere, the

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(1) The term Autonomy to define the French and English conception relating to the applicable rules on contract.

(2) Chitty on contract, general principles, p. 1 (1977).

equality of economic power between the contracting parties became a myth of historical value in municipal law.

The inequality in bargaining in the municipal legal structure between producers and consumers or members of the public has been off set by Judicial and parliamentary action. Many statutes introduce terms into contracts which the parties are forbidden to exclude or declare that certain provisions in a contract shall be void. In order to retain the equitable balance of the contract, the courts have also developed a number of devices for refusing to implement exemption clauses imposed by the economically stronger party on the weaker.

The evolution of the contract phenomena in the purely municipal Law, between the entirely subjective criterion in deciding the applicable rules on legal agreements to the sociable objective criterion, has had it's own effect on contracts involving foreign elements. (3)

Whether the parties to a legal transaction may choose the Law by which it is to be governed, and if they do so under what limitation, is a question in which we find traces of wide agreement in the judicial decisions and comparative Law-contracts with sharp contrariety in theoretical opinion.

On this issue academic view in it's greatest part is substantially opposed to judicial practice.

This situation is caused partly from the analytical difficulties due to the prescription of general principles of Law that govern obligations resulting from contracts, and partly to the shift in modern times from the liberal conceptions of Law. The reign of the subjective theory to nationalistic that emphasize the power of the sovereign state as the exclusive source of the rules, and in particular of private international Law, with the involvement of the objective theories.

We will try to analyse by this research the principle in general.

Introduction :-

The underlying principle

About a century ago Savigny (4) pointed out the fundamental difficulties which face the determination of the Law applicable to obligations resulting from a contract, since an obligation is an ideal relationship involving two or more persons, that it has no perceptible location in space, also many contractual transactions had reciprocal obligations.

(3) Called by the Doctrine the «international contracts».

(4) Savigny, *System des heutigen romischen rechts* vol. 8(1984) pp. 200 & seq. pointed out by Cohn IC-L.Q. p 373.

In view of their nature it is not always possible to select the governing Law for an obligation by reference to a particular person or tangible thing with which it is obviously connected, as it is true, for example, in the case of real estate right i.e. proprietary rights.

On the one hand the obligation arising from delicts can be governed by the Law of the place of the acts giving rise to such obligations, the *lex-loci delictis* is commonly accepted by the doctrine in this case. But for contractual obligations the problem of the proper Law is more delicate to decide, because it has been frequently remarked, that reference either to the Law of the place of contracting "*lex-loci contractus*" or to the Law of the place of performance "*lex loci solutions*," is insufficient to precisely indicate the applicable Law, for the former indicates the objective acts of the parties, and the latter their intended acts (5). Neither the objective nor the subjective presumption is acceptable in all cases.

Our analysis will include:

- A) The subjective thesis.
- B) The objective thesis.

In the light of Comparative review of the existing Laws, the meaning of the term "Autonomy" should be explained.

Reference to autonomy in the existing laws, presupposes a definition of the conception which is necessarily controlled by the basic doctrine.

In general three-theses have been proposed, depending on the angle to be considered, subjective or objective or as has been recently suggested in view of the location of the contract by it's economy (6). Morris (7) defines the proper Law of a contract as **"The system of Law by which the parties intended the contract to be governed, or, where, their intention is neither expressed nor to be inferred from the circumstances, the system of Law with which the transaction has its closest and most real connection."**

This presupposed definition implies the three theses. Under the first view, characteristically explained by "Laurent" (8) and commonly accepted a century ago, the parties to a legal transaction are free, to choose the law governing their transaction. It results that within the sphere of private law the intention of the parties, express, tacit or presumed from the circumstances of the case controls the applicable law.

According to this view which has been generally adopted by the Judicial practice proved by comparative Law studies, private consent

(5) Hessel E. Yntema, Autonomy is Choice of Law, A.J.C.L. (52).

(6) Batiffol (H), *les conflits de lois en Matiere de contracts* (1983) at 38.

(7) Dicey, *Morris on the conflict of Laws* (1973) at 721.

(8) Laurent, *Le Droit Civil International* (1881) Vol. 2 at 378 and vol. 7 at 512.

provides the Law of the contract, except as restricted by imperative regulations due to public order or public policy.

The second opposed view in explaining the meaning of "Autonomy" consists of admitting that the parties are free within the limits prescribed by Law, to enter into agreements on such terms as they may prefer and for their convenience to adopt the rules of a given system for summary purposes. But in itself the incorporated legal provisions are not legislation, and they are binding to the extent that the Law prescribed by the sovereign state having jurisdiction over the contract, so provides, it is clear that this view which rejects the conceptions of Autonomous self determination by the parties is only of theoretical significance, as it is pointed out (9). In variety of transactions the parties were free to choose the applicable Law, and it is prohibited to allow such freedom in the case of other transactions (10). Moreover it is insisted by a part of the doctrine (11) that the principle of autonomy permits the parties to avoid the incidence of Laws which in their domestic application are obligatory. And it is regarded by the opposite view, to be improper that a Law shall be obligatory and imperative in municipal Law and facultative in private international Law.

This view postulates that Law exclusively emanates from a sovereign state, covering all human activities within territorial jurisdiction.

A third conciliatory thesis proposed by Batiffol (12) is a more accurate interpretation of the principles followed by the French jurisdiction in dealing with contracts. According to this view, **autonomy denotes not the capacity and power to stipulate the applicable Law as such but the freedom of the parties in contracting to localize transactions by their own voluntary acts, so the choice of Law will be indirectly decided.** The Laws of the contract are determined by its "economy" involving circumstances that indicate its location in space which may include an express stipulation regarding the applicable Law.

In fact this last view avoids certain difficulties in the two traditional theses which start from a presupposed principle by allowing the parties to choose the Law of the contract (13). At the same time it avoids the conflict resulting from the discussions about the admissibility of "renvoi" and the

(9) Delaume, L'autonomie de la volonté en droit International prive; Rev, Crit de D.I.P. (1950) 321, et 328 & seq.

(10) A. Pillet, Traite Pratique de D.I.P. (1924) 261 at seq.

(11) Niboyet, "La Theorie de L'autonomie de La Volonte" R.C.A.D.I. (1927) I & seq.

(12) Battifol (H) op. cit at 38 and seq.

(13) Hassel yentima, op cit p. 344 Michel Vasseur un nouvel essor du concept contractuel les aspects juridiques de l'economie concertee et contractuelle, Re. Trim dr. Civ. 1964. 5 a 48.

Alson Toubiana Annie, le domaine De La loi Du COntract En Droit International Prive Dalloz 1972 p. 4 & 5.

problem it presented when the Law chosen by the parties to govern their agreement nullifies the contract.

In effect this view differs from and reverses Savigny's theses by interpreting the "proper Law" to ascertain the Law of a contract instead of utilizing intention to locate contract in space as it was called for by Savigny.

The intention of the parties in this case is inferred from the objective localization of contracts by their material elements.

In fact the real differences between the three theses are nominal and it is clear that every legal system in some measure recognizes and enforces private agreement, but a specific question is to be asked for present purposes: How far is the choice of Law influenced by the special terms of the agreement?

We can say that all the above mentioned theories allow autonomy in choice of Law, but they differ in their explanation and the extent to which the will of the parties is effected by "countervailing considering." Even the doctrine of the objective theorie (15 & 16) which rejects the conception of autonomy, it conceded in practice, choice of the Law applicable to contract is primarily controlled by the express, tacit or presumed (17) intention of the parties.

In contrast for the part of the doctrine, autonomy signifies specially the power of the parties to choose the Law governing inter alia the extent of their freedom to contract.

This last definition is too selective, it is liberal but not inclusive because it does not involve the restriction of public order and the facultative Law.

At this stage it is desirable that comparative consideration of the doctrine of autonomy, of the parties in choice of Law, in the existing private Laws should comprehend the different situations.

(14) Hessel E. Yntema, op. cit p. 344.

(15) Noboyet, op. cit.

(16) Pillet, op cit.

(17) For the purposes of the intention of the parties we cannot accept any presumed intention. Because the intention phenomena can either exist expressly or tacitly or otherwise it will be absent.

Section I. The Practical Analysis

Generality : the acceptance of the principle of Autonomy by different existing Laws

In such a comparison special difficulties might be presented. In the first place the description of the practice in a subject matter in a given jurisdiction depends essentially upon the treatment of conflict cases including contracts and other legal transactions. In the second place legislation in this field is either silent or normally discretionary. By a revision of the existing Law, which refers to choice of Law by the parties, and they are limited in number, we found that their reference is in a generalized manner which leaves room to interpretation. Some examples can be mentioned here from a comparative point of view; example art. 20/1 of the Syrian Civil Code pointed out that:

"As regards to the contractual obligations the applicable Law is that of the country of the parties common domicile if they have such a common domicile, otherwise the Law of the place of contracting unless the intention of the parties determines another Law as a proper Law of contract (18).

Also the Czechoslovakia Law of March 11, 1948 related to private international and interlocal Law and the legal position of aliens within the sphere of private Law, Art. 9 provides:

"The parties are entitled to submit the legal relationship to a particular Law, provided that the relationship has a significant connection with the Law so chosen and provided that such submission does not contravene the compulsory provisions to which the aforesaid relationship is in anyway subject in virtue of the provisions contained in this chapter."

In Japan, Law concerning the application of Laws in general Law No. 10/21 of June 1898 as amended by the Law No. 7 of 1942 and the Law No. 223 of 1947 Art. 7 predicts that:

"As regards to the formation and effect of a juristic act, the question as to the Law of which country is to govern, is determined by the intention of the parties."

"In case the intention of the parties is uncertain, the Law of the place where the act is done shall be followed." Similar provisions which include the same principle can be found in various kinds of Laws and codes. (19)

(18) Similar provisions are in effect in the Jordanian, Iraqi & Egyptian Civil Codes.

(19) France: Loi du 24 1921, réglant les conflits entre la loi française et la locale d'Alsace et Lorraine en matière du droit privé : the Greece Civil Code of 1940 by art. 25; and the Italian Civil Code ... etc.

On the other hand some conventions on private International Law includes such provisions, i.e., the convention on Private International Law (Bustamants Code) signed at Harvard on the 20th of February, 1928, provided that:-

Art. 3

"For the exercise of civil rights and the enjoyment of individual guarantees the Laws and regulations in force in each contracting state are deemed to be divided into the three following classes.

- 1 - Those applying to persons by reason of their domicile or their nationality and following them even when they go to another country, termed personal or of an internal public order.
- 2 - Those binding alike upon all persons residing in the territory, whether or not they are nationals, termed territorial, local, or of an international public order"
- 3 - Those applying only through the expression, interpretation, or presumption of the will of the parties or of one of them, termed voluntary or of private order."

At the same time article 184 of the same convention edicts the following:

"The interpretation of contracts should be effected, as a general rule, in accordance with the Law by which they are governed.

However, when that Law is in dispute and should appear from the implied will of the parties, the Legislation provided for in that case in articles 185 and 186 shall be presumptively applied, although it may result in applying to the contract a different law as a consequence of the interpretation of the will of the parties."

Article (190)

"The will of the parties regulates the Law applicable to gifts by reason of marriage, except in respect to their capacity, to the safeguard of Lawful rights of heirship and to the nullity thereof during wedlock, all of which is subordinated to the general Law governing marriages as long as it does not effect international public order."

In the third place the similarity of texts proves to cover certain differences; as a result, inquiry has to depend upon analysis of judicial decisions, which their inevitable nuances and differences depending upon the factual or doctrinal background in which issues are presented in individual cases. We are going to discuss the various stages of the intention in choice of Law by means of studying the existing Laws.

Sub-Section I : The express choice of Law (Professio Juris):

Whatever the scope of the disparities between the laws, the existence of the parties power to select the law governing their transactions by the express declaration of their intention is usually admitted, as it is expressly provided in Art. 20/1 of the Syrian Civil Code and Art. 19/1 of the Egyptian Civil Code and Article 20/1 of the Jordanian Civil Code (20). In England this doctrine is firmly established as a result of series of precedents starting in 1865 and clearly declared by Lord Atkin's statement in 1937 (21) in which he defined the "proper Law of a contract" as "the Law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention **be expressed, the intention will be presumed** by the court from the terms of the contract and relevant surrounding circumstances." this view was expressly confirmed by Lord Wright in the "Vita food Case." (22).

In France (23), until the 15th century, the conflict of Laws concerning the contractual obligations were decided on by the application of the Law of the country where the contract was made, "The *lex loci contractus*." But in the sixteenth century Dumoulin explained that the applicable law on matters concerning the matrimonial system is that which the intention of the parties is presumed to have chosen, and that the parties can choose another Law to be the proper Law."

This thesis has been severely criticized at the end of the nineteenth century and the beginning of our century, but in 1910 a famous decision

(20) The french legal system includes this principle which was decided by the "Cour de Cassation" Civ. 5 December 1910, S. 1, 129 and was adopted by the Courts and Doctrine Civ. 21 June 1950, *Messageries maritimes*, D., 1951 749 note Hamed; S, 1951.1.1, note Niboyet; J.C.P; 1950 11.5812, Note. JPh. Levy; Rev. Crit. 1960. 609 note H. Batiffol; Also that concerning the international Courts (i.e.) C.P.I.J. 12 July 1929, *Emprunts serbe et Bresilien* D.P., 1930 2. 45.

(21) The international Trustee Case, Yntema (1952) AM. Jo. of Comp. Law; Dicey and Morris on Conflict of Laws at 728 rule 146.

(22) (1939) A.C. 277; (1939) All E.R. 513; Cheshire & Filoots, Cases on the Law of contract 7 ed at 254.

(23) J.P. NIBOYET, LA Theorie de L'autonomie de La Volonte R.C.A.D.I. who denies the existence of such a principle. R.C.A.D.I., 1927 Tome 16 P.15, contrary to this view of, Civ ire, 4 juillet 1972. Bull Civ. I No. 275.

expressly adopted the principle of autonomy (24).

Concerning the United States, while the restatement of the Law of conflict of Laws is silent on the question of autonomy of the will in choice of law the courts generally applies the Law of the place of contracting to questions relating to the steps giving way to the agreement, i.e., form, capacity, validity. . . and the Law of the place of performance to questions of performance.

But as Beale (25) noted out that the tendency of the American cases is to regard the intention of the parties as controlling; and this intention is often conclusively found to be in favour of the Law of the place of performance.

Therefore we could accordingly decide that the reference to such or such a Law is the result of a presumption which the parties can give proof of the contrary. This solution reflects the relatively free economy of the United States. Where it is remarkable the lack of clarity in the doctrine and cases history with absence of statutory rules governing this problem (26).

Those are the main interesting legal systems for the purpose of our study in general and except in certain jurisdictions, the power of the parties to select the Law of their contracts by express agreement appears to be firmly established in Civil Law countries. However, in certain important legal systems within the Civil Law sphere, the Doctrine of Autonomy is rejected as seems to be the case during a determined period of the Soviet History (27) but decided afterwards that "with the exception of transactions relating to structures located in the U.S.S.R. whose form is governed by the legislation of the USSR and the Union Republic concerned; the rights and duties of the parties to a foreign trade transaction are determined pursuant to the Laws of the place where it is concluded, unless otherwise **provided by agreement of the parties** (28).

On the otherhand, the Netherlands evaluated the principles to include some restrictions, thus after the famous decision of 1924 (29)

(24) Civ 9 Dec., 1960 *Journ. dr. Int.* 1964 50; *ler July 1964, Rev. crit dr. Int. Prive* 1966 47 note Mme. Simon Dpeiture; *Paris 11 Rev.* 1969, D. 1970 523 note de M L'arroumet.

(25) Beale, *A treatise on the conflict of Laws* (135) 1105-1174 *Yntema op.cit* 349.

(26) A further study of the principles origin & its evolution ref. to Batiffol, *Problèmes des contrats prive internationaux cours. I.H.E.I.* 1962.

(27) Makarov, *precis de droit international prive'd d'apres Legislation et ia doctrine Russes* (1923) P. 297.

(28) Chkhikvadze & others, *the Soviet State & Law Moscow* (1969) p. 251.

(29) *Hooge Road der Nederlanden, Arret du 13 June N.J.* 1924 at 859.

which decided that in the absence of a Law directing the Law to be applied, the contracting parties are free to choose such Law subject to the statutory provisions involving public policy & morals. This principle has been substantially restricted by the decisions of 1947 (30).

Where — by election of Law in international contracts limited its scope to facultative provisions excluding by that all imperative provisions. This nationalistic extension of the public order (order) phenomena, has restored the uncertainties that the earlier decision was believed to have dispersed. Other questions concerning the tacit election of the Law of "Autonomy" need to be dealt with.

Sub-Section II : The tacit election of Law:-

Generally speaking few of the provisions are interpreted in the sense that choice of Law by the parties must be express, such as the Laws of Portugal and Brazil, since they provide that in the absence of stipulation to the contrary, the Law determined by prescribed rules, shall apply. On the other hand the generality of Articles 20 of the Syrian and Jordanian Civil Codes and Article 19/1 of the Egyptian Civil Code include the express and tacit choice of Law, and it is assumed under the principle of autonomy that any conduct of the parties necessarily implying the choice of a particular Law will have the same effect as an express stipulation (31).

Some clauses may be construed in the sense that the parties contemplated the Law which will govern their contract, i.e., the language or the technical terminology in which the agreement is drawn, the locating domicile for purposes of Litigation in a particular place, or referring to some localized custom. From such inferences to the conception that the acts of performance dictated by a contract are an index to the intention of the parties respecting the Law of a contract for a part of the doctrine this thesis constitutes a slippery path which leads in the end to a fiction and to wide judicial discretion.

Sub-Section III : Presumed intention in Choice of Law:-

The classical theory of the liberal doctrine of autonomy of the parties predicts that the intention of the parties shall control and prevail, even

(30) Arret du 12 Dec. 1974 N.J. 1948 at 608.

(31) Morris, op. cit, Civ, 28 June 1966 Rev. Crit. dr. int. prive 1967 334. Note Batiffol.

where in the case of absence of express election or equivalent index it is suggested that there exists no agreement in this respect unless a presumed intention is established from other circumstances in the case.

This view is really a fictitious construction. For its part, the Polish Law of 1926 sought to control judicial decisions by a system of presumptions, a unique example, as far as we know, which has attracted considerable attention.

For Greece and Scandinavia, as it is the case of England, the doctrine of "Proper Law" as evolved by the English jurisprudence (32) recognizes only a real intention as a basic of choice of Law, and its absence gives directly the way to seek the other factors present in each case. We can confirm at this stage, that while the elimination of the fiction, in analysing the intention of the parties, is an urgent aim of the doctrine of theoretical importance, it is difficult to see how it can be realized.

After this comparative introduction in which we tried to explain the meaning of "Autonomy" in choice of Law by analysing the different views of the parties intention in a contract we are going to discuss the implication of the different views in the different theories.

Section II : Theoretical Analysis

Sub-Section I : The Subjective Theory

It has been admitted that the Law of conflict seeks a coordination between the legal systems of municipal private Laws. This principle was rejected by the jurisdiction (33), which excluded the proper Law of contract from this movement of coordination and submitted it to a special legal system far from being a purely municipal Law. This legal system is based on giving the mere intention of the parties the power to bind and to create rules, and a special legal system to govern their own contract.

It is important for the aim of this study to know that this thesis was explained in the sixteenth century by Dumoulin in his analysis of the rule "Locus regit actum" as it was stabilized during the middle ages. Then came "Rochus Curtius" who explained this rule by saying that the parties who signed a contract in a fixed place are presumed to have agreed to choose the Law of that place as the proper Law of their contract.

Later, Dumoulin went further in developing the principle of autonomy by allowing the parties to choose by their free will any other Law (34). During the 19th Century the doctrine was almost unanimous in accepting the principle of autonomy in choice of Law. Savigny submitted the *lex loci*

(32) Morris, *op. cit.*

(33) Batiffol (H), *Aspects philosophiques du droit International privé*, p 63.

(34) Graveson (R.H.), *conflict of laws* p. 404 seq.

solutionis; by adopting a special method based on the analytical study of the legal relations so as to attach it (localize it) into a certain place in which they produce all or the major part of their effects; then, he used to submit those relations to the Law of the place in which they were localized.

Savigny concluded that the *lex loci solutionis* is the proper Law of the contract, because the parties are supposed to have submitted voluntarily their contract to the Law of the place of its performance.

Mancini's argument was very close to Savigny's in taking part for the thesis of the personality of the Law, and consequently he called for the application of the Laws of the nationality on the citizens whenever and wherever they reside. Mancini then put many exemptions on this principle one of which was the application of the law which the parties intended to be the proper Law of the contract.

By the expansion of the individualist doctrine the principle of applicable by the jurisdiction of most of the countries in the world (35 & 36).

At this stage we have to discuss the arguments of the subjective doctrine, which can be classified into two categories:

**I : Arguments on principle,
II : Technical arguments,**

Noting that the emphasis of this study will be on what the judges do rather than on what they say (37).

I. Arguments on principle :

The arguments on principle can be grouped in four main ideas.

A) The first argument is inferred from the long practice of the English courts which "have adopted and guided a practice which prevails all over the world" (37) with some exceptions relating to a few presumably backward American States — so, for Dr. Mann, it would be a pity to doubt its correctness (38).

There is no doubt that the English learning (39) contributed to the

(35) Batiffol, *les conflits de lois en matiere de contracts*, these Paris 1938 No. 2 and seq.,

(36) Mann, *international Law Quarterly* 1950 at 60.

(37) Graveson (R.H.) *conflict of Laws*, London 1974 P. 405 & seq.

(38) Mann, *op. cit* at 60.

(39) Graveson, *ibid* at 404: Dicey & Morris, *conflict of Laws* 1973 at 721.

elaboration of the proper-Law of the contract doctrine but, also, there is no doubt that the principle of the autonomy of the will was developed in continental Europe by Dumoulin (40) and his successors centuries before the subjective theory was formulated by the English courts. "It is the objective theory and not the subjective which is peculiar to English Law" (41). As Falconbridge has pointed out (42) the rule that the proper Law is the Law intended by the parties is merely a judicial mode of expressing the rule that the proper Law is that of the country with which the transaction has the most real connection."

It has been admitted that the Law of conflict seeks a coordination between the legal systems of municipal private Laws. This principle was rejected by the jurisdiction (33), which excluded the proper Law of contract from this movement of coordination and submitted it to a special legal system far from being a purely municipal Law. This legal system is based on giving the mere intention of the parties the power to bind and to create rules, and a special legal system to govern their own contract.

(B) The second argument is based on the dismissal of any attempt to attach the possibility of allowing the parties to choose the Law governing their contract, to a prior step involving the examination of the Law permitting their choice. For the subjective doctrine (43) it is the private international Law of the forum that allows controlling influence on the parties selection.

The view assumes that the agreement to select a proper Law is itself binding as a contract (44). It also considers the indirect rules of the conflict of Laws as having direct influence, on the rights of the parties which properly belongs only to a system of domestic nature, and as Mr. Morris (45) puts it, "a rule of the conflict of Laws cannot say that an agreement is valid or not," but "can only say by what Law the validity of an agreement is to be governed," because the contract by its definition is an agreement to which the Law annexes an obligation.

We can conclude that the only Law which can decide the content and the limits of an obligation must be a domestic Law. The same theory goes further to decide that the parties can choose any Law whatsoever even if

(40) See *supra*.

(41) Morris, the proper Laws of a contract; a reply I.L.Q. 1950 at 198.

(42) Falconbridge, selected Essays on the conflict of Laws P. 351 mentioned by Morris *op. cit*.

(43) Mann *op. cit* at 62.

(44) Refers to this study p. 19.

(45) Morris, *op. cit* p. 199

it hasn't any connection with the agreement and they give the "vita food products V. United Shipping Co." as an example. This result can be rejected from the same aforesaid example because after the initial decision of the high court that no connection is necessary between the chosen Law and the contract, the same court considered the existence of such connections in the case (46).

Furthermore, this thesis gives the parties the power to limit in their choice of the Law, modality of the execution of such a Law by imposing some conditions, notably the stability of its provisions and the exclusion of any future amendment, even it gives the parties the capacity and the power to submit their contract to certain provisions and excluding others. The best example which can be given to this result is the award of the French "Cour de Cassation" of December 5/1916 (s 1911, 1 129 note Lyon Caen). The Civil Chamber decided that the Law chosen by the parties is applicable beyond the limits of the express terms and conditions decided by the parties. Consequently, the parties can decide not to submit their contract to any municipal Law what so ever. This is a direct result of accepting that the Law chosen by the parties continue to be the proper Law of the contract even if it was abrogated, that is to say, that the provisions of the Law continue to have effect for the purpose of the contract. By that, the subjective doctrine called for the incorporation of the Law's provisions in the contract. Also, this might be considered as a result for the third consequence which gives the parties the power to choose some provisions of a given Law and to reject others, notably by stipulating conditions contrary to the imperative rules of that Law.

The exemption of all kind of nullity signifies clearly that the international contracts are legally agreed upon even if they are not based on any municipal Law, this last result can be clearly inferred from different decisions of the French "Cour de Cassation" of the 15th Mai 1935 (47) and that of the 19th October 1938 (48). This tendency had been rejected by the German high court (49) and the French "Cour de Cassation" reversed this analyse in a more recent decision (50) by pointing out the necessity of an international contract to be linked with a domestic State Law.

The theory of "incorporation" as it was exposed by the subjectivists did not invoke any objection (51) from the objectivists if the concerned

(46) Batiffol (H), subjectivisme dans le droit international privé des contrats Melanges Maury Tome I p. 39.

(47) Rev. Crit 1936. 463.

(48) Nouv. Rev. de dr int. pr. 1939. 152.

(49) Batiffol (H), Subjectivisme et objectivisme dans le droit international privé des contrats p. 46.

(50) Batiffol (H). Supra p. 47.

(51) We tried to summarize some of the opposing views of the objective theory to clarify the subjective views.

rules of the proper Law of the contract designated by the parties are of complementary nature, the classical criticism for the subjective theory tried to limit the choice of rules to the supplementary ones by exempting the compulsory statutes. (provisions).

For the more recent objectivists, the proper Law of the contract (52) chosen by the parties, must be regarded as a whole, and without any distinction between compulsory and complementary rules. By that, they limit the application of the incorporation "concept" to the supplementary rules of proper Law.

A typical example may be mentioned for the actual practice involving the so called "theory of incorporation," that of the public international Law contracts which refers to a domestic national Law.

In conclusion, this argument assumes that the agreement to select a proper Law is itself binding as a contract without any need to be based on a domestic Law.

Also, this tendency offers the conflict of Laws a direct influence on the rights of the parties which, in fact, belongs only to a system of domestic Law.

This argument is very weak, because a rule of conflict of Laws cannot, by its nature, say that an agreement is valid but it can only say by what Law the validity of an agreement is to be governed; on the other hand a contract by its definition is an agreement to which the Law annexes an obligation. What Law annexes the obligation to the agreement between an English-man and a French, that their contract made and is to be performed in Germany, and shall be governed by the Dutch Law?

"The truth is that the subjective theory cannot be made to work unless we import parts of the domestic Law of contract in the conflict of Laws in order to determine whether an agreement to select a proper Law is binding" (53) and what are its conditions and limits.

(C) The third argument as exposed by Dr. Mann (54) states that it is no ideal to carry the parties selection of the governing Law into effect if the parties are free to select the localising elements of their contract, which according to the objective theory enables the judge to put his hand on the "center of gravity" of the contract.

(52) European Companies, publication of the European Council, 1952, p. 18; Batiffol, *Mélanges*. Maury p. 47.

(53) Morris op. cit p 199.

(54) Mann, L.L.Q. 63 - 64.

In fact this is an easily refutable argument from practical point of view, it is very difficult to say that the parties in a contract make a journey solely in order to change the localising element with a view to make their contract easier, and one must doubt whether any such case on evasion of contract Law could be produced even with the existence of a provisional rule, as it is the case in the Jordanian, Syrian and Egyptian Laws, where the proper Law of a contract can be the Law of the place of contracting or the Law of the common domicile of the parties.

Moreover, the localizing elements are of various different nature and a big part of them are far from the will of the parties.

(D) The last argument on principle which can be discussed is that which includes the question before the court whether the parties have reached agreement or not, in this case it is difficult to decide, on what principle, effect can be given to an express choice of Law by the parties. The same analyse can be applied to the question whether the law annexes an obligation to an agreement admittedly made. In respond to this question the adherents of the subjective theory are compelled to import into the private international Law of the forum such doctrine as they choose the domestic Law of contracts or, in a more general terms Law of contracts and to reject others. In fact such choice must be arbitrary.

II Arguments of Technical Nature

The technical arguments relating to th subjective theory can be grouped in five main categories.

(A) The first argument is inferred from the objection proposed by the candidates of the subjective theory to criticise the objective theory for not achieving certainty.

On the contrary, the vast majority of cases include one question of the same grade, shade, nuances, of fine distinctions and neat balancing. On which different minds may reach different conclusions. On the other hand the subjective theory achieves the Law's best aim in suggesting certainty and clearance. But this is an objection which might be urged against a good many legal doctrines. But we do not hesitate to confirm that justice is better promoted when we answer the question involving the essence of the contract than it's results, even though the latter is more certain. Moreover, a fundamental mistake destroys consent (essence) of a contract and so prevents the formulation of a contract, which is an essential matter to deal with, even though the principle may be difficult to deduce from English decided case.

(B) The second technical argument is inferred from Dr. Mann's illustration on the "Boissevain V. Weil" case in which Denning L.J. (55) expressed his approval of the subjective theory. Dr. Mann concluded that though the difficulties which he has been discussing are less serious when the parties have not made an express selection, nevertheless it is a relatively difficult matter to ascertain the country with which the contract has the most substantial connection, and "a relatively easy matter to ascertain the presumed intention of the parties" (56) For Dr. Mann concerning the aforesaid case, Monaco would seem to have been the place which the contract was most intimately connected with but, as he says, that "it is reasonable to assume that the parties had English Law in mind." (57)

In fact, if what Dr. Mann says is true it seems to be a strong argument in favour of the objective theory and not the subjective one. However, unfortunately for this argument, it is difficult to agree with Dr. Mann that Monaco was the place with which the contract was most intimately connected, because even the index deducted from the contract is clear in their amplified reference to the English Law as the proper Law of the contract under the circumstances.

(C) The third technical argument of the subjective theory is based on the attempt to criticize the objective theory in that it would introduce the "renvoi doctrine" into the Law of contracts. This is a very complicated argument difficult to understand. We think that no reasons are given as to why this consequences should follow, and no cases are presented in which this result has followed. It is therefore submitted that the apparition of the renvoi in this connection is a mere fiction, and as a result this baseless argument cannot support the subjective theory.

(D) The fourth technical argument, is deducted from the English subjective authors, in that the parties selection of English Law should always be enforced because, for them, "English Law will be applied if no other is pleaded and therefore it would be inconsistent to allow the parties to select English Law (by silence) in their pleadings, and not to allow them to select English Law expressly in their contract." (58)

This argument is more imaginary than to be real. For there isn't any rule of English Law, private international or domestic, substantive or procedural, which prevent a party in the contract from pleading that his contract was governed by another Law. The question of his plea will be

(55) Morris, I.L.Q. 1950 at 204.

(56) Supra

(57) Supra

(58) Morris (J.H. I.L.Q. 1950 p. 205.

successful depending not on any rule of English Law stressing that a foreign Law is a question of fact which must be specially pleaded, but simply on the general question whether the subjective or the objective theory is correct and can be based upon.

(E) The fifth argument advanced also by Dr. Mann (59) is that of the (depeçage) splitting up of the contract into separate phases, each governed by a different Law resulting from the objective theory.

Again this argument is not a solid one, because an international contract is a complicated transaction, which may lead to a great variety of related, but distinct, questions and it is clear that the function of the conflict of Laws is to supply a solution which considers the realities of the situation rather than pressing on the unity of the solution far from the real divergencies of problems from the nature of different elements in each separate contractual relationship.

So, this argument is based on formality related to simplicity which does not take into consideration the realities and the nature of each case.

With that out study of the purely subjective theory comes to an end, to keep room for the study of the opposite objective doctrine.

Sub-Section II : The Objective Theory

At the end of the 19th century the subjective theory faced serious obstacles which put an end to it's genuine progress. The development of the big industry put the light on the problem that the complete subjective freedom in contracting between two unequal parties, from economic point of view, will give way to the stronger party to impose his transaction, on his terms, upon the other party. For this purpose the legislator was obliged to intervene so as to protect the weaker by limiting the possibility of the parties will to choose the Law. This legislative intervention and its mode represent another difficulty to the subjective theory. If we agree that the state can always limit the zone of the individual liberty in contracting by means of the public order, and if the legislator can extend the contractual zone when it appears to him that it is suitable to do so; Consequently is it possible to deny that the Law constitutes a legal structure of "a system of rules organizing the social life" (60) which by considering the individual liberty to arrange their own legal transaction decides, at the same time, the manner in which this liberty can be

(59) Mann, I.L.Q. op. cit 72.

(60) Batiffol (H), Aspects Philosophiques Du Droit International Prive p. 73.

practiced? In other words, if the Law is in a position to be imposed on the individual's will of the parties, it can, for a stronger reason, precise the limits granted to the individual intention. So it is difficult to pretend that the first element, and which prevails, is other than the rules of a positive municipal Law.

This answer coincides with the fact that, when asking a judge to enforce the execution of a private agreement, reached between individuals, by the public force, the doctrine recognizes that the Law which organized the sanction for the breach of a contract, grants the agreement an obligatory force by means of the rules of conflict of Laws by giving competence to a determined Law. To deny that a positive municipal Law is to govern the contract, means to be satisfied by the exchange of the will as the sole source of the contract that grants its obligatory force. But there is a general consensus between the writers, and as it has been formulated by many different Laws, (61) that the provisions of the positive municipal Law decide the limits in which the will of the parties can be engaged and obliged to execute the terms of the agreement. (62) As a result of this general rule the agreement must be in conformity with the provisions of the Law, to be recognized as legally formulated. Consequently we can confirm the principle that the agreement is always integrated to a positive Law and not the contrary as stated by the subjective theory.

After this general introduction to the objective theory we are going to analyse the principle of autonomy in choice of Law from the objective point of view.

I Arguments of the Principle

The objective theory in choice of Law consists of two different branches. The first one implies in the assertion that the parties to a contract are not at full liberty to choose any legal system whatsoever of their own unrestrained choice, but they must choose a system with which the contract, which they are about to conclude, has some connection. The second branch consists of seeking to substitute for the presumed of

(61) For example Art. 1134 of the French Civil Code provided that "Les conventions Legalement formees tiennent lieu de loi a ceux qui les ont faites." See also Art. 92 and seq., of the Syrian Civil Code and Art. 90 of the Jordan Civil Code.

(62) Goldman (B), "Frontieres du droit et lex mercatoria" le droit subjective en question., Also for the same author concerning this subject "le droit des societes internationales" who tries to analyse the existence of a united international positive Law.

hypothetical intention of the parties some objective test. (63) This second is usually expressed, in the Anglo-Saxon countries, by the statement that where the parties have not considered the question of the choice of Law, the Law with which "the contract has the most real connection" is to be considered the proper Law of the contract. (64) The first part of the theory indicates that the parties freedom to contract is restricted and cannot be absolute. The second part provides that the search for the Law, which the parties would or should have intended, as proposed by the subjective theory, is replaced by a search for that one out of the circle of permissible possibilities which to the court appears to be the most real one.

— The adversaries answer on the Principle; In his article (65) Dr. Mann assured that the objective theory had no support in the practice of the European Continental Courts and this opinion was later on repeated by Dr. Morris in his answer to the question if the chosen Law must be connected with the contract or not (66). In fact, this situation was dealt with in the case where the parties have tried to evade the purpose of the rule of the *lex fori* by other means different than the objective theory consisting of another sharp tool of "ordre Public" put by the legislator and handles with ease by the continental judges. In case, this tool for some reason or other has not helped or where it did not appear tactful to apply it the European courts usually refer to the doctrine of "Fraudem Legis" (67) which covers the tricked application of the Law which is not covered with the doctrine of public order.

Also, from the point of view of the courts the "fraus Legis" doctrine, is, as they pretend, more useful than the objectivist doctrine for a further reason: it renders any investigation of the foreign Law, the conflict of Laws and the real connection, unnecessary once. It has been found that the circumventions was fraudulent and, as a matter of fact, all legal effects based upon this fraud are avoided. Consequently, the continental courts are therefore not likely to abandon the "fraus Legis" doctrine for what is believed to be "less efficient and more complex weapon of the objective theory (68).

It seems therefore likely that the first part of the objective theory, which consists in the assertion that the parties to contract are not likely to choose any legal system of their undisputable choice, will continue to be

(63) Similar to this view is the theory of "localization" developed by Mr. Batiffol (H) *Ref. Aspects Philosophiques* p. 245.

(64) Shmithoff. *The english Conflict of Laws* 3rd ed 1945 P. 109; Dr. Cohn, *The objectivist on the Proper Law* ICLQ, 1957 p. 373.

(65) Dr. Mann *the proper Law* op. cit.

(66) Dicey and Morris, *The conflict of Laws* (1973) at 730.

(67) *Fraude a la loi*.

(68) Dr. E.J. Cohn, *the objectivist Practice*, I.C.L.Q. page 376.

without any practical interest and remain of theoretical importance subject to the legal writers (69). On the other hand the adversaries of the objective theory cannot deny that the objective doctrine, in its second part, has captured this field in at least two main countries (70): Switzerland and Western Germany. In both countries the courts have adopted entirely or largely the views of the objectivist. It is now possible to judge from actual experience where the substitution of the search for the most real connection leads the daily work of the courts (71).

Arguments on principle inferred from the courts decisions:

A) It is to be noted that the objective practice in Switzerland and Germany does not correspond entirely to the expectations of some of the leading writers of the doctrine. i.e., Dr. Cheshire (72) who envisages a painstaking investigation of the various aspects of the contract, a calculation of the relative importance of these aspects and in the end taking a decision as to which of them are so grouped in one country as to render that country's Law to be the most reasonable choice and the most connected with the case. An attentive test of the decisions of the Swiss and German courts results in the fact that the aforesaid courts have understood and applied the objectivist doctrine in different way. They simply disregarded all but one aspect and granted it a decisive effect on the *lex contractus* under examination.

B) For the English objectivist writers it is reasonable to assume that an international contract is governed in all its aspects by a single Law because an investigation of every one of the numerous aspects, included, in a contract i.e., formation, interpretation, performance, discharge, branch... etc., is proposed to have its proper governing Law to be assigned. However the Swiss and German Courts have accepted the objectivist doctrine just in their search for a simpler solution — as the subjectivist tried to do — that would enable them to escape from the fractionist doctrine in its various forms, so as to submit all or most of the

(69) Even Savigny who without any doubt started as an objectivist when he argued that every contractual obligation had its seat, identified this seat with the place of performance & the parties can agree expressly or impliedly on the place performance, which is an easy path leading to a practical subjectivism.

(70) Dr. Morris refers to other two Austration cases; Dicey and Morris on the Conflict of Laws p. 729.

(71) It must be noted that the decisive step out of the subjectivist field by the Swiss Federal supreme court was only taken when the court began to consider the question of what shall be done if each part had to perform at a different place ref. Dr. Cohn op. cit. at 377.

(72) Cheshire, Private International Law 5th ed. (1957) p. 209.

proposed questions to one and the same Law in contradistinction with what the English objectivist called for.

C) The English Version of the objective theory called the courts to "ruthlessly" apply the external standard of the reasonable man (73). The Swiss and German courts in applying the objectivist doctrine demonstrated a liberal attitude by stressing the sense of the term "ruthlessly" for example it was decided that the mere fact that one of the contracting parties had concluded similar contract with another party and would have administrative difficulties if the contracts were subject to different Laws, is a sufficient criterion in favour of that party's Law. And as Professor Graveson (74) pointed it out, the objectivist doctrine stresses the importance of the "reasonable man" as if no body had the right to be what may appear later on, to be unreasonable to outside observers, it even takes into account the "public interests" in a private dispute between private individuals.

The objectivist theory presupposes the application of rules forming part of the individual legal system with different implications and sometimes of complicated ones. Consequently, as long as no international code of the Law of conflict of Laws exists, the objectivist theory must therefore, result in a further diversification of the tendencies of legal thinking in this area.

In the analysis of the courts decisions, in the aforesaid countries (Swiss and Western German) in their application of the objective theory, we find that the courts were unwilling to find that the intention of the parties could be implied from the circumstances. However even the European objectivist accept the proposition that if the parties have not expressed their intention as to choice of Law, such may be implied from the circumstances of the case, only where no express or implied intention can be found does the objectivists seek the "center of gravity" of the contract to find the Law with the most real connection. This theoretical hierarchy of test is not applied, generally, in practice where the courts pass straight in applying the objective test in case they don't find an express choice of Law.

In conclusion, it is submitted that the practice as has been with the objective theory in the aforesaid two European countries is not encouraging as to render it desirable for the English and Anglo-Saxon courts to give up their own practice and adhere to the objective theory as had been formulated and revised by the central European countries which is distinguished by hesitation.

With that we end our test to the objective theory so as to examine a special case of Batiffol's view of localization in the subject.

(73) Cheshire, Private International Law 5th ed. (1957) p. 209.

(74) Graveson, Conflict of Laws, 3rd ed (1956) at 184 et seq.,

Sub-Section III : The Theory of Localisation

1 The Localization of contracts by their external elements

It has been admitted that the common line of nearly all the municipal (Domestic) Laws leaves for the parties the choice of the Law to govern their contract, with their free will (75).

In fact if we examine the application practice of this principle we find that in the absence of an express choice of Law the judge refers "ex officio" to the localization of the contract, with a tendency to base their operation on the external material elements (76).

On the other hand, even with the existence of an express designation of Law, the localization of the contract still remain the base of such choice with a special importance given to the new element.

The orthodox subjectivists recognize without any difficulty that the absolute freedom in choice of Law is mere fiction.

After observing the judges attitude when they face a case without any clear index of the parties intention, this doctrine noted that the courts pretended to seek the implied will of the parties, and to be based on facts they referred to the localization technique, by means of the circumstances in every case, under the cover of interpreting the will of the parties.

The opponents of this method stressed the arbitrary power granted to the judge in his determination of the applicable Law on the contract by the examination of every case. Consequently, this method leaves no room for any prevision. The test of the greater part of the courts decisions can result on general directives which can put the light on manner used for localizing the contracts. It is important to underlie that the matter includes only directives and not solutions.

The most important and preferable measure is that of the place where the contract is to be performed.

In favour of this place mention the difficulties which may arise during the execution of obligations, it is the place where the creditor can ask the debtor to exact the performance, and localize it by the external element.

Conversely, the place where the contract is concluded (*lex loci contractus*) remain uncertain and cannot be easily localized or materialised especially in case of contracts made by the post (*par correspondance*) or concluded solely by the exchange of the will or it can be an accidental place without any link with the transaction.

(75) This was transferred to the customary international Law under the title "*Pacta sunt servanda*".

(76) Batiffol (H), *aspects philosophiques*, at 245.

Consequently the application of the *lex loci* solution is a tendency adopted by a large part of the courts and it is generally admitted by means of a presumption concerning contracts related to immovables that are governed by the law where the immovable thing is situated.

II The limits of the localization

First, we have to exclude the contracts with the express choice of Law or which includes stipulations such as the attributive conditions of Jurisdiction to the courts of a certain country, or the fixation of the place of arbitration in a certain country, such stipulations can be considered as an implied designation of the Law and not a presumed one: In this case it seems that this doctrine rejects every possibility to apply a materialist localization.

The ignorance of the fact that the Law decides the limits of its powers and effects on the persons, subjects and objects gave place for theoretical and practical difficulties.

In order to avoid the aforesaid difficulties, and to keep up with jurisdiction test a part of this doctrine suggested that the express and the implied choice of Law can be considered as an index that the structure of the contract as it was formulated by the contracting parties is localized in a certain country (77).

The analysis is of great importance, especially if it can explain the nullity of a contract in accordance with the Law chosen by the parties, and the requirement of the existence of certain link between the elements of the contract and the country whose Law was chosen by the parties.

In this case it is necessary to notice that the operation involves a localization but in a less material sense. (78)

The link between a contractual transaction with different countries could be multiple and of contradictory nature.

Besides the situation of the immovable things or the place of performance, the place in which the contract is concluded (*Loci contractus*) is materially less characterised, it can be more materialist if it coincides with the domicile of one of the contracting parties.

The arbitration conditions refer to a material link but of eventual character.

Professor Batiffol recognises that inspite of the importance of the external material elements in the localization doctrine, the evolution of the so called "contracts types" and the commercial system rendered it in the second rank.

(77) Michel Vasseur, *op. cit.* at 9 notes 3 & 4, "arrêt de la Cour de Cassation" 6 Juillet 1959, *Rev. Crit* 1959. 708 note Batiffol. The same result was implicitly obtained *cas.*, 24 April 1952 *Rev. Crit* 1952. 502 note Matulsky.

(78) Toubiana Annie, *op. cit.* at 6.

CONCLUSION

It is to be concluded that the term (Autonomy in Choice of Law) has evolved to be adapted with more than a monotonous conception and include other theories depending on the priorities which gives them the legislator. And as we noted by our comparative study it is a matter of policy decided by the legislator in accordance with the principle of adequacy by giving priority to one theory instead of the other but in the same time taking the other into consideration either explicitly, by implication or by a purely objective measure.

ABBREVIATIONS

Am. J. Comp. L . . . American Journal of Comparative Law.
Am. J. Int. L. . . . American Journal of International Law.
Annuaire Annuaire de L'Institut de droit international.
B.Y.I.L. British Yearbook of International Law.
C.I. J. Recueil . . . Recueil de la Cour Internationale de Justice.
Clunet Journal du droit international.
Int. & Comp. L.Q. . . . International & Comparative Law Quarterly.
I.H.E.L. Institut des Hautes Etudes Internationales.
Int. L.Q. International Law Quarterly.
L.Q. Rev. Law Quarterly Review.
R.C.A.D.I. Recueil des Cours de L'academie de droit International.
Rev. dr. int. et dt. comp. . . . Revue de droit international et de droit comparé.
Rev. dr. int. et légis. comp. . . . Revue de droit international et de législation comparée.
Rev. cit. dr. In. Pr. . . . Revue critique de droit international privé.

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