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exists is the clear implication of the *Howard* case. However, at present, there is no indication that the courts are willing to establish a right to join a union.

As a matter of prediction, the courts will probably continue to pay lip service to the rule that a union may determine its own membership requirements, while at the same time widening the duties of unions toward non-members to a point where unions will have no other practical choice but to admit non-members to membership.

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The Accumulation of Contact Points Theory In the Conflict of Laws

NO PROBLEM in the conflict of laws has caused more confusion and difficulty than the question of which jurisdiction's law shall govern the validity of a contract geographically contained within two or more jurisdictions.

The numerous texts and treatises and the large number of cases on the subject offer no rational method by which either layman or lawyer can predict with any certainty, in most instances, the ultimate ramifications of a multi-jurisdictional contract. This is often true within the United States even though the parties may know with absolute certainty the forum in which any litigation pertaining to the contract will arise, for a single forum may be so inconsistent with respect to its precedents that a given fact situation could be susceptible of solution under any one of several rules or theories ostensibly serving as general principles in solving the contract conflicts problem.[1]

Among the more recent theories to make an appearance is the accumulation of contact points theory, also known as the center of gravity theory.

[1] In New York, for example, four separate and inconsistent rules are concurrently in use. Which rule will be used in a given fact situation cannot be predicted, for the cases offer no rationale. In F. A. Strause & Co. v. Canadian Pacific Ry., 254 N.Y. 407, 173 N.E. 564 (1930), it was held that the law applicable to the contract was the law of the place where the contract was made. In Manhattan Life Ins. Co. v. Johnson, 188 N.Y. 108, 80 N.E. 658 (1907), it was held that the contract is governed by the law of the place of performance. In Wilson v. Lewiston Mill Co., 150 N.Y. 314, 44 N.E. 959 (1896), it was held that the law of the place intended by the parties governed the contract. In Rubin v. Irving Trust Co., 280 App.Div. 348, 118 N.Y.S.2d 70 (1952), all of the various elements entering into the picture were taken into consideration, and New York law was held to be determinative because the contract was more intimately connected with New York than with any other jurisdiction. The United States Supreme Court has also employed several theories in reaching its decisions. In Scudder v. Union National Bank of Chicago,

Since this theory is an outgrowth of the failure of the traditional rules to provide satisfactory explanations of contract conflicts cases, an examination of these traditional rules and their shortcomings precedes the discussion of the contact points theory.

Traditionally there have been three general rules, each with many variations, upon which the decisions have ostensibly been premised. These rules are:

1. The validity of the contract is governed by the law which the parties intend. This is the English view,[2] and at one time it was rather widely accepted in the United States,[3] although its popularity in this country has somewhat diminished since the turn of the century.[4] This rule is quite satisfactory and workable where the parties have expressed their intent and where the choice of law which the parties have made is bona fide and does not offend public policy. Where the forum applies this expressed intent rule, prudent men, at least, can make a contract, elements of which run to many jurisdictions, and still know with reasonable certainty that their expectations and intentions will not ultimately be frustrated by the application of a law which neither party had contemplated.

The weakness of the English view manifests itself where the parties have not expressed their intent. English courts attempt to solve this difficulty by imputing an intent, from facts and circumstances attending the case,[5] to parties who probably never thought about the law and had no actual intent whatsoever with respect to it. Where the law embraces this presumed intent fiction, it does not provide parties to a contract with any method by which they may know with certainty the rights which they possess and the obligations with which they are burdened under their contract.[6]

2. The validity of the contract is governed by the law of the place where the contract was made. This is the Restatement view[7] and the most popular American view.[8] It has substantial support among text writers,[9]

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91 U.S. 406 (1875), it was held that the law of the place where the contract was made governed a parol acceptance. In Hall v. Cordell, 142 U.S. 116, 12 Sup.Ct. 154 (1891), it was held that the place of performance governed the validity of a contract. In Pritchard v. Norton, 106 U.S. 124, 1 Sup.Ct. 102 (1882), the intention of the parties was held to govern.

[2] MORRIS, DICEY'S CONFLICT OF LAWS 579 (6th ed. 1949).

[3] 2 BEALE, THE CONFLICT OF LAWS 1173 (1935).

[4] *Id.* at 1172-1174.

[5] MORRIS, DICEY'S CONFLICT OF LAWS 589 (6th ed. 1949).

[6] 2 BEALE, THE CONFLICT OF LAWS 1079 (1935).

[7] RESTATEMENT, CONFLICT OF LAWS § 332 (1934).

[8] Gossard v. Gossard, 149 F.2d 111 (10th Cir. 1945); Keehn v. Charles J. Rogers, Inc., 311 Mich. 416, 18 N.W.2d 877 (1945); 2 BEALE, THE CONFLICT OF LAWS 1173 (1935).

and it does, admittedly, give contracting parties the advantage of knowing which law will apply if there is, in fact, no question about where the contract was made. However, the problem of where a given contract was made is often, in itself, a question of considerable complexity and uncertainty.[10]

Numerous hypothetical situations and actual decisions may be used to illustrate the inadequacy of the place of making rule as a general solution to all contract conflicts problems.[11] To further complicate matters, some courts purport to follow this rule, except where the contract is to be performed elsewhere, in which case the law of the place of performance applies,[12] and at least one jurisdiction accepts the place of making rule only where there is nothing to indicate where the contract is to be performed.[13]

3. The validity of the contract is governed by the law of the place of performance. This rule finds acceptance in many American jurisdictions.[14] It is satisfactory where performance, or a substantial part thereof, will, in fact, take place in a single jurisdiction. However, this very qualification is its weakness. A wide variety of contracts, notably freight and transportation contracts, call for performance in a large number of jurisdictions as well, in some instances, as upon the high seas. To determine where the place of performance of contracts of this nature may be, with reference to a single jurisdiction, is a problem that has not been consistently resolved and cannot be so resolved because of the wide diversity in the fact situations encountered.

These rules, in and of themselves, appear overly simple. However, as has been indicated, the problems that arise under each or any of them when one attempts to apply them to certain multi-jurisdictional contracts can be exceedingly complex. These complexities, and the irreconcilable results which they have precipitated even in the same jurisdcition,[15] have led commentators into what has been and continues to be a fruitless search for the philosophers' stone which will inject into the law a modicum of consistency.

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[9] 2 BEALE, THE CONFLICT OF LAWS 1171 *et seq.;* GOODRICH ON CONFLICT OF LAWS 321-323 (3d ed. 1949).

[10] Milliken v. Pratt, 125 Mass. 374 (1878); Illinois Fuel Co. v. Mobile & Ohio Ry., 319 Mo. 899, 8 S.W.2d 834 (1928); University of Chicago v. Dater, 277 Mich. 658, 270 N.W. 175 (1936).

[11] See the discussion of this theory in STUMBERG, CONFLICT OF LAWS 226-232 (2d ed. 1951).

[12] George Realty Co. v. Gulf Refining Co., 275 Mich. 442, 266 N.W. 411 (1936); Elk River Coal & Lumber Co. v. Funk, 222 Iowa 1222, 271 N.W. 204 (1937).

[13] Oakes v. Chicago Fire Brick Co., 388 Ill. 474, 58 N.E.2d 460 (1945).

[14] Crown Central Petroleum Corp. v. Speer, 206 Ark. 216, 174 S.W.2d 547 (1943); Reighley v. Continental Ill. Nat. Bank & Trust Co. of Chicago, 390 Ill. 242 61 N.E.2d 29 (1945); 2 BEALE, THE CONFLICT OF LAWS 1173 (1935).

[15] See note 1 *supra.*

Recent thinking along this line has produced the accumulation of contact points or center of gravity theory.[16] This theory has found favorable reception among several writers[17] and has been consciously applied by an extremely small number of courts[18] as a fourth theory for the solution of contract conflicts problems.

The rule may be briefly stated as follows: The law which governs the contract is the law of the jurisdiction with which the contract is most intimately connected.

Fundamentally, this rule is no more than a synthesis of all the more orthodox theories to which reference has been made and a variety of other factors as well. Under this theory, every significant contact which the contract or any party to it has with any jurisdiction is taken into consideration. The places of making and performance, the law which the parties intended and the public policy of each jurisdiction involved are among the significant contacts which are considered. There is, however, no authority which even attempts to define what constitutes a significant contact within the meaning of the rule; neither is there any authority establishing a definite scale of values for the various contact points considered. The problem of determining which contacts are significant and of establishing the relative weight to be given to each rests entirely with the court, and upon the court's application of these many differently weighted variables the decision will turn.

In effect this theory operates in practically the same manner as the English imputed intent theory, with two exceptions: (1) Under the contact points theory, the expressed intent of the parties as to what law should govern would be taken into consideration only as an important contact. The imputed intent doctrine, however, would never even apply where the parties had expressed a jurisdictional choice, for the expressed intent would govern, always providing, of course, that the public policy of the forum is not offended.[19] (2) The English imputed intent rule utilizes certain re-

[16] The origin of the theory is obscure. The earliest reference to an accumulation of contact points theory, so named, that the writer could find is HARPER AND TAINTOR, CASES ON CONFLICT OF LAWS 173 (1937).

[17] HARPER AND TAINTOR, CASES ON CONFLICT OF LAWS 173-175 (1937); 2 RABEL, THE CONFLICT OF LAWS 442-443, 480-484 (1947). Rabel's theory, though not so named, is in essence the contact points theory.

[18] W. H. Barber Co. v. Hughes, 223 Ind. 570, 63 N.E.2d 417 (1945); Rubin v. Irving Trust Co., 280 App.Div. 348, 113 N.Y.S.2d 70 (1952); Jones v. Metropolitan Life Ins. Co., 158 N.Y. Misc. 466, 286 N.Y. Supp. 4 (1936). In the latter case, although the rule was applied, it was not decisive because the court was able to reach the same result under any of the other three rules, all of which were discussed. The accumulation of contact points theory was recognized but not applied by the court in Jansson v. Swedish American Line, 185 F.2d 212 (2d Cir. 1950).

[19] Vita Food Products, Inc. v. Unus Shipping Co., Ltd. (1939) A.C. 277; MORRIS, DICEY'S CONFLICT OF LAWS 584 (6th ed. 1949).

buttable presumptions in favor of important specific contacts in order to guide the courts to results bearing some suggestion of consistency. Such presumptions include the place of making and the place of performance rules, which are utilized in the absence of countervailing circumstances.[20] However, the contact points theory indulges no presumptions in favor of any specific contact or contacts. The only remaining difference between these two theories appears to be that the accumulation of contact points rule is more aptly named.

The contact points theory is exceedingly broad. There are many decisions, ostensibly decided under the traditional rules, that can be logically explained under no other theory;[21] and a very large number of the cases which were decided under the traditional theories and can logically be explained under them can also be rationalized under the contact points theory. This is, perhaps, the reason why the contact points theory has gained proportionately more support from academic quarters than from any other, for the scholar is more likely to be satisfied with a theory which logically explains what has already come to pass than is the jurist or practitioner, who finds that the explanatory theory, however logical, furnishes no practical standard by which contracting parties can avoid the pitfalls that may lead them into litigation.

There are few American cases purporting to adhere to the contact points rule; nor does there appear to be any significant trend in this direction.[22] The writer suggests that the apparent lack of enthusiasm for the rule, as evidenced by the all but complete neglect of it on the part of the courts, can be ascribed to two principal reasons: (1) In many instances, where the courts have found it expedient to do so, they have, in fact, applied the contact points theory, even though purporting to use one of the traditional theories.[23] This subterfuge makes it unnecessary for them to disturb established precedent by announcing a new rule. (2) As a guidepost for those who seek to determine just what their ultimate rights and obligations under a contract may be, the contact points theory has nothing to offer except more of the wild confusion with which the law is already amply supplied in this quarter.

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[20] MORRIS, DICEY'S CONFLICT OF LAWS 593-594 (6th ed. 1949).

[21] See note 23 *infra.*

[22] See note 18 *supra.*

[23] See the introductory note in HARPER AND TAINTOR, CASES ON CONFLICTS OF LAWS 173-175 (1937). The following cases, which illustrate the point, are reprinted following the note: Liverpool & Great Western S.S. Co. v. Phenix Ins. Co., 129 U.S. 397, 9 Sup. Ct. 469 (1888); *In re* Missouri S.S. Co., 42 Ch.Div. 321 (1888); Wilson v. Lewiston Mill Co., 150 N.Y. 314, 44 N.E. 959 (1896); Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532, 55 Sup. Ct. 518 (1935); Hartford Acc. & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143, 54 Sup. Ct. 634 (1933).

It is the writer's conclusion that the accumulation of contact points theory, although it is quite useful for rationalizing a vast number of existing decisions, does not recommend itself as a useful rule of law, for the reason that it is no improvement upon the existing rules with respect to clearing up the problems that parties attempting to interpret a multi-jurisdictional contract would like to be able to anticipate.

The writer has no universal solution to offer for this problem but suggests that the English rule, insofar as it permits the expressed intent of the parties to govern where public policy is not offended, is manifestly fair to the parties because it permits the foresighted man to know his rights and anticipate his obligations. If the state whose law is chosen by the parties as controlling has some reasonable relation to the contractual transaction, most American courts would probably allow the express intent to govern.[24]

Where the parties have not expressed a jurisdictional choice, it seems to the writer that an arbitrary rule which establishes a definite standard is superior to the contact points rule, which knows no certainty of standard. Undeniably, the uniform application of an arbitrary rule will occasionally result in windfalls for some and hardship for others. It must be conceded that the application of the contact points rule might avoid these occasional misfortunes precipitated by the application of an arbitrary rule. It seems to the writer, however, that the application of the contact points rule would create more hardships than it would avoid, for there is no guarantee that even the most reasonable expectatons would not fall short of realization under a rule that knows no standard beyond human discretion.

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[24] Liberty Nat. Bank & Trust Co. v. New England Indust. Shares, 25 F.2d 493 (D. Mass. 1928); Boole v. Union Maine Ins. Co., 52 Cal. App. 207, 198 Pac. 416 (1921); Smith v. Parsons, 55 Minn. 520, 57 N.W. 311 (1893); Brotherhood of Railway Trainmen v. Adams, 222 Mo. App. 689, 5 S.W. 2d 96 (1928); Goode v. Colorado Invest. Loan Co., 16 N.M. 461, 117 Pac. 856 (1911); Hurwitz v. Hurwitz, 216 App. Div. 362, 215 N.Y. Supp. 184 (1926); Scott v. Perlee, 39 Ohio St. 63 (1883); Griesemer v. Mutual Life Ins. Co., 10 Wash. 202, 38 Pac. 1031 (1894).