ARTICLES

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SELF-LIMITING RULES AND PARTY AUTONOMY

David St. L. Kelly, Reader-in-Law at the University of Adelaide, called to my attention the decision of the High Court of Australia in *Augustus* v. *Permanent Trustee Company (Canberra) Ltd.*,[1] which deals with a question arising in the process of determination of the proper law of contracts or settlements. The problem is not new, but is still intriguing, as a perusal of the judgment of Walsh J., with whose arguments and conclusion the other members of the Court (Barwick, C.J., McTiernan, Windeyer and Owen, JJ.) agreed, clearly demonstrates.

The issue was whether a settlement executed in the Australian Capital Territory by a settlor domiciled and resident in the State of New South Wales was valid *in toto* or only in part. The settlement provided that one half of certain trust funds which had been transferred to the trustee, the Permanent Trustee Co. (Canberra) Ltd., (a company incorporated in the Territory but not registered as a foreign company in New South Wales) should be held on behalf of a son of the settlor, while the other half should be held on behalf of the latter's daughter and, if she died without issue, the children of the son. The daughter died without issue. The grandchildren of the settlor would have inherited the share of their aunt (she died after the settlor, whose estate had been entrusted for purposes of administration to the Permanent Trustee Company (New South Wales Ltd.), if the settlement was valid. Doubt arose because the provision in favour of the grandchildren was valid under s.36, Conveyancing Act, 1919-1967 (New South Wales), but void under the rule against perpetuities in force in the Australian Capital Territory. A clause in the settlement[2] seemed to indicate the law of New South Wales as the law governing the settlement.

The Supreme Court of the Australian Capital Territory, in a decision by Fox J.[3], held that the settlement "was to be construed and to have legal effect" according to the law of the Territory, under which the gift to the grandchildren was not valid. The High Court of Australia, on appeal, reversed this decision holding that the law of New South Wales applied, being the law

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1. *Augustus* v. *Permanent Trustee Company (Canberra) Limited and Others* (1971), 45 A.L.J.R. 365.

2. It stated *verbatim:* "In addition to the express powers hereby conferred on the Trustee, the Trustee shall be entitled to exercise in respect of the trust funds wherever situate all or any of the powers authorities and discretions conferred on Trustees by the law of the State of New South Wales as if the same were expressly included in these presents and the rights and liabilities of the Trustee and of the beneficiaries as between themselves and as against the Trustee and the administration of the trusts of this settlement shall be regulated in the same manner as they would be under the laws of the said State".

3. *Permanent Trustee Co. (Canberra) Ltd.* v. *Permanent Trustee Co. (N.S.W.) Ltd.* (1969), 14 F.L.R. 246.

"chosen by the parties"[4]. Apparently Fox J. thought that the reference in the settlement to the law of New South Wales was only an indirect means adopted by the parties of articulating certain points of agreement within the limits allowed by the proper law of the transaction. Walsh J., on the contrary, construed that reference as expressing the choice by the parties of the applicable law, on which depended the essential question whether the transaction was valid or not. In other words, that clause, according to the Supreme Court of the Territory, was an example of incorporation by reference to be controlled by the law of the Territory, which did not allow the parties to put in their agreement a clause modelled on the provisions of the Act of New South Wales and thus to validate the transactions; whereas for the High Court of Australia the clause was to be interpreted as a choice of the proper law of the settlement[5], operative according to a conflicts rule of the Territory.

To be sure, the clause in question read, in its first part, as if it were directed to utilization of "foreign" rules by turning them into terms of the agreement. It begins by stating, in fact, that "the trustee shall be entitled to exercise in respect of the trust funds wherever situate all or any of the powers authorities and discretions conferred on trustees by the law of the State of New South Wales as if the same were expressly included in these presents". But since it goes on to say that "the rights and liabilities of the trustee and of the beneficiaries as between themselves and as against the trustee and the administration of the trusts of this settlement shall be regulated in the same manner as they would be under the law of the said State", the interpretation given by the High Court seems more plausible, i.e. that the said provision constituted "a choice of law clause"[6].

In order to exclude the application to the case of s.36, Conveyancing Act (New South Wales) despite the fact that it formed part of the law governing the settlement (the law chosen by the parties themselves), it was argued that that provision applies only to settlements *either executed in New*

4. "It has not been disputed by any of the parties to this appeal", remarked Walsh J., at p.368, "that the general rules established in relation to contracts are applicable in deciding questions of the choice of law in relation to such voluntary settlements as that which is contained in the deed. In my opinion, those rules are applicable. That means that, subject to qualifications to which some reference will be made later herein, it was open to the parties to make their own choice of law. If they have expressed their intention on that matter, effect will be given to it: see *Vita Food Products, Inc.* v. *Unus Shipping Co. Ltd.* [1939] A.C. 277, at p.290. If they have not expressed an intention, the law to be applied must be ascertained as 'a matter of implication to be derived from all the circumstances of the transaction': see *Bonython* v. *Commonwealth of Australia,* [1951] A.C. 201, at p.221". *Cf.* P. E. Nygh, *Conflict of Laws in Australia,* (2nd ed., 1971) at p.343. I commented upon the *Vita Foods* case in (1944) 10 *Giurisprudenza Comparata di Diritto Internazionale Privato,* at pp.35ff.

5. For this distinction, see Dicey and Morris, *Conflict of Laws* (8th ed., 1967) at pp. 701-703; Mann, "Proper Law and Illegality" (1937) 18 *B.Y.B.I.L.,* 97 at p.101 See also G. Kegel, *Internationales Privatrecht* (3rd ed., 1971), at p.356, who speaks of the German equivalents, materiellrechtliche Verweisung and Kollisionrechtliche Verweisung.

6. "If the part of the clause", remarks Walsh J., at p. 369, "which begins with the words 'the rights and liabilities' had been followed by some such words as 'shall be governed by the laws of New South Wales', I am of the opinion that this provision would have been apt, in its natural meaning, to express the intention that a question whether some person or class of persons, named or described in the deed as an object of benefit, was or was not entitled to receive a share of the capital or of the income of the trust funds, should be determined by the law of that State. I am of opinion that no different conclusion is required by reason of the fact that the concluding words of the clause are 'shall be regulated in the same manner' etc."

South Wales or affecting property situated there. Since none of these "necessary territorial nexus"[7] existed *in casu*, the general rule against perpetuities, still effective in New South Wales, applied and the grandchildren of the settlor were not entitled to the share of the trust funds which the latter had set aside for his daughter as a life interest. It is on account of this argument—and of its rejection by the High Court—that Mr. Kelly called the decision to my attention. Questions raised by "self-limited", or "self-limiting", provisions in private international law[8] have already appealed both to Mr. Kelly and myself. We agreed on several points, but not on whether "spatial" *(lato sensu)*[9] limitations of this sort are to be taken into account when they are part and parcel of the rules of a foreign applicable law.

The High Court, besides considering immaterial or non-exclusive the territorial connecting factors mentioned above[10], held that the parties, by referring to the law of New South Wales, assumed that the case presented all the requirements for the application of the provisions of that law (including s.36, Conveyancing Act). The High Court concluded, therefore, that s.36, Conveyancing Act covered the case in hand even if the latter lacked some element which in New South Wales is considered necessary to bring that provision into operation[11]. "In other words", declared Walsh J., "the provision [of the settlement which refers to the law of New South Wales] renders the laws of New South Wales applicable not directly and by way of legislative command addressed to the parties, but referentially and by force of the declaration of the parties themselves as to how the rights, etc., are to be determined. Upon that view of the clause, there is no need to read down the general words of s.36, in order to keep the provision within legislative power."

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7. ". . . [It was argued that] a limitation must be placed upon s.36 so as to give it a sufficient territorial connexion with the State of New South Wales to bring it within the legislative competence of the Parliament of that State. Then it was submitted that s.36 should be construed as applying only to instruments executed in New South Wales. Since neither of those conditions was fulfilled in this case, the result is, according to the argument, that s.36 cannot operate to render valid any of the dispositions made by the deed" (Walsh J., at p.370).

8. Among the latest writings on the subject see D. St. L. Kelly, "Localising Rules and Differing Approaches to the Choice of Law Process", in (1969) 18 *International and Comparative Law Quarterly*, at pp.249-274 (an Italian translation by myself has appeared, under the title "Norme localizzanti e scelta della legge applicabile", (1970) *24 Diritto Internazionale*, pp.177-202); R. de Nova, "An Australian Case on the Application of Spatially Conditioned Internal Rules", (1969) 22 *Revue Hellénique de Droit International*, pp.24-32; D. F. Cavers, "Contemporary Conflicts Law in American Perspective", (1970) 131 *Rec. des Cours* at pp.133ff; A Toubiana, *Le domaine de la loi du contrat en droit international privé (contrats internationoux et dirigisme étatique)*, (1972) at pp.218-232.

9. Usable that is, in rules on "conflicts of laws in space", i.e. as points of contact in rules of private international or interstate law. The word covers, therefore, also "subjective" or personal connecting factors such as nationality or domicile. See, for terminological criticism, Kelly, *op. cit.*, at p.251 (p.179 of the Italian version), and T. Ballarino, *Forma degli atti e diritto internazionale privato*, (1971) at p.192, n.148.

10. "I do not accept the view that the necessary territorial nexus must be found either in the location of the property or in the place of the execution of the deed. In my opinion s.36 may operate upon an instrument which is intended to be governed in the relevant respect by the law of New South Wales" (Walsh J., (1971) 45 A.L.J.R. 365 at p.371).

11. " . . . the provision that the rights, etc., shall be regulated in the same manner as they would be under the laws of New South Wales, should be read as a direction that those laws should be applied as they would be upon the hypothesis or assumption that all conditions existed that were required to allow them to take effect in determining the rights, etc., to which the clause refers" (Walsh J., *id.*, at p. 370).

This passage seems inconsistent with what Walsh J. had said before about the meaning and significance of the reference by the parties to the law of New South Wales. While at the beginning of the judgment his Honour maintained that the reference amounted to a choice of the applicable law—applicable also, and above all, to the question of the transaction's validity, a question clearly to be resolved by mandatory rules—subsequent passages seem to interpret that reference as merely adding, by incorporation, a new clause to the settlement. Unlike the former, the latter operation does not belong to the conflict of laws but to the field of substantive law. It should be stressed in particular that, if the High Court believed that s. 36, Conveyancing Act applied because the parties had included it in their agreement by virtue of the reference to the law of New South Wales, but that, in so doing, they had meant to disregard any limitation attaching thereto which would have finally prevented its application to the case in hand, then it decided a question of substantive law—more precisely, how a private agreement was to be construed—[12], certainly not a question of private international or interstate law.

Seen in this light, the *Augustus* case suggests a distinction between two situations in which the limitation of spatial effectiveness imposed in a foreign legal order on some of its own substantive rules may become relevant *in foro*. One is the reference to foreign rules by the contracting parties or settlor, a reference permitted by the law governing the transaction. The other is the reference to foreign rules by the parties or settlor which amounts to a choice of the applicable law: something they are entitled to do by virtue of a conflicts rule of the forum. In the former instance, it is presumed that the parties (unless, of course, they specifically agreed upon a different sort of reference) intended to use those provisions of the foreign law which dealt with cases like the one they were considering but of an entirely local character, and thus paid no attention to the limitations which the "spatial" features of the real case might have called into play[13]. If, on the other hand, the expression of party intention was directed towards pointing out the applicable law, the purpose of the reference is the same as that of the conflicts rules which do not resort to the intention of the parties or settlor, i.e. to apply that rule of substantive law of the chosen legal order which suits exactly the situation before the court, consequently paying due consideration to any relevant localizing rule.

I realize, however, that at this stage my theory runs into a serious difficulty. It is often argued that the choice of the applicable law by the parties or settlor is not to be equated, for instance in relation to the use of "renvoi", with the determination of the applicable law by other means. Some authors maintain

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12. This interpretation entails the consequence that the parties, when they used the provisions of the legal order they had chosen, cannot be considered to have taken them over with such a meaning and such a range as would cause the invalidity, or a restriction in the efficacy, of the transaction.
In the case of s.36, the restrictions on its import as a rule of law had certainly not been set out in terms, and it was doubtful whether there was any such restriction, or, if there was any, what it was. When both the law and the parties were silent on this point, could a court read into s.36 (envisaged as a contractual clause) restrictions which would have prevented the validating effect of the provision upon the transaction?
Maybe the same conclusion would have been justified even if s.36 were undeniably fenced in (by a formal provision or according to an interpretation accepted by the courts in New South Wales) by limits which were effective in the case in hand. But, I repeat, this is a question of private law, of *foreign* private law, and I do not venture an opinion.

13. "Spatial" specifications sometimes result from the text of the statute itself, but may also be construed in view of the policy supporting the statutory rule.

that "renvoi" finds no place in the field of contract, whatever be the technique for the determination of the proper law[14]. Others maintain that, in theory, "renvoi" is to be accepted even in the field of contract. But still others take intermediate positions by distinguishing different types of situation[15]: when the choice of law is made by the parties, be it expressly or by implication, that operation is so deeply affected by this common decision that here, where the question pertains to private international law, the same inference can and must be drawn which is usually drawn when the question pertains to private law, i.e. it is assumed that the parties look at the foreign substantive rule, not to the foreign conflicts rule, whether they fill in the gaps in their agreement by a reference to a foreign law or, by such a reference, determine the proper law itself of the contract; if, on the other hand, the applicable law has not been agreed upon by the parties and must therefore be established by the real or fictitious decision-maker (be it by resorting to a "hypothetical", "presumable", "reasonable" intention of the parties or by drawing clues to the proper law from the circumstances of the case or some special feature of the transac-

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14. See, for instance, F. Vischer, *Internationales Vertragsrecht*, (1962) at p.111; E. E. Anton, *Private International Law* (1967) at pp.61ff., 198; J. Kropholler, in his amiable review of my Hague lectures, (1970) 34 *Zeitschrift für ausländisches und internationales Privatrecht (Rabels Z.)*, at p.777.

15. See, for instance, Kegel, *op. cit.*, at p.150; *id., Die Grenze von Qualifikation und Renvoi im internationalem Verjährungsrecht*, (1962) at p.43 (*contra* F. Bydlinski, in his review of the same essay, in (1965) 87 *Juristische Blätter*, (at p. 634); *id., Einführungsgesetz*, in Soergel-Siebert, *Kohlhammer Kommentar: BGB mit EG und Nebengesetzen*, Vol. 7 (10th ed., 1970), at pp.131, 707, with several citations of doctrinal and judicial opinions.
The question has been taken up *ex professo*, particularly from the point of view of German law, by L. Raape, "Die Rückverweisung im internationalen Schuldrecht", in (1959) 12 *Neue Juristische Wochenschrift*, at pp.1013-1016 (mainly a comment on the decision of the German Supreme Court of 1958); F. A. Mann, "Die international privatrechtliche Autonomie in der Rechtsprechung des Bundesgerichtschofes", in (1962) 17 *Juristenzeitung*, at pp.6-14; O. Sandrock, *Zur ergänzenden Vertragsauslegung im materiellen und internationalen Schuldvertragsrecht*, (1966) at pp. 277-295 (a detailed and well documented comparative analysis); O. Hartwieg, *Der Renvoi im deutschen internationalen Vertragsrecht*, (1967); E. D. Graue, "Rück-und Weiterverweisung im internationalen Vertragsrecht", (1968) 14 *Aussenwirtschafsdienst*, at pp.121-131.
The "Bundesgerichtshof", in its decision of 14 February, 1958 (reported in (1958) 47 *Revue Critique de Droit International Privé*, at pp. 542ff., with a comment by E. Mezger, at pp.550-556), held (at p.547) that when the connection is based on the will of the parties, *even if the latter is merely hypothetical (contra* P. H. Neuhaus, *Die Grundbegriffe des internationalen Privatrechts*, (1962) at p. 185), there is no room for "renvoi", while there is no reason for excluding it when one cannot resort to any connection based on the will of the parties and one has to turn, as in the case the court was considering, to an objective subsidiary connection such as the *locus executionis*.
Batiffol *(Droit international privé*, (5th ed., 1970) I at p.375, n.52 bis) refers to that decision and reads it as if it accepted the "renvoi" theory when the applicable law has not been chosen by the parties *explicitly*. He excludes "renvoi" "if a contract refers by implication to a foreign law" *(a fortiori*, I should say, if the reference is explicit). And what if no reference transpires? From n.52 bis it is possible to infer that Batiffol considers the express designation as *typical*, so that the other sorts of reference to the applicable law—implicit or hypothetical or fictitious references, or subsidiary objective connections—are to be operative in the same way (i.e., without "renvoi"). In other words, Batiffol rejects "renvoi" completely in contractual matters.
Apart from a doubtful *dictum* of Lord Wright in the *Vita Foods* case, theory and practice in common law countries deny that the reference to a foreign law as the proper law of the contract implies a reference to the foreign conflicts rules. See *Re United Railways of Havana and Regla Warehouse Ltd.*, [1960] 1 Ch. 52, at pp. 96-97, 115 ("the principle of renvoi finds no place in the field of contract"); Nygh, *op. cit.*, at p. 268; A. A. Ehrenzweig, *A Treatise on the Conflict of Laws*, (1962) at pp.338, 469; J. H. C. Morris, *The Conflict of Laws*, (1971) at pp. 235, 476.

tion, such as the "main or typical obligation"[16]), then the operation is free of any subjective or psychological implications and, in a system of private international law using "renvoi", there is no reason in principle for excluding it in connexion with the proper law of a contract.

However, if one distinguishes, as I do, between the application of foreign conflicts rules (the basic feature of "renvoi"), and the application of foreign localizing rules, it serves no real purpose to extend to the latter the debate occasioned by the former: to apply a foreign law means to apply its substantive rules which are congruous with the case; and to this purpose the foreign localizing rules must be taken into account even in the field of contract.

In order to see the problem in more general terms, free from the peculiar difficulties of the choice of the applicable law by the parties or settlor, let us suppose that the *Augustus* case had been about a will, instead of a settlement, and that in the Australian Capital Territory the validity of a will of movables depends on the *lex domicilii* of the testator, who *in casu* has been domiciled at death in New South Wales. Further, let us suppose—contrary to fact[17]—that in the Australian Capital Territory the "renvoi" theory is not followed, at least in matters of succession. Finally, let us suppose that s.36, Conveyancing Act (New South Wales) envisages in terms only wills executed in that State, whereas the will under discussion had been executed abroad. Could a court of the Territory save a clause of the will by applying to it s.36, although this provision, according to its terms, does not cover the case? Hardly, I should think! Since s.36 does not extend to the case in issue, the rule to be applied thereto, drawn from the reservoir of the substantive law of New South Wales, is the legal provision concerning those wills to which s.36 does not apply. Such a provision—being, *ex hypothesi,* the very opposite of s.36—declares null and void any testamentary clause which infringes the perpetuities rule. As this is also exactly what is decreed by the law in force in the Australian Capital Territory, the case presents a "false conflict", to use the terminology now fashionable in the United States[18].

To this reasoning, Mr. Kelly responded by indicating that it may lead into a blind alley[19]. Should one follow that theory unflinchingly, he remarks, situa-

16. *Cf.* L. I .De Winter, "Enige beschouwingen over de wet van de karakteristieke prestatie", in *"Met eerbiedigende werking", Opstellen aangeboden aan Prof. Mr. L. J. Hijmans van den Bergh,* (1971) at pp.367-379 (Italian translation, by myself, (1971) 25 *Diritto Internazionale,* at pp.227-238).

17. "Renvoi" is accepted in Australia under the guise of the "foreign court theory". See Nygh, *op. cit.,* at p. 267.

18. When the concurring legal systems have the same rules on the matter in issue, it is superfluous to choose between them. There is, practically, no *conflict* of laws. A different and debatable notion of "false conflict" is presented, for instance, by Currie. See, among many, P. A. Westen, "False Conflicts" (1967) 55 *California L. Rev.,* at pp.74-122.

19. Mr. Kelly's criticisms have been taken up with some asperity by J. Prebble, "Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws" (1973) 58 *Cornell L. Rev.* 433, 635, at pp.713-720. His remark, by the way, that "de Nova's argument is reminiscent of the conclusion of Ernest Lorenzen and Raymond Heilman that logically even traditional renvoi should be regarded as a part of vested rights doctrine" is supported by my openly sharing that view in my Hague lectures of 1966, where, however, I also venture a guess in order to explain Beale's "seeming inconsistency" on this point: see de Nova, "Historical and Comparative Introduction to Conflict of Laws" (1966) 118 *Rec. des Cours* 437 at p.495.
Mr. Prebble maintains (at p.717) that "Each type of rule (i.e. general rules of the conflict of laws and localizing rules) has, *as a part of its function,* the task of determining whether certain rules of domestic law apply to the case at hand".

tions would present themselves where the applicable law has no rule fitting the case. Let us suppose that an English court be confronted with a succession to movables *ab intestato* belonging to a Swiss citizen domiciled in Italy and resident in France. Let us suppose, furthermore, that Italian law (the *lex successionis* under the well-known English conflicts rule) has a "localizing rule" stating that certain Italian substantive rules on succession apply not only when the *de cuius* is an Italian citizen, but also when he is a foreigner with an Italian residence, while under the general rule of Italian private international law matters of succession are governed by the *lex patriae* of the *de cuius*[20]. Now, supposing (contrary to fact) that English law repudiates the "renvoi" theory, or declines to follow it in succession matters, a reference to Italian law would not yield a rule for the regulation of the hypothetical succession in England. On the one hand, Italian provisions on succession would not be available *in concreto,* because those which would be available *in abstracto* are excluded by their own localizing rules, the *de cuius* being neither an Italian citizen nor a foreigner resident in Italy. On the other hand, a further reference to the *lex patriae* of the *de cuius* (chosen by the Italian conflicts rules), could not take place because it would imply a "renvoi", which was assumed not to be permitted in English private international law. Therefore, since the Italian conflicts rules are irrelevant and, on the contrary, the Italian localizing rules can and must be taken into consideration, it will be impossible to decide the case "according to Italian law".

I must acknowledge that Mr. Kelly's thrust has gone home. His criticism is well founded. I should point out, by the way, that when I raised the question whether foreign localizing rules should be taken into account when they belong to the applicable law—a question I answered in the affirmative—I did not envisage the possibility that some of them might "enlarge", so to speak, the field of application ascribed by the conflicts rules of the same legal order to its own substantive rules. I always took for granted that the effect of localization is to oppose a special rule, the localized one, to the general rule, basically applicable to the subject matter. For instance, to take up again the fictitious case sketched above, I envisaged a localizing rule by which, within the field of application of the *lex successionis,* certain provisions on inheritance were made to cover only the succession of resident nationals, or successions affecting local property, whereas the general rules on inheritance were limited, or localized, only through the operation of the rules on conflict of laws. It is quite possible, on the contrary, as Mr. Kelly pointed out, that a legal provision be endowed by a localizing rule with a sphere of application *more broad* than the one conferred by the conflicts rules of the same legal order to the foreign laws and, be it directly or indirectly, to the said local provision as well. Nay, it is probable that the *favor legis fori,* operative and even rampant in several countries, finds an outlet in this very type of "localizing rule".

In such cases, I do not see any other way out, in a legal order which is uncompromising in its rejection of "renvoi", than to ignore the foreign localiz-

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But this is simply not true of localizing rules: their *only* function is to affect domestic rules, whereas general rules of the conflict of laws—provided they are taken to act bilaterally, as Mr. Prebble also supposes—do have a *further* function (acording to Ago and Morelli their only true, direct function), namely to make *foreign* rules applicable. *Op. cit.,* at pp.265ff. (Italian version, pp.193ff.).

20. As a result of the "localising rule", however, the *lex patriae* of the decedent finally governs only the succession of foreigners *who have their residence outside Italy.* Italian law applies, on the other hand, to the succession of Italian nationals in general, because the Italian conflicts rule confirms, on this point, the localising rule.

ing rules. I am forced, by this admission, to add an exception to my favourite theory that the localizing rules of the foreign "competent" legal system are to be respected, in order properly to apply its rules.

Let us look once more at our example: as it is not possible, owing to the rejection of "renvoi", to follow *in foro* the rule of private international law of the Italian *lex causae,* which would submit the inheritance to the *lex patriae* of the *de cuius,* one is confined to Italian substantive law; Italian substantive rules on the subject are only those which relate specifically to the succession of Italian nationals and to the succession of foreigners resident in Italy. The extension of these provisions, as effected by their localizing rules, to the succession of foreigners resident in Italy, however, does not contradict the view that the said provisions are still, and first of all, intended for the inheritance of Italian nationals and are the only Italian substantive rules available within the Italian legal order when the Italian conflicts rules do not submit a succession to a foreign law (or when it is assumed that the Italian legal order does not do so). Hence those provisions must be applied whenever Italian law is referred to for the purpose of deciding a question of succession and no conflicts rules are found therein which turn the question over to a foreign law, or, if such rules do exist, they are deliberately overlooked.

In short, those Italian provisions on succession should be applied abroad even to succession of foreigners (i.e. non Italians) having no residence in Italy. This conclusion certainly fails to acknowledge that those Italian provisions do not fit the case in their own terms owing to the operation of localizing rules which I ignore, but which do exist and are part of those very provisions. But if the principle which I support, that the localizing rules attached to certain substantive rules within the competent legal order are to be taken into account in the search for the substantive rule covering the case from the point of view of that legal order, cannot be applied in certain situations like those analysed above, it does not cease to be worth following in all other situations, where the difficulty pointed out by Mr. Kelly does not arise.

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Mr. Kelly has also called to my attention another recent case, this time an English one, which could be taken as supporting the theory that the localizing rules of the applicable law are to be respected: *Sayers* v. *International Drilling Company N.V.*[21] The point in issue was the validity of a clause in a contract

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21. *Sayers* v. *International Drilling Company N.V.,* [1971] 2L1. Rep. 105 (C.A.).
By a remarkable coincidence, the learned colleague, and friend of many years, in whose honor this article has been written also rose to the challenge of the *Sayers case.* See W. Wengler, "Immunité législative des contrats multinationaux", (1971) 50 *Rev. Crit. de D.I.P.,* at pp.637-661. I became acquainted with the latter essay when my own was already written and was unable, therefore, to put it to full use.
Wengler criticizes the opinion of Lord Denning that Dutch law was, *in casu,* the "proper law of the tort". Also Wengler's remarks against the doctrinal trend which would place outside the interplay of national rules certain international contracts deserve close examination.
Other writings on the *Sayers* case which I was unable to consider are those by R. Smith, "International Employment Contracts—Contracting Out", (1972) 21 *International & Comparative Law Quarterly,* at pp.164-169, and L. Collins, Exemption Clauses, Employment Contracts and the Conflict of Laws", *id.,* at pp.320-334; L. J. Kovats, "Employment Contracts in the Conflict of Laws" (1973) *J. Business L.* at pp.15-22; P. B. Carter (1971) 45 *B.Y.B.I.L.* at pp. 404-406.

of employment executed in England by a Dutch company[22] and an "Englishman"[23], whereby the latter had accepted a voluntary death and disability compensation programme organized by the company in contemplation of accidents occurring to its employees in the course of employment. It was agreed that the compensation programme replaced any system of compensation, whether contractual or not, provided by the applicable law for loss suffered by the company's employees during their service outside the United Kingdom. Had the contract been governed by English law, that clause would have been void, because it was incompatible with s.1(3) of the Law Reform (Personal Injuries) Act, 1948[24]. The plaintiff maintained that the proper law of the contract was indeed the law of England and sued the company in England for damages, claiming that the latter was responsible for the accident he had suffered in Nigeria through the negligence of a fellow servant. The company referred in rebuttal to Dutch law as the proper law of the contract, according to which the indemnity clause was valid: the circumstance that the contract had been executed in England was quite "fortuitous", while the circumstance that it had been drawn up in English (besides, was not the language used really American rather than English?) and that the payment was to be effected in sterling, did not constitute the relevant connecting factor. In this phase of the litigation—which turned upon the determination of the validity of a contractual clause—the parties did not pay any attention to the law of the country (Nigeria) where the accident had taken place.

Mr. Justice Bean, in giving judgment at first instance, and, on appeal, all the members to the Court of Appeal (Lord Denning, M.R., Salmon and Stamp L.JJ.) came to the same conclusion, although with different degrees of assurance and on a variety of grounds[25]: the proper law of the contract was Dutch law[26].

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22. More precisely, it was a subsidiary—registered in Holland and having its head office at The Hague—of a Texan company.

23. "Mr. Sayers is a Yorkshireman whose home is (in) Easingwold, Yorkshire" (per Lord Denning M.R. [1971] 2 Ll.R. 105 at p.110).

24. "Any provision contained in a contract of service . . . shall be void in so far as it would have the effect of excluding or limiting any liability of the employer in respect of personal injuries caused to the person employed . . . by the negligence of persons in common employment with him".

25. Bean J. (*id.* at p.109): "The location of the defendants' headquarters in The Hague is the one permanent and unchanging fact in a contract that is otherwise fluid. It is the feature of the contract that in my judgment tips the balance in favour of Dutch law".
Lord Denning M.R. (*id.* at p.111ff): "If I were asked to decide the proper law of the contract (apart from the tort) I should be inclined to say that it was English. . . . [S]eeing that English law is in terms excluded, I think that the issue of liability has its closest connection with Dutch law".
Lord Justice Salmon (*id.* at p.113): "I can find very little clue in the contract as to what the parties intended, and very little indication that the contract has a very real or close connection with any particular system of law. I agree, however, with Lord Denning, M.R., that on the whole the conclusion at which the learned Judge arrived ought not to be disturbed". He adds (at p.114) that "a pointer (although its importance must not be exaggerated) . . . suggests that the parties may well have intended the contract to be governed by a system of law under which it would be valid rather than invalid, i.e., Dutch law rather than English law".
Lord Justice Stamp (*id.* at p.115): "I would hold on those facts that the law which had the most real connection with the contract was the law of the Netherlands, and if the question be asked, what is the law which would give the contract the greatest efficacy, I would answer that it was the law of the Netherlands".

26. Both by s.1(3) of the English Personal Injuries Act and Article 1638 x (iv) of the Dutch Civil Code the rules on the liability of the employer for accidents affecting their employees cannot be put aside by an agreement of the parties. The

This established, Mr. Justice Bean asked[27]: "What would happen to this contract under the law of Holland?" On the basis of the evidence of the expert witness on Dutch law, Bean J. asumed that article 1638 x(iv) of the Dutch Civil Code[28], just like s.1(3) of the Law Reform (Personal Injuries) Act, 1948, invalidated the exempting clause of the contract. But he added that, according to the expert, the Dutch provision applied only to "Dutch contracts" and not to a contract which by Dutch law would be, like that under examination, an "international contract".

The same remark is to be found in the judgments of Lord Denning, M.R.[29] and Salmon L.J.[30] It is worthwhile quoting the words of the latter *in extenso:* "It is plain that *under Dutch law in the ordinary way*[31] any term of a contract of employment which excludes the master's liability for negligence is of no effect. However, according to the evidence called before the learned judge, there is in Dutch law a distinction between an ordinary contract and what is called an international contract of employment. As far as an international contract is concerned the clause excluding the master's liability for negligece is effective. There was no explanation in the evidence of the Dutch lawyer as to what constitutes an international contract; nor any authority cited as to the effect of such a contract. However, there was no cross-examination and no evidence called on the part of the plaintiff on this issue. The Judge accordingly had no alternative other than to accept as he did the evidence of the Dutch lawyer."

As presented to the English judges in that suit, then, Dutch law made void any contractual clause which limited the responsibility of the employer for accidents suffered by an employee during employment, but only when the contract of employment was strictly national in character; on the other hand, international contracts of employment—undefined, but including the contract in issue—were unaffected by that restriction.

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application of those rules depends, therefore, on whether the question of liability is submitted by the rules on conflict of laws to English or to Dutch law.
This seems to be the standpoint taken by Lord Denning. His Lordship also takes the opportunity for reaffirming the theory of the proper law of the tort which he had supported in the much discussed case *Boys* v. *Chaplin,* [1968] 2 Q.B. 1, affirmed, on appeal, *Chaplin* v. *Boys* [1968] 3 All E.R. 1085. He further maintains that in the *Sayers* case, while the *lex contractus* was English law, the *lex delicti* was Dutch law. "So far as the claim in tort is concerned", he says ([1971] 2 Ll.R. 105, at p.111), "the accident took place in the territorial waters of *Nigeria.* But it took place on an oil drilling rig owned and controlled by a *Dutch* company and manned by employees of that company. The Nigerians had nothing to do with the rig. So Nigeria is out. The injured man was English, but his fellow employees (who were negligent) may have been English or American or of some other nationality. The only common bond between them was that they were employed by the Dutch Company. So Dutch is in. If I were asked to decide the proper law of the *tort* (apart from contract) I should have said it was Dutch law".
Had the rig been in English territorial waters, I wonder, with all respect, whether Lord Denning would have found it so easy to say that "England was out". A cutting expression used by Professor Ehrenzweig comes to mind: the not so proper law of the tort . . . ("The Not So 'Proper' Law of a Tort" (1968) 17 *I.C.L.O.* at p.1).

27. [1971] 2 Ll.R. 105 at p. 109.
28. "Elk beding, waardoor deze verplichtingen des werkgevers zouden worden uitgesloten of beperkt, is nietig" ("Any clause excluding or restricting these obligations of the employer is null and void").
29. [1971] 2 Ll.R. 105 at p.111.
30. *Id.* at p.112.
31. Emphasis added.

Mr. Justice Bean reached the conclusion that the contract in question was to be treated exactly as it would have been according to Dutch law[32]. On the other hand, although two of its members had pointed out that English law came to the same result as the Dutch provision unencumbered by any localizing rules, the Court of Appeal arrived, by application of Dutch law, at a conclusion opposite to what everybody agreed would have been the ruling under English law. This means that the Court of Appeal, when it resorted to Dutch law, took into account the localizing rule which it believed to be attached to the relevant Dutch provision. If the Court had applied to the case the Dutch provision which, by general opinion, the Dutch legal system had fashioned for a situation of that type but free of any foreign element (fashioned, in short, for a purely Dutch contract of employment), it should have come to the opposite conclusion. And there would have been no need to choose between Dutch and English law as being the proper law of the contract, since on the central issue both laws came to the same result; in other words, the conflict of laws was a confrontation of identical rules, was a "false conflict"[33].

The primary equivocation stems from the statement of the Dutch expert that Article 1638 x(iv) of the Dutch Civil Code did not extend to "international contracts". It was not made clear what was meant by "international contract". Was it a contract which, according to Dutch private international law, was not governed by Dutch law because it was more significantly connected with a foreign country? I do not think so, because the expert declared that the contract in question was, indeed, international, but in Holland was governed by Dutch law[34]. He must have meant, therefore, that in Dutch law there are two types of contract among those governed by Dutch law: contracts exclusively connected with Holland ("national", or Dutch, contracts) and contracts presenting also some foreign element ("international" contracts). To the former, for instance, Article 1638 x(iv) of the Dutch Civil Code applies, while the latter is regulated by the principle of the autonomy of the parties which is stated or implied in the Dutch Civil Code.

It is to be regretted that the expert was not invited to explain this supposed peculiarity of Dutch private law, which would refuse or grant recognition to certain agreements depending on their "national" or "international" character. I am not versed in Dutch law and cannot substantiate my suspicion that it does nothing of the sort. But I think that when a contract is governed by Dutch law according to the Dutch rules on conflict of laws, Article 1638 x(iv) of the Dutch Civil Code applies to it, even if the transaction is connected also with other legal orders. It is conceivable that the choice of law

32. Putting aside, however, the Dutch rules on conflict of laws. This is my own guess. Bean J., did not mention the question, nor had he any reason for mentioning it, because in the present case the exclusion or the acceptance of the "renvoi" theory, in any form, was immaterial. The expert on Dutch law had stated indeed that a Dutch court would have applied the Dutch substantive rules as well. See *supra*, n.14 *ad fin.*
"I add", said Bean J. (*loc. cit.*, p.110), "*for what it is worth*, Mr. Van Den Bergh's view is that a Dutch Court would find that Dutch law applies to this contract because the employers are Dutch and the principal point of contact of this contract is with the law of Holland" (emphasis added).
Apparently Bean J. mentions only *ad abundantiam*—because it agrees with the solution he considers correct from the point of view of English private international law—the information supplied by the expert about the solution given by the Dutch conflicts rule.

33. See *supra*, n.18.

34. See the statement by Bean J., quoted *supra*, n.32.

technique is not extended, in some legal system, to certain types of contract, to which are applied, instead, special substantive law provisions fashioned *ad hoc* by the law-maker, or by the parties themselves under a particularly broad power conferred on them by that legal system. By now it is, indeed a fairly common notion[35] that the contracting parties may, and perhaps should, be allowed to place their contract, when it is an instrument of international business, under rules which are not in force in any State connected with the relationship, or even in any State whatever. But this hypothesis, or programme for rulemaking, obviously cannot be used as a means of explaining the decision in the present case.

35. *Cf.* T. Reimann, *Zur Lehre vom "rechtsordnungslosen Vertag"*, (1970).