



3-1-1984

International Contracts under the Conflict of Laws Rules of Great Britain and Japan

Karen Denise Untiedt

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Law Commons](#)

Recommended Citation

Karen Denise Untiedt, *International Contracts under the Conflict of Laws Rules of Great Britain and Japan*, 7 Loy. L.A. Int'l & Comp. L. Rev. 193 (1984).

Available at: <https://digitalcommons.lmu.edu/ilr/vol7/iss2/2>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

COMMENTS

International Contracts Under the Conflict of Laws Rules of Great Britain and Japan

I. INTRODUCTION

A critical consideration in the drafting of any international contract is the choice of its governing law. Significant differences may exist among both the substantive contract law and the conflict of laws rules of the potential forums.¹ A contract or contractual term which is enforceable in one legal system may be unenforceable in another.² To alleviate potential conflict of laws problems, parties may contractually agree that the laws of a certain country are to govern in the event of a dispute. Even such an express choice of law, however, gains force and effect through the conflict of law rules of the forum country.

This Comment will familiarize the reader with the English and Japanese conflict of law rules concerning international contracts and will compare and analyze these general rules. These two countries were selected because of the basic difference in their legal systems. Moreover, conflict of law problems are likely to arise in these nations because they are island economies and international trade is particularly important to their economic well-being.³

1. "Forum" or "forum country" denotes the country where litigation concerning the contract has been or will be commenced.

2. For example, it is simple to make a contract enforceable under Japanese law because there is no concept of consideration and no statute of frauds. Kitagawa, *Contract Law in General*, in 3 *DOING BUSINESS IN JAPAN* II 1-1, 1-23 (Z. Kitagawa ed. 1982) [hereinafter cited as Kitagawa I].

3. The impact of international trade on the economies of England and Japan is demonstrated by international trade statistics. In 1980, the United Kingdom imported \$117,902,094,000 in commodities and exported \$114,380,488,000 in commodities. At the same time, Japan imported \$140,527,652,000 and exported \$129,807,025,000 in commodities. UNITED NATIONS DEPARTMENT OF INTERNATIONAL ECONOMIC AND SOCIAL AFFAIRS STATISTICAL OFFICE, 1980 YEARBOOK OF INTERNATIONAL TRADE STATISTICS 984, 987, 532, 534 (1981) (all amounts in United States dollars). By comparison, the United States exported \$12,694 million worth of goods to the United Kingdom and \$20,790 million to Japan in 1980. In the same year, the United States imported \$9,842 million worth of goods from the United Kingdom and \$30,714 million from Japan. Based upon worldwide import-export figures for the United States, exports to the United Kingdom represented approximately 5.75% of the

Since the Japanese legal system may be unfamiliar to some readers, Part II will discuss the sources of Japanese conflict of law rules. In Part III, the general rules that govern the validity of choice of law clauses in Great Britain and Japan will be addressed. The rules that determine the "proper law"⁴ of the contract in absence of such a clause will then be discussed in Part IV. After setting forth these general rules, Part V will address the limitations on these rules in terms of their relationship to both particular contractual issues and particular types of contracts. The role of "public policy" as a special limitation upon the general conflict rules relating to contracts will be discussed in Part VI. Finally, these rules will be compared and placed in an analytical framework.

II. SOURCES OF JAPANESE CONFLICT OF LAW RULES

Due to the basic differences between the English common law system and the Japanese civil law system, it is appropriate initially to delineate the sources of Japanese conflict of law rules. Unlike Great Britain, Japan's conflict of law rules are primarily found in statutes. The primary source is the *Hōrei*, or Law Concerning the Law on the Application of Laws,⁵ which originated in German law.⁶ Various trade regulations, foreign exchange restrictions, foreign investment controls, antitrust regulations and other legislation, however, may

total United States exports in 1980 and exports to Japan represented 9.42%. Imports from the United Kingdom represented approximately 4.02% of total United States imports in 1980 and imports from Japan represented approximately 12.54%. U.S. DEPARTMENT OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1982-83, at 836-38 (103d ed. 1982).

4. The "proper law of the contract" is "a convenient and succinct expression" used by commentators and some courts to describe the laws of a given legal system which the court holds applicable to govern most matters arising out of or related to a specific contract. P. NORTH, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 195 (10th ed. 1979). Stated another way, the "proper law" means "the system of law which governs the interpretation and the validity of the contract and the mode of performance and the consequences of breaches of the contract." *Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.*, 1971 A.C. 572, 603, [1970] 3 W.L.R. 389, 411, [1970] 2 All E.R. 71, 91 (opinion of Lord Diplock). The proper law is, of course, determined by reference to the forum's conflict of law rules.

5. Law No. 10 of June 21, 1898, as amended by Law No. 7 of 1942 and Law No. 223 of 1947, translated in A. EHRENZWEIG, S. IKEHARA & N. JENSEN, AMERICAN-JAPANESE PRIVATE INTERNATIONAL LAW Appendix A, at 115 (1964) [hereinafter cited as AMERICAN-JAPANESE PIL], and in DOING BUSINESS IN JAPAN Appendix 3B (Z. Kitagawa ed. 1984). All further references to the *Hōrei* shall be from the translation in AMERICAN-JAPANESE PIL.

6. Egawa, *Private International Law as it is Studied in Japan*, 1 JAPAN SCI. REV. 59, 61 (1950). In fact, the later advancement of Japanese conflict of law rules was strongly influenced by European conflict rules, particularly those of Germany and France. *Id.* at 62.

also affect the validity or enforceability of the contract.⁷

Resolution of conflict of law problems may also turn upon principles found in Japanese case law and custom. Case law plays an especially significant role by interpreting and complementing the rather sparse provisions of the *Hōrei*.⁸ The role of custom,⁹ on the other hand, is less important as its use is restricted under Article 2 of the *Hōrei*. Article 2 provides that “customs not contrary to public policy and good morals have the force of law to the extent they are recognized by statute or ordinance, or concern matters not otherwise covered by statute or ordinance.”¹⁰ The result is that custom is usually a “subsidiary source of law,” applied only in the absence of other sources of law.¹¹

III. EXPRESS CHOICE OF THE PROPER LAW

The simplest way to avoid uncertainty regarding the proper law

7. Fujita, *Transnational Litigation—Conflict of Laws*, in 7 *DOING BUSINESS IN JAPAN* XIV 5-1, XIV 5-52 (Z. Kitagawa ed. 1982) [hereinafter cited as Fujita]. See generally Fujita, *Japanese Regulation of Foreign Transactions and Private-Law Consequences*, 18 *N.Y.L. FORUM* 317 (1972) [hereinafter cited as *Japanese Regulations*]. See also *infra* note 185.

8. Yamada, *Private International Law*, 7 *JAPAN ANN. L. & POL.* 129, 135 (1959). Japan is a civil law country and theoretically no judge is bound by any judicial precedent (except a lower court by a decision of a higher court in the same case). Y. NODA, *INTRODUCTION TO JAPANESE LAW* 226 (A. Angelo trans. & ed. 1976). However, if a judge refused to follow a well established *hanei ho* (the body of rules built up by judicial interpretation of a particular piece of legislation), he would undoubtedly be reversed on appeal. *Id.* at 225-26. In general, the importance of case law varies depending upon the branch of law, but it has long played an important role in commercial and civil law. *Id.* at 257, 277.

9. One Japanese scholar defines “custom” as “those rules of conduct which are generally followed in a society . . . [and] are rules of popular origin formed unconsciously by the force of habit.” Y. NODA, *supra* note 8, at 217. In Japan, the judge’s function is to provide a “reasonable solution” to social conflicts that arise. *Id.* at 188, 221-22. He is not required to apply existing rules at the expense of a “reasonable solution” to the case at hand. *Id.* Therefore, in order to reach a proper solution, judgments often rely upon customary rules that are incompatible with imperative or statutory rules. *Id.* at 221.

10. *Hōrei* art. 2, translated in *AMERICAN-JAPANESE PIL*, *supra* note 5, at 115.

11. Y. NODA, *supra* note 8, at 219. *Jori* is another source of law in Japan but it is not explicitly mentioned in the context of sources of conflict of law rules. See *id.* at 222-24. *Jori* is defined as “natural law” and “written reason” or general principles of law. *Id.* Although it is universally accepted as a basis for a judgment in Japan, it is most commonly used to test the rationality of applicable legislation to ensure a rational solution. *Id.* For a more detailed discussion of sources of law in Japan and the Japanese legal system, see Y. NODA, *supra* note 8, and H. TANAKA, *THE JAPANESE LEGAL SYSTEM* (1976). For a review of Japan’s popular alternatives to litigation as a method of dispute resolution, see Taniguchi, *Dispute Settlement Framework*, in 7 *DOING BUSINESS IN JAPAN* XIV 1-1 (Z. Kitagawa ed. 1982); Yamashita, *Compromise*, in 7 *DOING BUSINESS IN JAPAN* XIV 2-1 (Z. Kitagawa ed. 1982); Yamashita, *Conciliation*, in 7 *DOING BUSINESS IN JAPAN* XIV 3-1 (Z. Kitagawa ed. 1982); Hattori, *Arbitration*, in 7 *DOING BUSINESS IN JAPAN* XIV 4-1 (Z. Kitagawa ed. 1982).

of the contract is to include a contractual provision dealing with this issue. Both Japanese and English conflict of law rules generally allow the parties to choose which law will govern their contract.¹² Allowing such a choice is consistent with the familiar principle of freedom of contract.¹³

In determining the wording of their contractual choice of law clause, the parties must initially consider the distinction found in English conflict of law rules between a "party reference" and an "incorporation."¹⁴ Under a party reference, the parties submit their contract to the chosen law.¹⁵ In other words, they agree that all disputes arising out of their contract will be governed by the law of a particular legal system. In contrast, under an incorporation, the parties merely incorporate selected provisions of a foreign law as terms of the con-

12. *England*: P. NORTH, *supra* note 4, at 199-202; DICEY AND MORRIS ON THE CONFLICT OF LAWS 697-98 (J. Morris 8th ed. 1967) [hereinafter cited as DICEY & MORRIS]; LORD HAILSHAM, 8 HALSBURY'S LAWS OF ENGLAND ¶ 584, at 407-08 (4th ed. 1974) [hereinafter cited as HALSBURY'S]; and J. MORRIS, THE CONFLICT OF LAWS 214-18 (2d ed. 1980).

Japan: Fujita, *supra* note 7, at XIV 5-52 to 5-32; see *Hōrei* art. 7(1), translated in AMERICAN-JAPANESE PIL, *supra* note 5, at 115. See generally Yamada, *The Law Applicable to Contracts—The So-Called Principle of Party Autonomy*, 1 L. JAPAN ANN. 60 (1967).

13. Yamada, *supra* note 12, at 63; see also P. NORTH, *supra* note 4, at 197 (a counterpart to the *laissez faire* principle); and Lando, *Contracts*, 3 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 15 (1976).

Freedom of contract remains a fundamental, underlying principle of contract law in Japan. Kitagawa, *Contract Law in General*, in 1 DOING BUSINESS IN JAPAN 2-1, 2-13 (Z. Kitagawa ed. 1982) [hereinafter cited as Kitagawa II]; and Kitagawa I, *supra* note 2, at II 1-84. Under it, parties are given *freedom* to make a contract, select the party they will contract with, decide the terms of the contract, as well as freedom from formal requirements. Kitagawa II, *supra*, at 2-13.

The freedom expressed in this underlying principle, however, is restricted by equitable principles (i.e., public policy, good faith, the rule against abuse of others' rights), as well as various statutes whose purpose may be to equalize bargaining power, restrict inherently dangerous activities, or simply regulate particular industries and professions. Kitagawa I, *supra* note 2, at II 1-84 to 88. Some of these statutes restrict a party's freedom to make a contract by imposing a duty to accept particular offers. *Id.* at II 1-88. Others may impose certain requirements as to the form of the contract, or restrict a party's right to select with whom he will contract (i.e., the Anti-Monopoly Act). *Id.* Finally, some, such as the consumer protection statutes, restrict the parties' freedom to decide the contractual terms. *Id.* at II 1-88 to 89. See also *id.* at II 1-91 to 94 (listing statutes where noncompliance voids the contract).

14. P. NORTH, *supra* note 4, at 202-03; DICEY & MORRIS, *supra* note 12, at 701-02; J. MORRIS, *supra* note 12, at 218; and Lando, *supra* note 13, at 13 & n.70 (noting this distinction is also found in the conflict of laws rules of the United States, Germany, Switzerland, and the Netherlands). There is no indication that this distinction is recognized in Japan. In England, however, this distinction has been particularly relevant in determining the proper law of shipping contracts that make reference to the United States' Harter Act. The English courts have typically read such a reference as merely an incorporation. Blom, *Choice of Law Methods in Private International Law of Contract*, 1980 CANADIAN Y.B. INT'L L. 161, 170.

15. *E.g.*, Lando, *supra* note 13, at 13; DICEY & MORRIS, *supra* note 12, at 701.

tract—a shorthand alternative to setting out in the contract the actual provisions of the foreign law.¹⁶ The effect of this incorporation, however, is limited to having the foreign law operate as a contractual term or terms and does not govern all contractual issues in dispute.¹⁷ An incorporation presupposes a different proper law and derives its validity from the provisions of the proper law.¹⁸

The distinction between a party reference and an incorporation is important for at least two reasons. First, if there is a party reference, the mandatory rules of legal systems other than the one chosen by the parties are disregarded, because the parties' choice is the proper law of the contract.¹⁹ Under an incorporation, however, the application of the mandatory protective rules of the proper law of the contract may limit the effect of the incorporation, because the incorporation derives its validity from the proper law of the contract.²⁰ Second, with a party reference, any changes in the proper law from the time the contract was made until a dispute arises apply.²¹ Thus, what was once a favorable legal climate could become surprisingly unfavorable. In contrast, when a foreign statute is incorporated into a contract, it remains a part of the contract, unaffected by subsequent changes in the law.²²

16. P. NORTH, *supra* note 4, at 202-03; DICEY & MORRIS, *supra* note 12, at 218; Lando, *supra* note 13, at 13. Parties who wish to "incorporate" the provisions of a particular law may, of course, choose one of two alternatives. They may either include in the contract a verbatim transcript of the particular provision or simply include a general statement that certain rights and duties will be governed by the particular law. P. NORTH, *supra* note 4, at 203.

The following is a commonly used example of an "incorporation." The parties to a sales contract agree that the seller's obligation of fitness of goods is to be governed by certain provisions of the French Civil Code. To accomplish this, they can simply refer to these code provisions, rather than attempt to delineate the requirements under those provisions. By this "incorporation," however, they do not thereby submit all of their contract disputes to French law. Lando, *supra* note 13, at 13; DICEY & MORRIS, *supra* note 12, at 701-02; and J. MORRIS, *supra* note 12, at 218.

Thus, if the parties are unable to agree on the law that is to govern all contract disputes, incorporation is one avenue for compromise whereby the most strongly desired provisions of one party's chosen legal system may apply.

17. DICEY & MORRIS, *supra* note 12, at 701-02; J. MORRIS, *supra* note 12, at 218.

18. DICEY & MORRIS, *supra* note 12, at 701-02; J. MORRIS, *supra* note 12, at 218; and P. NORTH, *supra* note 4, at 203.

19. Lando, *supra* note 13, at 13-14.

20. *Id.* See P. NORTH, *supra* note 4, at 203; DICEY & MORRIS, *supra* note 12, at 701-02; and J. MORRIS, *supra* note 12, at 218.

21. Lando, *supra* note 13, at 13-14; P. NORTH, *supra* note 4, at 203; DICEY & MORRIS, *supra* note 12, at 702-03; and J. MORRIS, *supra* note 12, at 218.

22. Lando, *supra* note 13, at 13-14; P. NORTH, *supra* note 4, at 203; DICEY & MORRIS, *supra* note 12, at 702-03; and J. MORRIS, *supra* note 12, at 218. For the remainder of this

A. *Recognition of Express Choices of Law in England*

In 1865, England became the first country to respect the parties' right to choose the proper law of their contract, and to clearly recognize party autonomy as the guiding principle in this area.²³ The leading case, *Vita Foods Products v. Unus Shipping Co. Ltd.*,²⁴ reaffirmed the theory of party autonomy and established the only absolute restrictions under English law upon the parties' right to select the proper law.

In *Vita Foods*, the defendant, a Nova Scotian corporation, agreed to transport a cargo of herring from Newfoundland to New York for the plaintiff, a New York corporation. During the voyage, however, the first ship ran aground due to the shipmaster's negligence. As a result, the goods were damaged when they finally arrived in New York. The plaintiff sued, contending that the language in the bills of lading exculpating the defendant from liability due to the shipmaster's negligence was invalid because the bills of lading failed to include the required statement that the contract was governed by the Newfoundland Carriage of Goods by Sea Act. The bills of lading, however, had expressly stated that English law was to govern. Since the Newfoundland Act would also have exculpated the defendant, the case centered upon whether the contract was void for failure to incorporate the statement and which law should govern that determination.²⁵

The Privy Council first ruled that English law would govern the dispute, including the effect of the failure to comply with the Newfoundland Act.²⁶ Speaking for the Council, Lord Wright emphasized that in England a "fundamental principle" is that the proper law of the contract "is the law which the parties intended to apply."²⁷ After restating the rule that the parties' intent expressed in a choice of law clause is "conclusive," he justified it by reasoning:

Where the English rule that intention is the test that applies, and where there is an expressed statement by the parties of their intention to select the law of the contract, it is difficult to see what quali-

Comment, the phrase "express choice of law" designates a party reference rather than a mere incorporation.

23. Lando, *supra* note 13, at 14-15 (discussing and citing *P & O Steam Navigation Co. v. Shand*, [1865] 3 Moo. P.C. (n.s.) 272, 291, 16 Eng. Rep. 103, 110, and *Lloyd v. Guibert*, [1865] 1 Q.B. 115).

24. 1939 A.C. 277, [1939] 1 All E.R. 513.

25. *Id.* at 283-89, [1939] 1 All E.R. at 516-20.

26. *Id.* at 289-92, [1939] 1 All E.R. at 521-22.

27. *Id.* at 289-90, [1939] 1 All E.R. at 521-22.

fications are possible; *provided* the intention expressed is *bona fide and legal*, and *provided* there is no reason for avoiding the choice on the ground of *public policy*.²⁸

As to the contention that the choice in this case should be disregarded because the shipping contract had no connection with its proper law,²⁹ the Council found that “[c]onnections with English law [are] not as a matter of principle necessary.”³⁰ In this regard, the Council noted that international contracts bearing no relationship to England often had clauses providing for arbitration in England or that English law would govern, and that such clauses were frequently upheld.³¹ Finally, the court ruled that under English law the contract was not void for failure to incorporate a clause stating that the contract was subject to the provisions of the Newfoundland Act.³²

Since *Vita Foods* continues to control in England, an express choice of law will be respected by English courts so long as it is “bona fide and legal” and not contrary to “public policy.”³³ It is widely agreed, however, that the “bona fide and legal” requirement would invalidate an express choice of law provision where the parties’ motive was to evade the adverse consequences of a provision which would have otherwise been part of the proper law of the contract.³⁴ The courts may also disregard a choice of law clause where the choice is “meaningless.”³⁵ In addition, despite the dictum in *Vita Foods*,

28. *Id.* at 290, [1939] 1 All E.R. at 521 (emphasis added).

29. *Id.* This contention stems from the fact “that the transaction [was] . . . one relating to the carriage on a Nova Scotian ship of goods from Newfoundland to New York between residents in these countries.” *Id.*

30. *Id.*

31. *Id.* It was also suggested that some contact with England could be construed from both the fact that the ship which originally carried the goods might have been subject to an English imperial statute due to its registration, and the fact that it was likely to be insured by English underwriters. *Id.* at 291, [1939] 1 All E.R. at 521.

32. *Id.* at 292-300, [1939] 1 All E.R. at 522-28.

33. P. NORTH, *supra* note 4, at 201-02; HALSBURY’S, *supra* note 12, ¶ 584, at 407-08. See DICEY & MORRIS, *supra* note 12, at 697-701; and J. MORRIS, *supra* note 12, at 217-18.

34. P. NORTH, *supra* note 4, at 201; DICEY & MORRIS, *supra* note 12, at 699; HALSBURY’S, *supra* note 12, ¶ 584, at 407; and J. MORRIS, *supra* note 12, at 217.

35. P. NORTH, *supra* note 4, at 202; HALSBURY’S, *supra* note 12, ¶ 584, at 408. For example, in *Compagnie d’Armement v. Compagnie Tunisienne de Navigation S.A.*, [1969] 1 W.L.R. 1338, [1969] 2 All E.R. 589 (C.A.), the court of appeal held that a clause stating that the shipping contract was to be “governed by the laws of the flag of the vessel carrying the goods” was meaningless and inapplicable because a number of different ships, each flying different flags, had carried the cargo in dispute. This decision was reversed by the House of Lords on the ground that French, not English, law was the proper law of the contract. 1971 A.C. 572, [1970] 3 W.L.R. 389, [1970] 3 All E.R. 70. Yet, the Lords disagreed as to the effect of the clause and each used a different rationale to determine that the proper law of the con-

there has been controversy as to whether connection between the proper law and the contract is required. Although the law in this respect remains less than clear,³⁶ no English court has ever refused to give effect to a choice of law clause solely on this ground.³⁷

B. Recognition of Express Choices of Law in Japan

In Japan, as in England, contracting parties are allowed to select the proper law of their contract through a choice of law clause.³⁸ Article 7(1) of the *Hōrei* provides that "[t]he intention of the parties shall determine what country's law will govern the creation and effect of a juristic act."³⁹ A juristic act within the meaning of the *Hōrei* is an act which effects a legal consequence according to the manifestation of the intent of the parties, such as a contract or a waiver and release.⁴⁰ Thus, with a few exceptions, the principle of party autonomy extends to all types of contracts and contractual issues without restrictions such as a "bona fide and legal" choice or a nexus between the chosen law and the contract.⁴¹ Of course, the rule that a court will not give effect to an express choice of law where it would violate public policy is an ever-present restriction.⁴²

Although Japanese law presently places no restrictions other than public policy upon the parties' contractual choice of law, Japanese commentators have proposed various theories to limit the use of choice of law clauses. The "qualitative restriction" theory attempts to limit the parties' choice of the proper law to the area of dispositive law so that the parties cannot evade mandatory or imperative provi-

tract was French law. *Id.* at 582-609, [1970] 3 W.L.R. at 392-417, [1970] 3 All E.R. at 72-96. Thus, the court of appeal's decision may still have some effect, particularly since Lord Wilberforce agreed that the clause was meaningless and inapplicable, and Lord Ried similarly found it to be ineffective. *Id.* at 583, 595, [1970] 3 W.L.R. at 393, 404, [1970] 3 All E.R. at 74, 84.

36. P. NORTH, *supra* note 4, at 201-02; DICEY & MORRIS, *supra* note 12, at 697-701; HALSBURY'S, *supra* note 12, ¶ 584, at 407-08; and J. MORRIS, *supra* note 12, at 217-18.

37. DICEY & MORRIS, *supra* note 12, at 699; J. MORRIS, *supra* note 12, at 217. *See also* Blom, *supra* note 14, at 165-66 (discussing dicta supporting such a view but disregarding the requirement because of lack of authority).

38. Fujita, *supra* note 7, at XIV 5-53; AMERICAN-JAPANESE PIL, *supra* note 5, at 47; and Yamada, *supra* note 12, at 61-62.

39. *Hōrei* art. 7(1), translated in AMERICAN-JAPANESE PIL, *supra* note 5, at 115.

40. Fujita, *supra* note 7, at XIV 5-53.

41. *Id.* *See also* Yamada, *supra* note 12, at 68.

42. Yamada, *supra* note 12, at 68; Fujita, *supra* note 7, at XIV 5-76 to 77. *See Hōrei* art. 30, translated in AMERICAN-JAPANESE PIL, *supra* note 5, at 117 (Article 30 provides: "The law of a foreign country shall not govern if its provisions are contrary to public policy and good morals"). The role of public policy is discussed *infra* at notes 162-89 and accompanying text.

sions of what would otherwise be the proper law.⁴³ A criticism of this theory, however, is that it denies party autonomy by presupposing the existence of a specific legal system to otherwise govern the contract and determine which provisions are imperative or mandatory and which are dispositive.⁴⁴ The English rule requiring a “bona fide” choice of law has also been advocated in Japan.⁴⁵ This theory has been criticized on the ground that the parties’ motives are immaterial once the parties are granted the freedom to designate a proper law.⁴⁶ Commentators have also suggested implementing the rule advocated in England that would limit the parties’ choice to legal systems having a close connection with the contract.⁴⁷ Critics believe this “quantitative restriction” theory may be unrealistic because international contracts often do not have a noticeable or especially close connection with any particular legal system—itsself a justification for allowing the parties freedom.⁴⁸

Adhesion contracts have also been a topic of great concern among Japanese commentators. Some have suggested that choice of law provisions should not be permitted in adhesion contracts because the choice will inevitably be unilateral.⁴⁹ Instead, they suggest that adhesion contracts be governed by the law of the place of the business establishment.⁵⁰ This solution, however, has been criticized for unnecessarily eliminating party autonomy when the same effect can be gained by accepting the express choice of law and then applying only the rules of the other legal system that are specifically designed to protect the weaker party.⁵¹

While no limiting theory has been expressly adopted by the Japanese courts, it has been suggested that Japanese courts would draw a distinction between contracts of parties with equal bargaining power and contracts of adhesion.⁵² This distinction is grounded upon the assumption that the principle of party autonomy embodied in Article

43. Yamada, *supra* note 12, at 65.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 66-67.

49. *Id.*

50. *Id.* at 67.

51. *Id.* at 67-68.

52. AMERICAN-JAPANESE PIL, *supra* note 5, at 48 (suggesting that Japanese courts would apply a “validating law” to govern a contract where the parties were of equal bargaining power, but not if the contract was one of adhesion).

7(1) of the *Hōrei* does not apply to adhesion contracts if its application would circumvent Japanese legislation.⁵³

C. *Analysis of the Recognition of Choice of Law Clauses*

The parties' express choice of the proper law is generally recognized worldwide,⁵⁴ probably because of its inherent virtues: certainty and predictability. Parties to international contracts are rarely able to foresee the forum for their dispute. Thus, due to the worldwide divergence of conflict rules, the parties are usually unable to predict what the proper law would be absent a choice of law clause. Since a choice of law clause is generally recognized around the world, however, it can provide the necessary degree of certainty and predictability.⁵⁵

The rule can also be justified on the ground that it implicitly recognizes that parties may have both a genuine need and credible motives for their selection of one country as the proper law.⁵⁶ Given the underlying principle of *laissez faire*, it would be hypocritical to grant parties the freedom to contract, yet deny them the opportunity to fully exercise that right by declaring them incompetent to select the proper law which reflects their needs and motives. In fact, parties entering into international contracts may negotiate and bargain over the proper law with as much vigor as they negotiate over the substantive terms of the contract.⁵⁷ Considering the parties' needs, the interests of international trade demand a certain degree of freedom to ensure predictability in order to keep the exchange of goods and service unhampered.⁵⁸

Given these advantages, one might legitimately wonder why rules have been adopted and theories advanced for restricting the parties' freedom. First, there is a recognition that countries other than the forum country and the country whose law is the proper law may have an interest in the resolution of the dispute. Specifically, the in-

53. *Id.* at 48 n.227.

54. Lando, *supra* note 13, at 33.

55. E. RABEL, 2 CONFLICT OF LAWS 365 (2d ed. 1960) (reasoning that party autonomy "endeavors to obviate the unpredictable findings of unforeseeable tribunals and to consolidate the contract under one law while negotiation is in course"); Lando, *supra* note 13, at 33.

56. For instance, a particular law may be selected because: (1) a certain formula is internationally known; (2) the selected law dominates the market; (3) the selected law is "neutral"; (4) the selected law is particularly well developed and well suited to the specific contract; or (5) the selected law was used in earlier transactions between the parties. Lando, *supra* note 13, at 33.

57. *Id.*

58. *See id.* at 41.

terests of the legal system most closely connected factually and socially with the contract may demand application of its mandatory rules to ensure that the legitimate governmental interests (i.e., protection of the weaker contracting party) are not thwarted.⁵⁹ Those interests of comity must be balanced with the need for predictability in international trade to determine the appropriate restrictions. Additionally, or as part of the interests of comity, is the present primary concern that inequalities in bargaining power may lead to abusive choices of law by the stronger party to the contract.⁶⁰ The most important question, however, is whether the limiting rules and theories adequately reflect the proper balance between the interest of comity, the concern over abusive choices, and freedom of international trade.

The requirement that the chosen law have some connection with the contract has been unsuccessfully advocated in both England and Japan. Assuming, *arguendo*, that this theory would promote the interests of comity to some degree and provide some protection against abusive choices, there are four main difficulties with this theory when applied to all contracts. First, in order to retain some degree of predictability, one would have to articulate the particular type of connection with the contract that would be sufficient to meet this requirement.⁶¹ Moreover, some degree of variation in the establishment of this minimum connection would probably be required depending upon the type of contract involved. Second, even if acceptable minimum connections standards could be delineated, they might unreasonably and unnecessarily limit the parties' choice of the proper law.⁶² Third, the theory does not recognize that there may be legitimate, credible reasons for choosing a legal system unconnected to the contract.⁶³ Finally, it does not adequately protect against evasive choices of law, because parties who intentionally select an unconnected proper law need only construct some connection between the chosen law and the contract to avoid the rule.⁶⁴ As a result, this the-

59. *Id.*

60. *Id.* at 35-38. The principle of *laissez faire* has been somewhat eroded worldwide in recent years by the recognition that inequality in bargaining power may exist. See, e.g., *supra* note 14; and The Unfair Contract Terms Act 1977, reprinted in 47 HALSBURY'S STATUTES OF ENGLAND 86 (3d ed. 1978). Consequently, the concern that there may be abusive choices of the proper law could be due to the interest of the forum in somehow protecting its policies against adhesion contracts and/or the interest of comity.

61. *Cf.* Lando, *supra* note 13, at 35.

62. *See id.*

63. *Id.* at 36.

64. *Id.*

ory has also failed to gain significant worldwide acceptance.⁶⁵

The requirement that the selection of the governing law be "bona fide"—that is, a selection made without evasive intent and requiring a reasonable basis for the selection⁶⁶—has gained increasing acceptance worldwide since its inception in England.⁶⁷ While this restriction may be appropriate for international commercial contracts where inequality of bargaining power is usually not present,⁶⁸ Ole Lando, a leading commentator, argues that it does not provide sufficient protection for the weaker party to an adhesion contract.⁶⁹

Instead, Lando advocates the adoption of a theory that distinguishes between contracts where the parties are likely to be of unequal bargaining power and those where such power is roughly equal. Where bargaining power is likely to be equal, for example in international commercial sales, leasing, agency and distribution contracts, he suggests that the parties' choice should be presumed to be valid and determinative. This presumption could only be rebutted by proving that the choice was made *mala fide*—that the parties had "morally impeachable or anomalous and unreasonable intentions."⁷⁰ For contracts where unequal bargaining power is likely to be involved, he suggests that the parties' choice be restricted to a set of presumed proper laws designed to fit the particular type of contract. The parties would, however, be permitted to deviate from the presumed proper law if the law selected has *considerable* connection with the contract, so that the protection that would have been afforded under the presumed proper law will be assured.⁷¹

65. While this theory is embodied in the Polish conflicts of law statute and has been mentioned in some American and older West German cases, it has been rejected by a number of countries, including Switzerland, France, and Italy, as well as by Japan and England. It is also unlikely to be followed in Russia or Czechoslovakia. *Id.* at 36-37.

66. For examples of reasonable, nonevasive bases for the choice, see *supra* note 56.

67. Lando, *supra* note 13, at 36-37. For example, this principle has also been applied in France and Switzerland, and is incorporated in both the American RESTATEMENT (SECOND) OF CONFLICTS LAW § 187(2)(a) (1971), and Article 2 of the Hague Convention on the Law Applicable to International Sales of Goods; it would probably be followed even in Russia. *Id.*

68. *E.g.*, J. MORRIS, *supra* note 12, at 218. See also Lando, *supra* note 13, at 41.

69. Lando, *supra* note 13, at 37. First, it fails to recognize that the selected law may clash with the mandatory protective rules of the legal system most closely connected to the contract, even though there was a reasonable, nonevasive intent behind the selection. Second, it still permits an almost unrestricted freedom which gives the stronger party a powerful bargaining tool against the weaker party. *Id.*

70. *Id.* at 42.

71. *Id.* at 42-43. Lando suggests that: (1) the law of the place of work will be presumed to be the proper law for employment contracts; (2) the law of the insured's domicile will be presumed to be the proper law of insurance contracts; (3) the law of the place where the goods

IV. PROPER LAW IN ABSENCE OF AN EXPRESS CHOICE OF LAW

If the parties to a contract have not expressly chosen the proper law,⁷² both English and Japanese courts attempt to discern the parties' implied intent regarding the proper law from the circumstances of the case.⁷³ The two countries differ, however, in their determination of the proper law when the parties' intent is not expressed and cannot be implied or inferred.

A. English Rules Applied in Absence of an Express Choice

In the absence of an express selection, English courts will first attempt to infer the parties' intent from the circumstances of the case and the terms and nature of the contract in light of sound business considerations.⁷⁴ Usually, a court will consider a jurisdiction or arbitration clause as an indication that the parties intended the contract to be governed by the law of that forum.⁷⁵ Additionally, in attempt-

will be used will be presumed to be the proper law for consumer contracts for goods; (4) the law of the *situs* will be presumed to be the proper law for leases of immovables; and (5) the law of the country where the risk is located will be presumed to govern contracts for fire or liability insurance. *Id.*

72. As used in this Comment, the phrase "in absence of an express choice of law" indicates those conflict rules which apply when the parties have not expressly chosen the governing law of the contract by including a contractual provision to that effect.

73. *England*: P. NORTH, *supra* note 4, at 203; DICEY & MORRIS, *supra* note 12, at 704; J. MORRIS, *supra* note 12, at 219. See HALSBURY'S, *supra* note 12, ¶ 585, at 409.

Japan: Yamada, *supra* note 12, at 70. See also Fujita, *supra* note 7, at XIV 5-53.

74. DICEY & MORRIS, *supra* note 12, at 704-05; J. MORRIS, *supra* note 12, at 219. See P. NORTH, *supra* note 4, at 203; HALSBURY'S, *supra* note 12, ¶ 585, at 409.

75. P. NORTH, *supra* note 4, at 203; HALSBURY'S, *supra* note 12, ¶ 585, at 409; and J. MORRIS, *supra* note 12, at 219-20. See DICEY & MORRIS, *supra* note 12, at 704-05. Arbitration clauses are not always held to be determinative of the parties' intent. See, e.g., *Compagnie d'Armenent Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.*, 1971 A.C. 572, [1970] 3 W.L.R. 389, [1970] 3 All E.R. 72. In that case, the House of Lords held that the shipping contract was governed by French law, despite the presence of a clause providing for arbitration in England. *Id.* Lord Wilberforce reasoned:

[t]hat the selection of a certain place for arbitration and, by inference, of nationals or residents of that place as arbitrators, is an indication that the parties intended the law of that place to govern is a sound general rule. But it should not be treated as giving rise to a conclusive or irresistible inference, as recent pronouncements appear to suggest.

.....

... An arbitration clause must be treated as an indication, to be considered together with the rest of the contract and the relevant surrounding facts. Always it will be a strong indication; often, especially where there are parties of different nationality or a variety of transactions which may arise under the contract, it will be the only clear indication. But in some cases it must give way where other indications are clear.

Id. at 596, 600, [1970] 3 W.L.R. at 404-05, 408, [1970] 3 All E.R. at 84, 88. Similarly, Lord Morris reasoned:

An agreement to refer disputes to arbitration in a particular country may carry with

ing to discern the parties' intent, the courts have looked to such factors as: (1) the origin of legal terminology used in the contract; (2) the form of the documents involved in the transaction; (3) the currency in which payment is to be made; (4) the use of a particular language; (5) a connection with a preceding transaction; (6) the nature and location of the subject matter of the contract; (7) the residence of the parties; and (8) the fact that one party is a sovereign (the inference being that the law of that country was intended to be the proper law).⁷⁶ Where a contract or one of its terms would be void or invalid under one system of law, but not under another, the courts may also infer that the parties intended the validating law to be the governing law.⁷⁷ Nevertheless, courts will be especially cautious in applying the "validating law" to standard form contracts exhibiting a gross disparity of bargaining power.⁷⁸

When the intention of the parties cannot be discerned, the contract is governed in England by the system of law to which the trans-

it, and is capable of carrying with it, an implication or inference that the parties have further agreed that the law governing the contract . . . is to be the law of that country. But I cannot agree that this is a necessary or irresistible inference or implication: there is no inflexible or conclusive rule to the effect that an agreement to refer disputes to arbitration in a particular country carries with it the additional agreement or necessarily indicates a clear intention that the law governing the matters in dispute is to be the law of that country. There might be such an additional agreement or there might not. In many cases there might be. In many cases it will be reasonable to infer that the parties are so agreed. In other cases the conclusion may well be that the parties placed confidence in the arbitrament of chosen commercial men in a particular country and their methods and system, while remembering that arbitrators may be accustomed to and competent to deal with disputes by the application of some system of law other than that of their country.

Id. at 588, [1970] 3 W.L.R. at 397, [1970] 3 All E.R. at 77-78. Lord Diplock reasoned:

The fact that they have expressly chosen to submit their disputes under the contract to a particular arbitral forum of itself gives rise to a strong inference that they intended that their mutual rights and obligations under the contract should be determined by reference to the domestic law of the country in which the arbitration takes place since this is the law with which arbitrators sitting there may be supposed to be most familiar. But this is an inference only. It may be destroyed by inferences to the contrary to be drawn from other express provisions of the contract or relevant surrounding circumstances, and those inferences may be so compelling as to lead to the identification of another system of law which the parties must have intended.

Id. at 604-05, [1970] 3 W.L.R. at 412-13, [1970] 3 All E.R. at 92. The same reasoning could logically apply to the conclusive effect of a jurisdiction clause.

76. P. NORTH, *supra* note 4, at 205-06; DICEY & MORRIS, *supra* note 12, at 705-07, 709; HALSBURY'S, *supra* note 12, ¶ 585, at 409.

77. P. NORTH, *supra* note 4, at 200; DICEY & MORRIS, *supra* note 12, at 708; HALSBURY'S, *supra* note 12, ¶ 586, at 410; and J. MORRIS, *supra* note 12, at 220.

78. DICEY & MORRIS, *supra* note 12, at 709; J. MORRIS, *supra* note 12, at 220 (no cases cited in either authority).

action has its "closest and most real connection."⁷⁹ The courts use this "closest connection" or localization theory to determine what law "ordinary, reasonable, and sensible businessmen would have been likely to have had if their minds had been directed to the question."⁸⁰ Many factors may be taken into consideration under this theory, but the most prominent are: (1) the place of contracting or performance; (2) the residence or place of business of the parties; and (3) the nature and subject matter of the contract.⁸¹ Attempts have been made to formulate presumptions based upon case results under this theory in an effort to provide greater predictability.⁸² The use of presumptions, however, is disfavored and the modern practice is to weigh the relevant factors without the aid of presumptions.⁸³

Whether an English court is attempting to determine the proper law of the contract by discerning the parties' unexpressed intent, or by using the localization theory because no intent can be discerned, the inquiry is always directed to the time when the contract was made.⁸⁴ Courts, therefore, will not consider the subsequent conduct of the parties in determining the proper law unless the parties have agreed to modify the original contract, have entered into a new collateral contract, or have engaged in subsequent conduct which amounts to an estoppel.⁸⁵

B. Japanese Rules Applied in Absence of an Express Choice

In Japan, as in Great Britain, when no express choice has been made, the parties' implied intent will first be sought out rationally from the circumstances of the case.⁸⁶ In discerning the parties' implied intent, the Japanese courts consider a number of factors,

79. P. NORTH, *supra* note 4, at 208; DICEY & MORRIS, *supra* note 12, at 712; HALSBURY'S, *supra* note 12, ¶ 587, at 410-11; and J. MORRIS, *supra* note 12, at 220.

80. J. MORRIS, *supra* note 12, at 220. See P. NORTH, *supra* note 4, at 208.

81. P. NORTH, *supra* note 4, at 211. There is also some disagreement among jurists as to whether only "physical" contacts or facts should be considered when "weighing" the contacts, or whether such things as the style of drafting or the validity or invalidity of contractual clauses under the potential proper laws should be considered under this theory. *E.g.*, *id.* at 206-10; Blom, *supra* note 14, at 176-78. See J. MORRIS, *supra* note 12, at 220-22.

82. *E.g.*, DICEY & MORRIS, *supra* note 12, at 712-23.

83. J. MORRIS, *supra* note 12, at 221-22; P. NORTH, *supra* note 4, at 210 (presumptions are of little value). See also HALSBURY'S, *supra* note 12, ¶ 588, at 412 (agreeing that the use of presumptions is disfavored but suggesting that the place of performance may be determined to be the proper law if the contract is made in one country but is performed or ought to be performed in another).

84. P. NORTH, *supra* note 4, at 210; and HALSBURY'S, *supra* note 12, ¶ 590, at 413.

85. HALSBURY'S, *supra* note 12, ¶ 590, at 413.

86. Yamada, *supra* note 12, at 70; Fujita, *supra* note 7, at XIV 5-53.

roughly similar to those used by the English courts. These factors include the form and content of the contract, as well as the language in which it was written, the parties' nationalities (including the fact that one party is a sovereign), the subject matter of the contract, and jurisdiction or arbitration clauses.⁸⁷ Further, because Article 7(1) of the *Hōrei* is considered inapplicable to adhesion contracts, the Japanese courts, like their English counter-parts, would probably distinguish between adhesion and other contracts by considering the "validating law"—that law under which the contract would be valid or enforceable—*only* if the contract was one between parties of equal bargaining power, but not if the contract was one of adhesion.⁸⁸

A major difference, however, arises between the Japanese and English conflicts rules where the parties' intent cannot be implied by the court. While the English courts apply the flexible "closest connection" or localization theory when the parties' intent is not expressed and cannot be inferred, the Japanese courts are obliged to follow a single, rigid, uniform rule that the place of contracting is the proper law.⁸⁹ Article 7(2) of the *Hōrei* provides that "[i]f the intention of parties is uncertain, the law of the place of [contracting] shall govern."⁹⁰ For contracts made *inter absentes*, or between persons in different places, the place from which the offer was made or dispatched governs as the place of contracting or *lex loci contractus*.⁹¹

87. Yamada, *supra* note 12, at 70 & n.20; Fujita, *supra* note 7, at XIV 5-53 to 54. Of course, the court may also look to the conduct of the parties, including conduct after the contract is formed. For example, in *Multi Product Int'l v. Tao Kogyo Co.*, Tokyo District Court, Hanreiiibō, No. 863 (1977) at 100, Apr. 22, 1977, translated in 23 JAPAN. ANN. INT'L LAW 187, 196 (1979-80), the court found "an implicit agreement between the parties" that Japanese law was the proper law of the contract because both parties had "expressed . . . an intent to [that] effect" during pretrial proceedings.

88. AMERICAN-JAPANESE PIL, *supra* note 5, at 48 & n.227. See *Bangkok Bank Ltd. v. Sakurai*, Supreme Court, 32 Saiko Saibansho Minji Hanreishu 616, Apr. 20, 1978, translated in 24 JAPAN. ANN. INT'L L. 109, 111 (noting that the bank deposit contract "has the characteristics of a contract of adhesion" and then finding that the parties impliedly designated Japan as the proper law of the contract since the foreign bank did business in Japan and the plaintiff was a Japanese resident at the time of contracting).

89. *Hōrei* art. 7(2), translated in AMERICAN-JAPANESE PIL, *supra* note 5, at 115; Yamada, *supra* note 12, at 71-72; Fujita, *supra* note 6, at XIV 5-54 to 55.

90. *Hōrei* art. 7(2), translated in AMERICAN-JAPANESE PIL, *supra* note 5, at 115.

91. *Hōrei* art. 9(2), translated in AMERICAN-JAPANESE PIL, *supra* note 5, at 115-16. Article 9(2) states:

The creation and effect of a contract are governed by the law of the place from which the offer is made. If the offeree, at the time of acceptance, does not know from where the offer was made, the place of the offeror's domicile is deemed to be the place of [contracting].

See also Fujita, *supra* note 7, at XIV 5-54 to 55; AMERICAN-JAPANESE PIL, *supra* note 5, at 48.

Where one of the parties is a Japanese citizen, however, the court may be expected to give preference to Japanese law by reference to Japanese public policy or otherwise.⁹²

The rationale behind this rigid rule is that the place of contracting is presumed to be the proper law that the contracting parties would typically intend if they had considered it.⁹³ Because this rationale is tied to the principle of party autonomy, it is unclear how far the court will go to find the parties' implied intent to apply a different law.⁹⁴ Nevertheless, the Japanese courts seem to favor *lex loci contractus* as the proper law, unless a contrary intention of the parties can be clearly established.⁹⁵

C. *Analysis of the Rules Applied in Absence of an Express Choice*

Conflict rules applied in absence of an express choice of law may be classified as either flexible or rigid. The rule that the parties' implied intent controls is an example of a flexible rule. This is the primary rule applicable in both England and Japan, in absence of an express choice. England's secondary rule—that if the parties' intent cannot be discerned, the law of the country that is the most "closely connected" with the contract is the proper law—may also be classified as a flexible rule. In contrast, Japan's secondary rule—that if the parties' intent cannot be discerned, the law of the place of contracting governs—is a rigid rule. The contrast between the flexible and rigid rules reflects the tension between two primary goals. Flexible rules afford the courts an opportunity to fashion just and equitable rules in each individual case. Rigid rules, on the other hand, ensure the predictability and certainty necessary to guide contracting parties when making and performing contracts, although they may sometimes result in hardship for the individual litigants.⁹⁶

The rule that the presumed intent of the parties controls absent an express choice of law has both advantages and disadvantages. The

92. AMERICAN-JAPANESE PIL, *supra* note 5, at 48. See *supra* note 88.

93. Yamada, *supra* note 12, at 77-78.

94. AMERICAN-JAPANESE PIL, *supra* note 5, at 47.

95. *Id.* See Yamada, *supra* note 12, at 72 (criticizing this approach). Cf. Fujita, *supra* note 7, at XIV 5-54 (stating that Japanese courts generally will first make some attempt to find an implied intent before applying the rule of Article 7(2)).

96. See Lando, *supra* note 13, at 78. The degree of predictability, however, is always affected by the foreseeability of the forum and the worldwide variation in which laws control in the absence of an express choice. Unlike the worldwide recognition of express choice of law clauses, there is considerable variation in the rules that govern in the absence of an express choice. See *id.* at 53, 79.

rule is adaptable in the multitude of unpredictable fact combinations found in the many varieties of international contracts. Through such a flexible rule, the court can examine each situation anew and weigh the facts in a fashion best suited to the individual case. At the same time, however, the flexibility of the rule makes its application unpredictable and also allows the courts to regularly find that the parties "intended" the law of the *forum* to govern the contract. Moreover, the presumed intent rule has been criticized as a legal fiction because of the rarity in which a common intent can actually be gleaned from the particular circumstances of a case. The rule is also criticized on many of the same grounds as the recognition of choice of law clauses, such as lack of adequate protection for the weaker party to an adhesion contract. Nevertheless, the rule has thrived since it was first adopted by several European countries in the nineteenth century, and remains in force around the world.⁹⁷

The rule that a contract is governed by the system to which it is most closely connected suffers from many of the same infirmities as the presumed intent rule. This rule can also produce uncertainty as well as a disproportionate number of decisions where the court concludes the law of the *forum* is the proper law of the contract. To remedy this problem, some countries have supplemented this "localization" theory with specific presumptions for specific types of contracts. The English courts, however, randomly enumerate the relevant contacts, in rejection of this solution. Nevertheless, England's enumeration can give the mistaken impression that the test is mechanical, "localizing" the contract in the country where it has the greatest number of relevant contacts. Although this would add a degree of certainty to the rule, in theory the proper law should be determined by weighing rather than simply counting contacts.⁹⁸

The rigid secondary rule used in Japan—requiring application of the law of the place of contracting—lies on the opposite end of the spectrum. The rule was predominant worldwide during the eighteenth and the beginning of the nineteenth century, but its popularity declined as fewer and fewer international contracts were entered into and performed at the same time and place. Nevertheless, a number of countries, including Japan, have retained the rule in some context. Thus, tradition is one explanation for the continued use of this rule.⁹⁹

97. See *id.* at 58-59.

98. See *id.* at 81.

99. See *id.* at 78-79 (the rule is currently used in some manner in the Soviet Union, Austria, Italy, Portugal, Taiwan, Iran, and some Latin American countries).

In addition to its long history, the rule could also be explained because of its ease of application and the certainty and predictability it provides. Moreover, under the rule courts are denied the opportunity to show a preference for the law of the forum. Despite these virtues, however, the rigidity of the rule has inherent disadvantages. Mechanical application of the law of the place of contracting may result in inequitable results which ignore the significant and legitimate interests of other countries which may have greater relation to the contracting parties, the subject of the contract, or the effects of the contract. It is possible that the place of contracting has only a *de minimus* relationship to the international contract. Thus, the place of contracting should not be dispositive, but instead merely one factor to help determine the parties' presumed intent or to "localize" the contract.¹⁰⁰

Aside from these advantages and disadvantages, the fundamental difference between their respective legal systems might explain the difference between England's and Japan's rules to determine the proper law in absence of an express or implied choice by the parties. England's localization theory requires a great deal of interpretation by the courts to determine which legal system is most closely connected to the contract. On the other hand, Japan's rule that the law of the place of contracting governs in such situations seems well suited to a civil law country, since it requires virtually no interpretation.

V. THE SCOPE OF THE PROPER LAWS

A. *Application of the Proper Law to Particular Issues*

With few exceptions, the proper law governs most issues arising out of a contract under both English and Japanese conflict of law rules. Issues relating to the creation and formation of a contract—offer and acceptance, mistake, misrepresentation, duress, and consideration—are governed by the "punitive" proper law, that is, the law that would be the proper law if the contract were validly created.¹⁰¹

100. *Cf. id.* at 54.

101. *England*: P. NORTH, *supra* note 4, at 215-19; DICEY & MORRIS, *supra* note 12, at 741-43 (expressing some hesitation with regard to the application of the proper law to the issues of mistake, fraud, misrepresentation, or duress); HALSBURY'S, *supra* note 12, ¶¶ 595, 596, 598, at 415-16; and J. MORRIS, *supra* note 12, at 226-28.

Japan: Fujita, *supra* note 7, at XIV 5-55 to 56. *See also* Hōrei art. 7, translated in AMERICAN-JAPANESE PIL, *supra* note 5, at 115. *But see* Akiba, *Conflict of Laws*, 12 JAPAN-ANN. L. & POL. 77, 86 (1964) (one Japanese scholar advocates the use of some other law to govern such pre-contract issues because: (1) "[n]o absolute necessity, logical or practical demands the uni-

Issues relating to the essential or material validity of the contract, its terms, or its "effects" are likewise governed by the proper law.¹⁰²

In England, however, the illegality of a contract may be determined by reference to four different laws: the place of contracting, the place of performance, the *lex fori* (the law of the forum), and the proper law.¹⁰³ For example, a contract which is invalid under the proper law would be unenforceable in an English court.¹⁰⁴ Additionally, contracts are unenforceable in England if they are contrary to England's public policy or illegal under an English statute having an extraterritorial effect.¹⁰⁵ Finally, there is some uncertainty as to whether a contract which is illegal under the law of the place of performance can be enforced.¹⁰⁶ Nevertheless, all commentators agree that a contract will probably be enforceable, even though it is illegal under the law of the place of contracting.¹⁰⁷

Capacity to contract is also given special mention in both nations. While case law is sparse and there is no decisive rule, there are three possible laws that might govern this issue in England: the law of the place of contracting, the law of the parties' domicile, or the proper law of the contract.¹⁰⁸ Recent authority, however, indicates that the proper law, so long as it is "objectively ascertained," governs capacity.¹⁰⁹ Thus, the parties' choice on the issue of capacity is likely to be limited to the law of the country with the closest connection to

form reference of 'contract' inclusive of offer and acceptance to a single system of law"; and (2) there are different policy considerations when dealing with such pre-contract issues).

102. *England* (except for illegality): P. NORTH, *supra* note 4, at 230-32; DICEY & MORRIS, *supra* note 12, at 754-55; HALSBURY'S, *supra* note 12, ¶ 601, at 418; and J. MORRIS, *supra* note 12, at 234-35.

Japan: Fujita, *supra* note 7, at XIV 5-55 to 56. See also Hōrei art. 7, translated in AMERICAN-JAPANESE PIL, *supra* note 5, at 115.

103. HALSBURY'S, *supra* note 12, ¶¶ 603-07, at 419-22; and J. MORRIS, *supra* note 12, at 232. See P. NORTH, *supra* note 4, at 223-30 (flatly rejecting the law of the place of contracting as a possibility).

104. P. NORTH, *supra* note 4, at 224; HALSBURY'S, *supra* note 12, ¶ 604, at 419; and J. MORRIS, *supra* note 12, at 232. See DICEY & MORRIS, *supra* note 12, at 755-58.

105. P. NORTH, *supra* note 4, at 225-26; DICEY & MORRIS, *supra* note 12, at 730-34; HALSBURY'S, *supra* note 12, ¶ 607, at 421; and J. MORRIS, *supra* note 12, at 233.

106. P. NORTH, *supra* note 4, at 225-26; DICEY & MORRIS, *supra* note 12, at 730-34; HALSBURY'S, *supra* note 12, ¶ 607, at 421; and J. MORRIS, *supra* note 12, at 233.

107. HALSBURY'S, *supra* note 12, ¶¶ 605, 606, at 419-20; J. MORRIS, *supra* note 12, at 233-34. See P. NORTH, *supra* note 4, at 226-29 (concluding there is only dicta supporting this rule); DICEY & MORRIS, *supra* note 12, at 756-57.

108. P. NORTH, *supra* note 4, at 221; DICEY & MORRIS, *supra* note 12, at 744-48; and HALSBURY'S, *supra* note 12, ¶ 599, at 416; and J. MORRIS, *supra* note 12, at 229, 231-32.

109. P. NORTH, *supra* note 4, at 222; DICEY & MORRIS, *supra* note 12, at 744, 745, 748; and HALSBURY'S, *supra* note 12, ¶ 599, at 416. Cf. J. MORRIS, *supra* note 12, at 232 (sug-

the contract.¹¹⁰ In Japan, this issue is governed by special provisions of the *Hōrei*. Under Article 3(1) and (2), capacity to contract is governed by the law of the party's nationality.¹¹¹ However, a person legally capable to contract in Japan who makes a contract in Japan is deemed capable of contracting under the doctrine of *favor negotii*.¹¹²

Similarly, the *Hōrei* has special provisions to govern the formalities of a contract that are equivalent to the English common law rules. In both countries, a contract is formally valid if it complies with the requirements of the law of the place of contracting or the proper law.¹¹³ Note, however, that England classifies some formality requirements, such as the Statute of Frauds, as procedural and thus governed by English law.¹¹⁴

Matters relating to performance and excuses for nonperformance of a contract also provide some exceptions to the proper law principle. In England, the proper law generally governs such issues, except that the mode and minor details of performance are governed by the law of the place of performance.¹¹⁵ It has been suggested that Japanese

gesting the question is still unresolved, but a court would find a party has the capacity to contract if it was so found under any of the three laws).

110. See P. NORTH, *supra* note 4, at 222; DICEY & MORRIS, *supra* note 12, at 744, 745, 748; and HALSBURY'S, *supra* note 12, ¶ 599, at 416.

111. *Hōrei* art. 3(1) & (2), translated in AMERICAN-JAPANESE PIL, *supra* note 5, at 115. Article 3 provides:

- (1) The capacity of a person is determined by the law of the country of his nationality.
- (2) An alien who lacks capacity under the law of the country of his nationality, who performs a juristic act in Japan, and who would have capacity under Japanese law, is deemed to have capacity, notwithstanding the provisions of the preceding paragraph.
- (3) The provisions of the preceding paragraph do not apply to juristic acts governed by the law of family relations or the law of succession, or to juristic acts concerning immovables situated abroad.

Id. See also Fujita, *supra* note 7, at XIV 5-56.

112. *Hōrei* art. 3(1) & (2), translated in AMERICAN-JAPANESE PIL, *supra* note 5, at 115. See also Fujita, *supra* note 7, at XIV 5-56.

113. *England*: P. NORTH, *supra* note 4, at 219-21; DICEY & MORRIS, *supra* note 12, at 749-54; HALSBURY'S, *supra* note 12, ¶ 600, at 417; and J. MORRIS, *supra* note 12, at 228-29.

Japan: *Hōrei* art. 7, translated in AMERICAN-JAPANESE PIL, *supra* note 5, at 115. Article 8 provides:

- (1) The formalities of a juristic act shall be governed by the law governing the effect of the act.
- (2) Notwithstanding the provisions of the preceding paragraph, compliance with the formal requirements of the law of the place of acting is sufficient, except where a juristic act establishes or disposes of a right in rem or a right requiring registration.

Id. See also Fujita, *supra* note 7, at XIV 5-57 to 58.

114. P. NORTH, *supra* note 4, at 220-21; DICEY & MORRIS, *supra* note 12, at 753-54; and J. MORRIS, *supra* note 12, at 228.

115. HALSBURY'S, *supra* note 12, ¶ 602, at 418-19. See J. MORRIS, *supra* note 12, at 235-37.

courts would follow this same rule with the mode and minor details of performance governed by the law of the place of performance, unlike the more substantive issues of performance which are governed by the proper law.¹¹⁶ The law of the place of performance, however, is only applicable to the extent that it does not conflict with the proper law of the contract.¹¹⁷

Issues often arise over the uncertainty of the meaning of contractual terms. Both Japan and England have special rules to govern this issue. Issues of interpretation are governed in England either by the law expressly or implicitly chosen by the parties, or the "objectively ascertained" proper law.¹¹⁸ In contrast, Japanese courts determine the meaning of foreign terminology in a contract by reference to the law of the country of that language, regardless of the proper law of the contract.¹¹⁹

While the proper law governs discharge in both the Japanese and English systems,¹²⁰ these two countries vary as to the law governing the remedies for breach of contract. In Japan, the proper law governs the remedies for breach of contract.¹²¹ In England, however, the issue of which law governs remedies is complicated by the substantive/procedural distinction¹²² found at common law. For instance, both the nature of the available remedy and the measure of damages are char-

116. Fujita, *supra* note 7, at XIV 5-58, 5-55 to 56. See also AMERICAN-JAPANESE PIL, *supra* note 5, at 49-50.

117. Fujita, *supra* note 7, at XIV 5-58.

118. P. NORTH, *supra* note 4, at 239-40; DICEY & MORRIS, *supra* note 12, at 767-70; and J. MORRIS, *supra* note 12, at 238-39. *But see* HALSBURY'S, *supra* note 12, ¶ 608, at 422 (does not indicate that the parties' implied choice of law will govern this issue).

119. Fujita, *supra* note 7, at XIV 5-58; AMERICAN-JAPANESE PIL, *supra* note 5, at 50.

120. *England* (some exceptions): P. NORTH, *supra* note 4, at 241; DICEY & MORRIS, *supra* note 12, at 775-83; HALSBURY'S, *supra* note 12, ¶ 609, at 432; and J. MORRIS, *supra* note 12, at 238-40.

Japan: Fujita, *supra* note 7, at XIV 5-56.

121. Fujita, *supra* note 7, at XIV 5-58.

122. In common law countries, the classification of a particular issue as "procedural" has the effect of removing that issue from the sphere of conflicts rules. The issue is decided solely upon the basis of the laws of the forum. On the other hand, if the issue is classified as "substantive," the issue must be decided by the proper law according to the forum's conflict rules. The distinction between "substantive" and "procedural" has caused a great deal of uncertainty and confusion primarily because it is based upon the unrealistic assumption that there is a precise objective point at which the two can be distinguished for all purposes. In actuality, courts often apply the distinction in an apparently inconsistent manner. As a result, most of the fundamental bases for the distinction disappear as almost all issues are capable of being regarded as "substantive" in some context. See W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 154-93 (1942).

acterized as procedural, and therefore governed by English law.¹²³ Yet, the remoteness of the damage or "proximate cause" element, the liability for interest, and the rate payable on a contractual debt are characterized as substantive, and therefore governed by the proper law.¹²⁴

The two countries are also substantially similar with regard to the inapplicability of the doctrine of *renvoi*.¹²⁵ In England, the doctrine is said to have "no place in the law of contracts."¹²⁶ In Japan, under Article 29 of the *Hōrei*, *renvoi* applies to a contract case only with regard to the capacity to contract.¹²⁷

B. Applicability of the Proper Law to Types of Contracts

Although the sale of goods is a common international transaction, England and Japan have no special conflict rules for sales contracts, other than those relating to contracts generally.¹²⁸ Ordinarily, the *result* in English cases is that English law controls any sales con-

123. HALSBURY'S, *supra* note 12, ¶¶ 611, 613, at 424-25.

124. *Id.* ¶¶ 612, 614, at 424, 425.

125. *Renvoi* is a convenient term used to denote the rule that the judge of the forum is to consider the conflict of law rules prevailing in the country to which the forum's conflicts rule refers, regardless of the particular law that may eventually control. E. LORENZEN, SELECTED ARTICLES ON THE CONFLICTS OF LAWS 19 (1947). The problem arises whenever any conflicts rule refers to the "law" of a foreign country but the foreign conflicts rule would have referred the question of the "law" to the forum or some other country. DICEY & MORRIS, *supra* note 12, at 54. In essence, *renvoi* asks the forum court to consider the conflicts rules of the country it is directed to under its own conflicts rules as a part of the "law" to be applied to the case. Because of the potential for an endless chain of cross-references, commentators are overwhelming opposed to *renvoi*. Those courts and commentators who do favor it usually agree that the theory of *renvoi* should be abandoned after the first reference. E. LORENZEN, *supra*, at 23, 27-28.

126. DICEY & MORRIS, *supra* note 12, at 695; HALSBURY'S, *supra* note 12, ¶ 593, at 414; and J. MORRIS, *supra* note 12, at 214.

127. Fujita, *supra* note 7, at XIV 5-74. Cf. *Hōrei* arts. 29 & 3, translated in AMERICAN-JAPANESE PIL, *supra* note 5, at 117, 115. Article 29 provides: "[w]hen the governing law is that of the country of a party's nationality and Japanese law is to govern according to that law, Japanese law shall govern." *Id.* art. 29, translated in AMERICAN-JAPANESE PIL, *supra* note 5, at 117. Article 3, which provides that capacity is governed by the law of the party's nationality, is set forth *supra* at note 111.

128. Lando, *supra* note 13, at 125. See, e.g., DICEY & MORRIS, *supra* note 12, at 791-95. England has ratified the Uniform Law on the International Sale of Goods (ULIS) from the 1964 Hague Conventions on the Law Applicable to International Sales of Goods. The effect of England's ratification, however, is minimized by two factors. Most significant is that England ratified the ULIS with the reservation that it would apply only if the contracting parties expressly choose the ULIS as the proper law of their contract. England also adopted the reservation that the ULIS is applicable only if each party has his place of business (or habitual residence if no place of business) in different nations which have ratified the ULIS. Lando, *supra* note 13, at 126.

tract bearing a reasonable (rather than a close) relationship to England, absent an express choice of law.¹²⁹ Yet, no case expressly adopts such a rule,¹³⁰ and the English courts have declined to establish any presumptions for sales contracts.¹³¹

Nevertheless, England and Japan both have special conflicts rules to determine the rights of parties over movables and immovables. Both countries generally follow the universal consensus¹³² that the *lex situs*, the law of the place where the subject of the right is located, controls. In Japan, under Article 10 of the *Hōrei*, all "real rights"—ownership, possession, hypothec, pledge, lien and the like—of both movables and immovables are governed by *lex situs*.¹³³ Therefore, *lex situs* determines, first, which kinds of real rights are entitled to recognition in a Japanese court, and, second, which requirements of registration, delivery, or possession are applicable to create or transfer a "real right."¹³⁴ *Lex situs* also governs the passage or transfer of titles¹³⁵ and the unpaid seller's right of stoppage *in transitu*.¹³⁶

In England, *lex situs* is applied to movables and immovables in a slightly different manner. *Lex situs* governs generally all questions concerning rights over *immovables*.¹³⁷ This includes the capacity to assign or acquire an immovable, the formalities required, the validity

129. Lando, *supra* note 13, at 128 ("[a]lmost every known case has been held to be governed by English law").

130. *Id.* at 129.

131. *Id.*

132. Venturini, *Property*, in 3 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3 (1976).

133. Fujita, *supra* note 7, at XIV 5-66. Specifically, Article 10 states:

(1) Rights in rem in movables and immovables and rights requiring registration are governed by the law of the place where the property concerned is situated.

(2) The acquisition and loss of rights mentioned in the preceding paragraph are governed by the law of the place where the property concerned is situated at the time the facts giving rise to the acquisition or loss are completed.

Hōrei art. 10, translated in AMERICAN-JAPANESE PIL, *supra* note 5, at 116.

134. Fujita, *supra* note 7, at XIV 5-66 to 67.

135. *Id.* at XIV 5-67. However, the risk of loss is governed by the proper law of the contract. *Id.* at XIV 5-67 to 68. Article 10(2) of the *Hōrei* specifically mentions acquisition and loss of real rights—the transfer of title. See *supra* note 127.

136. Fujita, *supra* note 7, at XIV 5-68. Although this common law seller's right is not recognized in Japan, in one case involving a subsequent purchaser of goods, the court held that this right is a matter of "real rights" within the meaning of Article 10(1), and was therefore governed by *lex situs*. *Id.* (citing Siebel Hagner & Co. v. The Peninsular & Oriental Steam Navigation Co., Yokohama District Court, 8 Hyoron (Shoho) 4, Oct. 29, 1918). Thus, it is suggested that where the original purchaser is claiming delivery of the goods, and the sales contract and bill of lading are governed by Anglo-American law, the Japanese courts will protect the unpaid seller's right to stoppage *in transitu*. Fujita, *supra* note 7, at XIV 5-68 to 69.

137. DICEY & MORRIS, *supra* note 12, at 519-24; HALSBURY'S, *supra* note 12, ¶¶ 651-56,

of assignments, the effect of a lapse of time upon the rights to immovables, and questions relating to monetary sums charged upon an immovable.¹³⁸ With respect to tangible *movables*, *lex situs* determines the validity of transfers and their effect on the proprietary rights of the parties and those claiming under them, including the seller's right of stoppage *in transitu*.¹³⁹ If the transfer is valid under the *lex situs*, it remains valid even if the *situs* changes—unless the transfer was made after the change, and even then not until it is declared invalid under the new *lex situs*.¹⁴⁰

The application of *lex situs* to most issues relating to rights over movables and immovables raises the problem of which issues are governed by *lex situs* and which are governed by the conflicts rules relating to contracts. This is a matter of "characterization,"¹⁴¹ and depends upon whether the issue should be classified as one of property law dealing essentially with proprietary rights, or one of contract law dealing essentially with contractual rights. Reliance upon the distinction between proprietary rights, subject to the *lex situs* rules relating to property and contractual rights and subject to the conflict rules relating to contracts,¹⁴² has lead to two general rules: (1) *lex situs* determines the nature of assets, whether they are capable of becoming the object of proprietary rights, and the content, limits and exercise of

at 441-43; and J. MORRIS, *supra* note 12, at 288, 291-94. See P. NORTH, *supra* note 4, at 503-07.

138. DICEY & MORRIS, *supra* note 12, at 519-24; HALSBURY'S, *supra* note 12, ¶¶ 651-56, at 441-43; and J. MORRIS, *supra* note 12, at 288, 291-94. See P. NORTH, *supra* note 4, at 503-07. A contract relating to immovables is nevertheless considered formally valid if it satisfies the requirements of either the law of the place of contracting, or the proper law of the contract. DICEY & MORRIS, *supra* note 12, at 523-24, 530; J. MORRIS, *supra* note 12, at 291.

139. P. NORTH, *supra* note 4, at 525-30; DICEY & MORRIS, *supra* note 12, at 544-45; HALSBURY'S, *supra* note 12, ¶¶ 657, 659, 660, at 443-45; and J. MORRIS, *supra* note 12, at 295, 297.

140. HALSBURY'S, *supra* note 12, ¶ 658, at 444; DICEY & MORRIS, *supra* note 12, at 551; and J. MORRIS, *supra* note 12, at 298.

141. "Characterization" is a problem that arises because the conflict of law rules differ depending upon the classification of an issue, just as applicable domestic law provisions differ depending upon the classification of an issue. DICEY & MORRIS, *supra* note 12, at 19-21; P. NORTH, *supra* note 4, at 42-43. Thus, the objective is to "characterize" the issue in order to determine which of the forum's conflict rules apply. P. NORTH, *supra* note 4, at 43. Characterization is always performed even if it is not expressly designated. *Id.* In England, the classification is usually based upon the law of the forum, since judges are most familiar with English law. *Id.* This approach, however, may be improper in the technical legal sense because, at least in England, the issue of which law determines the characterization is a complex and unresolved matter. See generally *id.* at 43-46; DICEY & MORRIS, *supra* note 12, at 22-33.

142. Venturini, *supra* note 132, at 8.

such rights, including acquisition;¹⁴³ and (2) the proper law of the contract, rather than *lex situs*, determines the transaction underlying the acquisition or contractual effects arising therefrom, at least with respect to movables.¹⁴⁴

Japan and England also have special conflict rules pertaining to negotiable instruments. Japan codified the 1930 and 1931 Geneva Convention rules on negotiable instruments into the Bills of Exchange and Promissory Notes Act and the Checks Act.¹⁴⁵ Under these statutes, capacity is determined primarily by the law of that party's country,¹⁴⁶ and formalities are governed by the place of contracting—that is, where a party affixed its signature to the instrument.¹⁴⁷ The duties and obligations of the acceptor are determined by the law of the place where the instrument is payable, while the duties and obligations of other parties are determined by the law of the country where they signed the instrument.¹⁴⁸ Most other issues, including questions of acceptance and the measures to be taken in the event of loss or theft, are determined by the law of the place where the instrument is payable.¹⁴⁹ The time limit for exercising the right of recourse, however, is determined by the law of the place where the instrument is issued.¹⁵⁰

Section 72 of the Bills of Exchange Act of 1882¹⁵¹ contains some of the English law relating to conflicts of law rules regarding negotia-

143. *Id.* at 8-9. For example, the effect of the transfer of immovables on the proprietary rights of the parties is determined by the *lex situs* in England and in Japan. P. NORTH, *supra* note 4, at 525, 527; Fujita, *supra* note 7, at XIV 5-68.

144. Venturini, *supra* note 132, at 9. For example, under Japanese law, the risk of loss is determined by the proper law of the contract. Fujita, *supra* note 7, at XIV 5-68. Similarly, under English conflict rules, contractual rights and obligations under a sale of goods contract are also governed by the proper law. P. NORTH, *supra* note 4, at 525, 527. Additionally, in England the essential validity of a contract relating to an immovable is governed by the proper law of the contract, as long as the *lex situs* does not prevent the execution of the contract. *Id.* at 510.

145. Fujita, *supra* note 7, at XIV 5-60 (citing the Bill of Exchange Act as *Tegato Ho*, Law No. 20, 1932; and the Checks Act as *Kogitte Ho*, Law No. 57, 1933).

146. *Id.* There are exceptions to this rule, including the bilateral application of the principle of *favor negotii*. *Id.*

147. *Id.* (a valid subsequent instrument shall not be affected by the prior invalid instrument).

148. *Id.* at XIV 5-60 to 61.

149. *Id.* at XIV 5-61.

150. *Id.*

151. Bills of Exchange Act, 1882, 45 & 46 Vict., Ch. 61, 3 *Stats.* 188, reprinted in 3 HALSBURY'S STATUTES OF ENGLAND 186, 227 (3d ed. 1968). Section 72 provides:

Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

- (1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the super-

ble instruments. Generally, Section 72 rejects the notion of a single law governing the transaction, and instead adopts a general principle that the liability of each contracting party is governed by the law of the place where each separate contract is made.¹⁵² An express choice of law by the parties is prohibited by the provisions of Section 72.¹⁵³ With some exceptions, formal validity of a bill is determined by the law of the place of "issue"—the place where the bill is first delivered to its holder—while the formal validity of each supervening contract is determined by the law of the place where it is made.¹⁵⁴ The Act also declares that the interpretation of a bill or note is determined by the law of the place where it is made.¹⁵⁵ Questions relating to presentment and dishonor are decided by the law of the place where the act is done.¹⁵⁶ The due date of the bill is determined by the law of the place

vening contracts, such as acceptance, or indorsement, or acceptance *supra protest*, is determined by the law of the place where such contract was made.

Provided that—

- (a) Where a bill is issued out of the United Kingdom is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.
- (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.
- (2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra protest* of a bill, is determined by the law of the place where such contract is made. Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.
- (3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonored.
- (4) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.
- (5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable

Id.

152. P. NORTH, *supra* note 4, at 252. See also DICEY & MORRIS, *supra* note 12, at 818-21.

153. P. NORTH, *supra* note 4, at 252. See also DICEY & MORRIS, *supra* note 12, at 818-21.

154. Section 72(1), reprinted in 3 HALSBURY'S STATUTES OF ENGLAND 227 (3d ed. 1968). See P. NORTH, *supra* note 4, at 252-54; DICEY & MORRIS, *supra* note 12, at 822-26; and J. MORRIS, *supra* note 12, at 312-13.

155. Section 72(2), reprinted in 3 HALSBURY'S STATUTES OF ENGLAND 228 (3d ed. 1968). See P. NORTH, *supra* note 4, at 254-56; DICEY & MORRIS, *supra* note 12, at 826-36; and J. MORRIS, *supra* note 12, at 313-14. It has been suggested and there is some support for the view that the term "interpretation" in this subsection could be broadly construed to include the essential validity and effect of the contract. DICEY & MORRIS, *supra* note 12, at 829.

156. Section 72(3), reprinted in 3 HALSBURY'S STATUTES OF ENGLAND 228 (3d ed. 1968).

where it is payable.¹⁵⁷

Although not codified in the Act, there are also common law rules to determine capacity, negotiability, and transfer of negotiable instruments. Capacity to enter into a contract should be determined by the law designated under the general contracts conflict rule.¹⁵⁸ In addition, although foreign instruments are not negotiable in England unless they are recognized by an English statute or the custom of English merchants,¹⁵⁹ the effectiveness of a transfer of negotiable instruments is determined by the law of the place where the transfer was made.¹⁶⁰ Finally, it is suggested that the essential validity and effect of the instrument is governed by the law of either the place of contracting or the place of performance.¹⁶¹

VI. PUBLIC POLICY—AN EVERPRESENT RESTRICTION ON THE APPLICATION OF THE PROPER LAW

A universal rule of conflicts is that foreign law will not be applied when its application contravenes the public policy of the forum country.¹⁶² In the conflict of laws field, public policy serves three functions: (1) to reject foreign laws repugnant to the forum's sense of morality and decency; (2) to prevent injustice in the special circumstances of the particular case; and (3) to affect choice of law in any particular case.¹⁶³ Although the "moral repugnancy" use has declined, it remains viable because it protects a legal system from the risk involved in opening itself up to enforcement of undesirable foreign-acquired rights.¹⁶⁴ Under the second function, judges retain a "residual discretion" to avoid unjust or unconscionable results from the sometimes harsh effect of the application of a foreign law man-

See P. NORTH, *supra* note 4, at 255-56; DICEY & MORRIS, *supra* note 12, at 836-37. This provision has been criticized as being obscure and unintelligible, because it does not expressly designate the proper law if the act is not done. P. NORTH, *supra* note 4, at 255-56; DICEY & MORRIS, *supra* note 12, at 836-37. It is suggested, however, that the law of the place of performance would probably be applied. P. NORTH, *supra* note 4, at 256.

157. Section 72(5), reprinted in 3 HALSBURY'S STATUTES OF ENGLAND 228 (3d ed. 1968). See P. NORTH, *supra* note 4, at 257; DICEY & MORRIS, *supra* note 12, at 839; and J. MORRIS, *supra* note 12, at 317-18.

158. P. NORTH, *supra* note 4, at 254.

159. *Id.*; J. MORRIS, *supra* note 12, at 311.

160. DICEY & MORRIS, *supra* note 12, at 832-35; J. MORRIS, *supra* note 12, at 314-16.

161. DICEY & MORRIS, *supra* note 12, at 829-30.

162. Lando, *supra* note 13, at 108; Fujita, *supra* note 7, at XIV 5-76.

163. Note, *The Traditional View of Public Policy and Ordre Public in Private International Law*, 11 GA. J. INT'L & COMP. L. 591, 607-09 (1981) [hereinafter cited as *Public Policy*].

164. *Id.* at 607-08.

dated by the conflicts rules.¹⁶⁵ Finally, courts may use public policy to reject the choice of law made by their own conflicts rules in a particular case (and typically apply the law of the forum itself), rather than modify or change the conflicts rules altogether.¹⁶⁶ A common example of this third function is the invocation of public policy to prevent extraterritorial application of United States antitrust laws, which many countries regard as an unwarranted interference with their internal affairs.¹⁶⁷

Japan and England both employ the notion of public policy in the field of conflict of law. Under Article 30 of the *Hōrei*, any provision of an otherwise applicable foreign law will not apply if contrary to the "public order and good morals" of Japan.¹⁶⁸ One controversial decision even held a statute of limitations to be a matter of Japanese public policy.¹⁶⁹ Although the invocation of public policy under Article 30 is rare in contract cases, it has been invoked in some employment contract cases.¹⁷⁰ Thus, despite the unpredictability of its use due to both the vagueness of the idea and a lack of translated material concerning its use, public policy remains a potential tool to be used in Japan to disregard an express, implied or otherwise mandated choice of foreign law.

In England, the notion of public policy embodied in case law is no more defined or predictable than in Japan. Public policy is commonly invoked to substitute English law for an otherwise applicable

165. *Id.* at 608.

166. *Id.* at 609.

167. *Id.* at 612.

168. *Hōrei* art. 30, translated in AMERICAN-JAPANESE PIL, *supra* note 5, at 117.

169. Fujita, *supra* note 7, at XIV 5-76 (discussing and citing *Ueda v. Suzuki*, Great Court of Judicature, 23 *Minroku* 378, Mar. 17, 1917). Fujita also points to the decision in *Cassel v. Toko Nylon K.K.*, Tokushina District Court, 254 *Hanrei Times* 209, Dec. 16, 1966, which questioned the validity of the *Ueda* case and sustained a claim for attorneys fees even though the action would have been barred by the Japanese statute of limitation. *Id.* He notes, however, that the *Ueda* case could be distinguished from *Cassel* on the ground that both parties were Japanese in *Ueda*. *Id.*

170. Fujita, *supra* note 7, at XIV 5-77. *E.g.*, *George v. International Air Service Co.*, Tokyo District Court, 16 *Rodo Kershu* 308, Apr. 26, 1965, translated in 10 *JAPAN. ANN. INT'L L.* 189 (1966). In *George*, the court sustained a petition for unfair labor practices even though the American employee of a California company had been unsuccessful in seeking relief in the United States on the same claim. 10 *JAPAN. ANN. INT'L L.* at 196. The court reasoned that "labor laws regulating labor relations do not have a nature which is common to different nations . . . and each nation intervenes, from its own necessities in labor agreements by which labor is actually supplied in said country." *Id.* at 194. Thus, since all of his work had been performed in Japan, the court held that Article 7 of the *Hōrei* was inapplicable because of the need to effectuate the Japanese public policy embodied in its labor laws. *Id.* at 194-95. The court then applied these Japanese labor laws to grant relief. *Id.*

foreign law to determine the validity of a contract "if and insofar as the application of foreign law would be opposed to the public policy of English law, or to the provisions of an Act of Parliament which, by the terms of the Act or by virtue of established principles of statutory interpretation, applies to the contract."¹⁷¹ One act that falls within this definition and could be characterized as a "directly applicable" law is the Unfair Contract Terms Act 1977,¹⁷² which limits and in some cases negates contractual terms that attempt to restrict or exclude liability for breach of contract or negligence.¹⁷³ Overall, how-

171. DICEY & MORRIS, *supra* note 12, at 725-26; see P. NORTH, *supra* note 4, at 73.

172. Reprinted in 47 HALSBURY'S STATUTES OF ENGLAND 86-103 (3d ed. 1978).

173. *Id.*; Note, *Unfair Contract Terms Act 1977 and the Conflict of Laws*, 27 INT'L & COMP. L.Q. 661, 661 (1978); and Blom, *supra* note 14, at 167-68. The applicability of the Act and its consequential effect on the field of conflicts of law is set forth in Section 27, which provides:

- (1) Where the proper law of a contract is the law of any part of the United Kingdom only by choice of the parties (and apart from that choice would be the law of some country outside the United Kingdom) sections 2 to 7 and 16 to 21 of this Act do not operate as part of the proper law.
- (2) This Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where (either or both)—
 - (a) the term appears to the court, or arbitrator or abiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Act; or
 - (b) in the making of the contract one of the parties dealt as a consumer, and he was then habitually resident in the United Kingdom, and the essential steps necessary for the making of the contract were taken there, whether by him or by other on his behalf.

Reprinted in 47 HALSBURY'S STATUTES OF ENGLAND 100 (3d ed. 1978). See also *id.* at 97 (Section 12 defines "dealing as a consumer"). It is important to note, however, that under Section 26, the Act is expressly made inapplicable to international supply contracts, which are defined in Section 26(3) and (4) as:

- (3)
 - (a) either it is a contract of sale of goods or it is one under or in pursuance of which the possession or ownership of goods passes; and
 - (b) it is made by parties whose places of business (or, if they have none, habitual residences) are in the territories of different States (the Channel Islands and the Isle of Man being treated for this purpose as different States from the United Kingdom).
- (4) A contract fails within subsection (3) above only if either—
 - (a) the goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one State to the territory of another; or
 - (b) the acts constituting the offer and acceptance have been done in the territories of different States; or
 - (c) the contract provides for the goods to be delivered to territory of a State other than that within whose territory those acts were done.

Id. at 99. See also *id.* at 101-02 (another exemption is stated in 29(1)(b) for contracts that comply with an international agreement to which the United Kingdom is a party). In general, the Act applies regardless of the fact that the parties expressly selected, or the general conflict rules designate, some law other than England as the proper law of the contract. Blom, *supra*

ever, the English courts have taken a rather "narrow," or "technical," view of public policy, basically restricting it to extraterritorial statutes and common law principles of morality and decency.¹⁷⁴ The English courts have rejected a broader view that might hold a contract contrary to public policy simply because it may be contrary to an English domestic statute or rule.¹⁷⁵

Despite the narrow view taken, the role of public policy in the English contracts conflict of laws field remains vague, primarily due to the lack of cases.¹⁷⁶ Contracts in restraint of trade, contracts involving trade with the enemy, champertous contracts, wagering contracts, and contracts in violation of lending laws, however, have been held contrary to English public policy, regardless of their validity under the foreign proper law.¹⁷⁷ English courts have also used public policy to *enforce* contracts otherwise void under the foreign proper law.¹⁷⁸

There are, however, many ways in which a court may disguise its use of public policy to apply the law of the forum.¹⁷⁹ Courts in common law countries, such as England, may apply the substantive/procedural characterization to classify an issue as procedural in order to justify the application of the law of the forum instead of the proper law.¹⁸⁰ Both Japanese and English courts use the theory of "characterization" on a substantive level to disguise their invocation of public

note 14, at 167-69; J. MORRIS, *supra* note 12, at 224; and Note, *Unfair Contract Terms Act 1977 and the Conflict of Laws*, 27 INT'L & COMP. L.Q. at 661-63.

174. Blom, *supra* note 14, at 183. See P. NORTH, *supra* note 4, at 145-46.

175. Blom, *supra* note 14, at 183. See P. NORTH, *supra* note 4, at 145-46. There are, however, indications that such a narrow view of public policy may be declining. For example, in the recent case of *The Hollandia*, [1982] 1 Q.B. 872, 873, 884, 886, 890-91, [1982] 2 W.L.R. 556, 557, 562-66, 568-69, [1982] 1 All E.R. 1076, 1080-82, 1084-86, the court invoked the public policy of England to invalidate a provision of parties' choice of law clause that limited the shipowner's liability contrary to the Hague rules which have been adopted in England (the parties had selected the Netherlands as the proper law of the contract). Specifically, Lord Denning rejected the argument that the application of England's Carriage of Goods By Sea Act 1971 would unduly impair the parties' freedom of contract:

[T]here is a higher public policy to be considered—and that is the public policy which demands that, in international trade, all goods carried by sea should be subject to uniform rules governing the rights and liabilities—and the limitations of liability—of the parties. . . .

This public policy . . . [i]n short, . . . applies to all international transport. *Id.* at 884, [1982] 3 W.L.R. at 562, [1982] 1 All E.R. at 1080.

176. Blom, *supra* note 14, at 183.

177. DICEY & MORRIS, *supra* note 12, at 727-29. See P. NORTH, *supra* note 4, at 149-51.

178. DICEY & MORRIS, *supra* note 12, at 727-29.

179. See *Public Policy*, *supra* note 163, at 603-07.

180. *Id.* at 604.

policy.¹⁸¹ Both countries also commonly refuse to apply foreign "public laws," even when the foreign law is the proper law of the contract.¹⁸² Thus, by characterizing a particular foreign law as "public," the court can disregard it without expressly invoking the notion of public policy.

Moreover, the universal notion of "directly applicable," or mandatory rules of the forum,¹⁸³ is another way a court might implicitly invoke public policy. Under this theory, the validity of a contract or one of its terms is determined in accordance with a provision of the forum law because the law expressly or by virtue of statutory construction applies to the contract.¹⁸⁴ These "directly applicable" rules can be found in the private and public law of the forum, but they commonly take the form of trade, antitrust, or foreign investment regulations.¹⁸⁵ This theory has only been applied unilaterally, allowing

181. *Id.* at 606-07. See Fujita, *supra* note 7, at XIV 5-71. For a discussion of characterization, see *supra* note 141 and accompanying text.

182. Lando, *supra* note 13, at 108-09. See generally P. NORTH, *supra* note 4, at 131-37 (foreign penal and revenue laws denied application even if from the country of the proper law).

183. Lando, *supra* note 13, at 108-09.

184. *Id.*; DICEY & MORRIS, *supra* note 12, at 725-26. See Fujita, *supra* note 7, at XIV 5-52.

185. Lando, *supra* note 13, at 107-08; and Fujita, *supra* note 7, at XIV 5-52. For example, in Japan, the Foreign Exchange and Foreign Trade Control Law (*Gaikoku-kawase oyobi gaikoku-hōeki kanriho*, Law No. 228, 1949), the Foreign Investment Law (*Gaishini kansuru hōritsu* Law No. 163, 1950), and the Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade (*Shiteki-dokusen no kinski gyōbi kōsei-torihiki no kakuho ni kansuru hōritsu*, Law No. 54, 1947), all have the potential to effect international transactions. *Japanese Regulations*, *supra* note 7, at 317, 319 n.6, 333 n.38, 338 n.60.

Their potential for affecting the enforceability of international contracts, however, has been negated by the Japanese courts' classification of them as *torishimari-hōki* (regulatory law), which merely makes the contract illegal but not unenforceable. *Id.* at 318-19. If they had been classified as *kyōkō-hōki* (mandatory law), any contracts contrary to their provisions would have been both illegal and unenforceable. *Id.* In general, this has been the fate of most of the provisions of the Foreign Exchange and Control Law, and only one court has ever held any provision of it to *kyōkō-hōki*; and it is of questionable validity. *Id.* at 319-25, 328-32. In contrast, the Anti-Monopoly Act has clearly been established as *kyōkō-hōki* because it embodies a *strong* public policy, and it appears that the Foreign Investment Law will also be classified as *kyōkō-hōki* because it expressly provides that noncompliance will render a contract void. *Id.* at 339, 333-37.

Even where the courts have classified the applicable provision as *kyōkō-hōki*, it has not had a particularly fatal effect on a party's recovery. For example, in the one case that held the applicable provisions of the Control Law to be *kyōkō-hōki*, recovery was permitted under the theory of unjust enrichment. *Id.* at 324, 335-37. It is suggested that recovery may be permitted under this or some other theory if the contract fails to comply with applicable provisions of the Foreign Investment Law. *Id.* With regard to the offensive invocation of the Anti-Monopoly Law, Japanese courts have also taken a rather relaxed attitude towards noncompliance, at least where the contract has already been performed and third parties' rights might be affected by retroactive application. In such cases, rather than applying the law retroactively and voiding the contract, the courts have placed the responsibility primarily on the Japanese Fair Trade

application of the forum's rules but denying application of foreign "directly applicable" rules. Since resort to public policy is considered solely a national remedy, courts are reluctant to apply foreign rules that are not part of the proper law of the contract.¹⁸⁶

Although the operation of public policy may produce uncertainty, frustrate the intentions of the parties, and at times appear arbitrary and capricious, it is not entirely without virtue. At its root is the forum country's interest in the outcome of disputes resolved in its system. As one commentator has stated:

[P]ublic policy provides for a flexible response [to unforeseen consequences of forum recognition of foreign acquired rights. Completely automatic operation of conflicts rules produces mechanical, unjust and disquieting results in cases where a court may be able, on the facts of a particular case, to fashion a more equitable outcome It is a necessary exception in unusual conflicts cases where the court perceives dangerous intrusion of morally repugnant law, injustice in special circumstances, or facts so closely tied to the forum that the court is compelled to apply local law.¹⁸⁷

Despite these virtues, frequent invocation of public policy can result in forum shopping and endanger the uniformity of decision.¹⁸⁸ Therefore, it is suggested that courts be more tolerant of sometimes unpopular foreign law and be more cautious when determining that a particular foreign law is contrary to the forum's public policy, or that a particular law of the forum is "directly applicable" to the contract at hand.¹⁸⁹

VII. CONCLUSION

Despite the fundamental difference between their legal systems, there is surprising similarity between the conflict rules of England and Japan with respect to international contracts. Most significantly, both countries share the underlying principle of party autonomy as reflected in their recognition of choice of law clauses and rules requiring the courts to ascertain the parties' implied intent if they fail to express it. Even the factors used by both courts to ascertain this implied in-

Commission and relied upon the possibility of a subsequent tort action for damages. *Id.* at 340-45. Thus, overall the Japanese courts' treatment of this type of "directly applicable" rule is strikingly liberal, in contrast to the stern, literal approach taken in England. *Id.* at 319.

186. Lando, *supra* note 13, at 38, 108, 110.

187. *Public Policy*, *supra* note 163, at 613.

188. Lando, *supra* note 13, at 38-39.

189. *Id.*

tent are similar. Additionally, both countries have expressed concern over inequality in bargaining power and have addressed the issue to some degree in their conflicts of law rules for contracts. Both countries also believe that the proper law of the contract should govern most issues arising out of the contract (Japan perhaps more so than England), but recognize a distinction between contract and property issues when dealing with contracts involving real or personal property, and have adopted special rules for negotiable instruments. In fact, the few major differences between the conflict of law rules of Japan and England for contracts can be explained in part by the difference in their respective legal systems.

The conflict of law rules of England and Japan for international contracts present the practitioner with a somewhat complicated array of rules depending upon the issues in dispute. The practitioner must first determine whether the issues in dispute are really governed by the general conflict rules for contracts, or whether the issue is one of property rather than contracts. Even if the governing law should be determined by the general conflict rules for contracts, the proper law of the contract must then be determined. This of course depends upon whether a valid choice of law clause has been included. Absent an *enforceable* choice of law clause, the practitioner must argue that the parties actually intended or should be presumed to have intended the proposed law to apply. Once the proper law of the contract is determined, other legal systems might still control because the proper law may not exclusively govern that particular issue. Finally, the practitioner should anticipate a possible invocation of the forum's public policy or application of one of its "directly applicable" rules.

Conflict rules for international contracts should represent the proper balancing of the need for predictability and freedom in international trade, the interests of other countries having significant relationship to the contract, and the interests of the forum itself in disputes resolved through it. Whether the current practices actually represent the best accommodation of the interests involved is a question that ultimately can only be answered by the courts and legislatures in each of these countries, as well as by the parties to international contracts.

Karen Denise Untiedt