

1 DEEPLY ANALYSIS ON FRENCH RULES OF CONFLICT OF LAWS

2

3 ABSTRACT

4 The law, in a general way, has the role of regulating life in society. From this same Law, several
5 rights with branches facilitate their explanation and use in our social life to establish order. This
6 being life in society could be seen as a kind of contract to the extent that it would be difficult for
7 the individual to live without maintaining relationships with others. So, from the moment that
8 there is this exchange between individuals there is what we could call contract. As we know, the
9 contract is defined in law as an agreement by which one or more persons agree to one or more
10 other persons to give, do or not to do something. It should also be specified that there are several
11 kinds of contracts, but the one that will be the main focus of our development is the international
12 contract. An international contract is understood to mean this contract, which, unlike the internal
13 contract, presents an element of extraneity, in other words an international character. For
14 example, a contract between two individuals of different nationality.

15 The contract thus concluded, the contracting parties may indeed encounter difficulties that may
16 arise at any time, most often due to non-compliance with the terms of the contract. These
17 problems or disputes are often very difficult to resolve because the parties are from different
18 origins, residing in different countries, or bound by commitments made in a country other than
19 their country of residence, hence the existence of different laws. and the birth of what is called a
20 conflict of laws.

21 This being so, by conflict of laws is meant to be one of the main problems with private
22 international law (the branch of law which deals with the settlement of disputes of private rights
23 having at least an extraneous character). Thus, the question arises as to which law would be
24 applicable in the event of a conflict of laws in the matter of contract, that is, how to choose or
25 determine the applicable law in the course of a dispute with a foreign element? Thus, once the
26 French judge is seized of the dispute, it will be necessary to find the law applicable to the
27 questions of law asked. Assuming that the French judge can apply a foreign law, and that the
28 various foreign laws with links to the litigation have a theoretical vocation to apply, were
29 developed what are called conflict of laws rules which is an abstract rule, indirect (it does not
30 solve the substantive question asked, but only to determine the law competent to resolve this
31 substantive legal issue), and neutral (the substantive solution is not taken into account in the
32 determination of the applicable law).

33 In order to give answers to our questioning, we will focus on how to choose the law applicable to
34 conflict of laws in matters of contract and this, in the light of French law, the Rome Convention
35 of 19 June 1980 and the Rome 1 Regulation on the law applicable to international contractual
36 obligations.

37 **Key words: Analysis, French rules, conflict of laws,**

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40 1. INTRODUCTION

41 By conflict of laws, we mean private international law which is the area of law which deals with
42 the settlement of disputes over private rights having at least a foreign character, whether the
43 parties are of different nationalities, reside in different countries or are bound by commitments
44 made in a country other than their country of residence.

45

46 Thus, the conflict that is the subject of this thesis is the conflict of laws in matters of contract. In
47 French law, conflicts of law in matters of contract are defined as that part of private international
48 law which makes it possible to determine which law will be applied in the course of a dispute
49 presenting, at least, an element of foreign nationality [10]. is the implementation of a number of
50 legal mechanisms? Thus, for example, the international nature of the contract will allow the
51 location of the contract in a foreign legal order. Or, some rules are only applicable to
52 international contracts (eg exchange guarantee clauses that guarantee the parties against currency
53 fluctuations). To determine the international character of the contract, one always quotes the
54 Attorney General Matter who, in a judgment rendered on 17/05/1927, said that international is
55 the contract which includes a flow and a reflux over the borders. He argued for an economic
56 criterion (flow, crossing borders) to determine the international character of the contract [11].
57 Subsequently, we went much further by admitting more broadly the international concept
58 because the jurisprudence has considered that international is the contract that involves the
59 interests of International Trade.

60

61 This economic criterion has been criticized because judgments have accepted a more legal
62 criterion (1971 judgment): for the contract to be international, the headquarters of both parties
63 must be located in two different countries. Same thing in another judgment of 1981, considering
64 that the contract was international as long as the nationality of the parties was different. This
65 exclusively legal criterion has itself provoked criticism because in certain cases, the parties may
66 have a different nationality but have their domicile in France and carry out an operation within
67 the French borders. This situation is not extremely common.

68 This question of the international character of the contract is no longer really a matter of debate:
69 after having been tempted to adopt a legal criterion, French case law has come more to an
70 essentially economic criterion, as in the Vienna Convention on the sale of goods [12].

71 We have a new interrogation born from the Rome Convention of 1980 on the law applicable to
72 the contractual obligations and the community regulation of June 2008 since they apply in case
73 of conflict of laws. A certain number of authors are on the possible return of the legal criterion.

74

75 Thus, once the French judge is seized of the dispute, it will be necessary to find the law
76 applicable to the questions of law asked. Assuming that the French judge can apply a foreign law,
77 and that the various foreign laws with links to the litigation have a theoretical vocation to apply,
78 have been developed conflict of laws rules. They present general characters.

79 Whether the contract is national or international, it is subject to the same basic mechanisms
80 (Article 1108 of the Civil Code). The international contract, however, has a number of
81 particularities, the first of which is the existence of the conflict of laws.

82 The existence of a Conflict of Laws in contractual matters first requires that the contract be
83 international. If so, determine the applicable law to which this contract will obey. It should be
84 remembered that the resolution of the Conflict of Laws is largely influenced by the existence of
85 conventions.

86 Where a contract is concluded by parties who do not have the same nationality, an election
87 relating to the applicable law may be made upstream according to the Rome Convention of 19
88 June 1980 (the "Rome Convention"). In the absence of choice, the Rome Convention recognizes
89 as applicable law that of the country with which there is the closest connection.

90
91 This being so, we cannot deal with this thesis without defining what the international contract is
92 and what relationship it has with conflicts of laws [13]. Similarly, we cannot go forward without
93 understanding the French rules of conflict of laws, which we are going to apply to find the
94 applicable law to propose according to the law and according to our understanding of the subject,
95 methods of resolving conflicts of laws. contract laws and all this in the light of the Rome
96 Convention on the Law Applicable to Contractual Obligations is an international convention
97 signed within the framework of the European Community and which aims at determining the law
98 applicable to the contractual obligations and retains for this purpose a dualist system, setting as a
99 principle the autonomy of the will and then as subsidiary connection of the objective criteria.

100
101

102 **1. DEFINITION OF BASIC CONCEPTS OF CONFLICT OF LAWS IN FRENCH LAW**

103 we cannot talk about conflict of laws in the field of contract without talking about private
104 international law which is the branch of law which studies the settlement of private rights
105 disputes having at least an extraneous character, that the parties are of nationalities different,
106 reside in different countries, or are bound by commitments made in a country other than their
107 country of residence. In other words, private international law in civil law systems consists of all
108 the principles, usages or conventions which govern the legal relations established between
109 persons governed by the laws of different States. In this sense, it can be described as an
110 instrument for managing the diversity of rights. This is a situation of conflict of national laws
111 caused by an element of foreignness in the application of private law situations. In the case of
112 relations between States, the applicable law is public international law [5, 14]. Note that the term
113 "state" does not include only sovereign states or countries and may also refer to conflicts of law
114 between different states. For example, since Canada is a federal state in which the provinces
115 have the power to legislate in private law, when there are conflicts of law caused by an element

116 of foreign nationality, we are talking about international law. The term State therefore refers to
117 the State that has sovereignty in a particular area, be it the central state or the federated state.

118 The objective of private international law is therefore to determine in which country the dispute
119 is to be judged: this is a conflict of jurisdiction but also which country is the applicable law: it is
120 the conflict of law. are different, the courts of one country may be required to apply the law of
121 another country. French textbooks also often add a section dealing with subjects of law,
122 including the law of nationality and the status of foreigners [15].

123 It should be noted that private international law also organizes the recognition and application of
124 jurisdictional decisions from another country in the world. The main problems with private
125 international law are: the conflict of jurisdictions, which is subdivided into two distinct issues:
126 international jurisdiction (in which country can the dispute be judged?), And the recognition of
127 foreign decisions and the conflict of laws (what is the legal order - the country - whose law
128 applies).

129 The two questions are quite distinct, the courts of one country may have to apply the law of
130 another country. French textbooks also often add a section dealing with subjects of law,
131 including the law of nationality and the status of foreigners. Despite its name, private
132 international law is not uniform. There is a French private international law, a German private
133 international law, and so on. The subject of this thesis is private international law in France.

134 Roman law is the first legal system to have organized private international law. Very quickly, the
135 Romans made the distinction between the law applicable to the Roman citizenship and that
136 applied to the foreigners (this right was applied initially by a particular judge, it has for mission
137 to choose the applicable law).

138 At the beginning of the Middle Ages, the principle of the personality of the laws was consecrated
139 which implies the application of a variable law according to the ethnic origin. This vision of
140 things will be taken up again in France with the French colonies [16]. Everything changes in the
141 Middle Ages with the feudal era: things will freeze as a result of the stabilization of populations,
142 the impoverishment of trade. This fixation is accompanied by a fragmentation of power that
143 leads to an attachment to the land and leads to the birth of the notion of territory: the personality

144 of the laws will succeed the principle of the territoriality of the laws (we have the law of his
145 territory).

146 The transition from one principle to another will lead to a considerable erosion that will give rise
147 to customs for each territory. From there, the jurists will reflect on how we can articulate the
148 different customs between them: "d'Argentré " (1519 - 1590), ¹president of the presidia of
149 Rennes. He is one of the main artisans of the "New Brittany Custom", a legal source applicable
150 in Brittany, solemnly published in 1580. In the spirit, he defends the originality of the provincial
151 law, and fights against the influence of the rights French and Roman. It assumes that a custom
152 will not have an effect on the neighboring territory. It will distinguish between real and personal
153 customs: real customs have a territorialism expression and personal customs may have some
154 extraterritoriality.

155 The real customs are the most important, the home is the main connecting factor since nationality
156 and nation are still fuzzy concepts.

157 The notion of a subject of law does not yet exist (appears in the eighteenth century) The
158 introduction by Argentré of the principle of territoriality makes the conflict of laws possible. As
159 the historical evolution of our society evolves, the principle of territoriality will be coupled with
160 that of sovereignty. Therefore, the one who says the law is the judge seized (law of the forum).
161 Argentré's theory is the first really coherent theory in France that will then touch Holland and the
162 Anglo-Saxon countries. In a much more efficient way, the Voet brothers will take up Argentré's
163 theory but systematically couple the principle of territoriality with that of sovereignty [17].

164 From the Middle Ages and parallel to this political vision Develops an economic vision that sees
165 the proliferation of private sources through the exchanges between Flanders and the North of
166 Italy, which leads in particular to the development of the bill of exchange.

167 Things will change a lot in the nineteenth century: the world changes and discovered after the
168 French Revolution the notion of subject of law. Things were ripe for Friedrich Carl von Savigny
169 to publish a treaty in several volumes, in 1849. One of the parts of this treaty of Roman law will
170 completely change the global DIP by providing new bases, so much so that some commentators
171 were able to speak of "revolution".

172 Research of the development of international exchanges: He is very anchored on Roman law and
173 his idea is that there is a community of thought in Europe, a community of civilizations, of
174 economic system. He concludes that we need to find a conflict resolution method that is stable,
175 undisputed, secure and acceptable in a world in the process of internationalization.

176 We must not worry about the authority that lays the rule, but we must find the most reasonable
177 solution by conducting "the analysis of each type of legal relationship to apply the law most
178 consistent with its own nature [18]. and essential. "For each class of legal relationship, it is
179 necessary to determine the area to which it belongs, the seat of the legal relationship".

180 This Savinian construction will be applied to the rule of law conflict and this conflictual system
181 will spread all over the world. In the latter case, the harm suffered by an individual most often
182 involves a medical cost which, in the context of private international law, puts the legal security
183 of the individual at risk, with some States compensating in a less suffered within their internal
184 tort system. The American challenge will come from the tort liability in terms of accident. The
185 rule of conflict of law in this area is "lex loci delicti"² (literally "the law of the place of the
186 offense"). Thus, the American "point of contact theory" was born and initiated a conflict
187 movement because the rule of abstract conflict does not take into account all the political
188 elements of a situation.

189 Talking about conflicts of laws leads us to ask ourselves: what law would be applicable to
190 resolve contractual disputes? In other words, the object of our subject will be to study the
191 conflicts of laws in contractual matters. Thus, a conflict of laws is understood whenever a legal
192 situation can be related to several countries. It would then be necessary to choose between these
193 different States the law which will be called upon to regulate the relation of Right considered. It
194 should be pointed out here that it is therefore a question of option that arises. Other questions
195 could then arise: How to avoid this kind of contractual disputes? Can the parties to an
196 (international) contract freely choose the law that will apply to it?

197 What if they observe silence on the question of the applicable law? In the event of a conflict of
198 laws, it is necessary to turn to the provisions of the European regulation called Rome I to answer
199 these question

200 When two trading partners negotiate a case, they instinctively ask themselves a series of key
201 questions: what product to buy or sell, how much, what quality, what delivery system, and at
202 what price? Concomitantly, there is often an unresolved issue that is equally essential, that of
203 determining the applicable law that will govern the contract to be concluded and the obligations
204 it will provide.

205 The European institutions had already dealt with the question of the determination of the
206 applicable law in the "Convention on the law applicable to contractual obligations of 19 June
207 1980", known as the Rome Convention. They have groomed the rules of this Convention and
208 transformed them into a Community instrument in the form of a European regulation directly
209 applicable in the Member States by European Parliament, Regulation (EC) No 593/2008 and the
210 Council Of 17 June 2008 on the applicable law to contractual obligations more Commonly
211 known as the Rome I Regulation. The latter resolves conflicts of laws arising in contracts
212 concluded since December 17, 2009 [3]. In order to treat our subject well so that it is understood
213 and accessible to all, we refer to books as well as articles in order to draw a profile. It is because
214 we have noticed that the notion of contractual conflict is still current. It is also to say that any
215 contractual relationship gives rise to conflicts that may arise at a given moment [19].

216 As in some of the books on contractual obligations, we can see the choice of law rules that define
217 the dispute between litigants; choice of law rules and a connecting factor and the general form of
218 a legal category. This chapter will be concerned with the category legal of contract. Which
219 system of legal rules is it to resolve the issue which has arisen? For example, the litigants may be
220 disputed whether or not they have successfully performed the contract, or whether that party has
221 a sufficient excuse for non-performance [20]. The litigants may be contesting a contract or the
222 contract may be. A party to the contract may argue that it was not properly entered into written,
223 or that the party lacks capacity to conclude such a contract. The term of the contract relies upon
224 being ineffective as being unfair to a consumer or employee. All these issues are clearly defined
225 as being in the nature of a contract, or they may be categorized as evidentiary or as non-
226 contractual.). The contractual choice of law is the multilateral and jurisdiction selecting.
227 Therefore, the applicable law is a system of domestic law and it may be directly applicable to the
228 law.

229 In the case of conflict-of-law books, they provide a clear and up-to-date account of the private
230 international law topics covered in undergraduate courses [21-23]. Theoretical issues are
231 presented in an accessible style while providing precision and clarity on complex points and
232 terminology.

233 Conflict of laws area has undergone a profound change in recent decades. Now much of the
234 subject is dominated by legislation, both European and domestic, rather than by case law. In
235 practical terms, we note that issues relating to recognition and enforcement of judgments and to
236 jurisdiction have taken center stage and choice of law.

237 This changing emphasis concerning international private law is fully reflected in these books.
238 The authors provide detailed analyzes of the recognition and enforcement of foreign judgments,
239 the most important commercial topics of civil jurisdiction, and the choice of law relating to
240 contractual obligations. Involuntary introductions to the study of the contractual conflict, the
241 conflict of laws and the survey of the law of private international law.

242 **2. Definition of conflict of Laws**

243 As a branch of private international law, the conflict of laws is the part of the IPL that determines
244 which law will be applied in a dispute with at least one foreign element. In other words, there is
245 a conflict of laws whenever a legal situation may be related to several countries, it is necessary to
246 choose, between the laws of these different states, the one that will be called upon to govern the
247 legal relationship. Thus, once the French court is seized of the dispute, it will be appropriate to
248 find the law applicable to the questions of law asked [24]. Assuming that the French judge can
249 apply a foreign law, and that the various foreign laws with links to the litigation have a
250 theoretical vocation to apply, have been developed conflict of laws rules. They present general
251 characters. The conflict of laws rule is an abstract, indirect rule (it does not resolve the
252 substantive question raised, but only to determine the law competent to resolve this substantive
253 legal issue), and neutral (the substantive solution is not taken into account in the determination of
254 the applicable law). French private international law is composed of conflict of laws rules
255 emanating from international instruments (convention and treaty), the law (Article 3 of the Civil
256 Code), or case law.

257 An example of a rule of conflict of laws: "The conditions of substantive validity of marriage are
258 determined by the personal law of the spouses" (Article 3.c.civ, CA Paris, February 2, 1956, JCP
259 1956, II.9229, note PG). In other words, the law applicable to the substantive conditions of
260 marriage - in the event of a dispute brought before the French court - is the law of the country of
261 which the spouse concerned by the dispute originates. On the other hand, and on the other hand,
262 the formal conditions of marriage are determined by the law of the place where the marriage is
263 celebrated. In practice, a polygamous marriage celebrated abroad can still produce some effects
264 in France, where polygamy is however strictly prohibited by law.

265 On this we ask ourselves the question of how to settle a conflict of laws? Two broad approaches
266 can be considered by states to resolve a conflict of laws.

267 The first is the implementation of material private international law rules, and the second is the
268 enactment of conflict rules. The rules of substantive private international law are substantive
269 rules, often in the form of international treaties, which are intended to apply when a situation,
270 with elements of foreignness, can thus be characterized as an international situation [25]. It falls
271 within the scope of the Treaty. The interest of a substantive rule of private international law is
272 that, because of its substantive character, it directly gives the solution of the dispute. It is no
273 longer necessary to take the detour of a rule of conflict and the solution of the dispute can be
274 obtained much more easily.

275 **6. Solutions of the Rome Convention of June 1980**

276 Article 1 (1) of the Convention declares the provisions of this Convention to be applicable in
277 contractual conflict situations in situations of conflict of laws. But even though the expression in
278 situations presenting a conflict of laws appears to constitute a periphrasis aimed at the
279 international contract, reading the rest of the text shows that it is not so. Article 3.3 indicates in
280 fact somewhat laboriously that the choice by the parties of a foreign law, with or without a
281 foreign court, cannot, when all other elements of the situation are located at the time this choice
282 in one country, to undermine the provisions to which the law of this country does not allow to
283 derogate by contract, hereinafter referred to as mandatory provisions.

284 It can be seen that the Rome Convention does not use the notion of an international contract to

285 determine its scope. In fact, not only does it not give any definition of the international contract,
286 but above all it agrees to apply to a contract whose elements are located in a single country. Such
287 a contract is clearly capable of being purely internal. The real criterion of the Rome Convention
288 is therefore a contract involving a conflict of law situation and not an international contract. But
289 the decisive notion of a conflict of laws is subjective since it can be based solely on the parties'
290 choice of a foreign law, even though the contract does not contain any foreign element in the
291 traditional sense of the term.

292 In practice, the Rome Convention applies, of course, to international contracts within the
293 meaning of French private law (and most of the countries) presented above. But it also applies to
294 internal contracts for which the parties have decided to designate a foreign law because, in doing
295 so, the parties have provoked a conflict of laws within the meaning of the Convention. This
296 solution, somewhat surprising, however, sees its scope singularly limited by the mention of the
297 provisions to which it is not permissible to derogate by contract (mandatory provisions of the
298 domestic law of the country), to which the choice of law foreign to the supplementary provisions
299 of the law of the internal contract) lead to doubts about the usefulness of a text which legitimizes
300 the choice of a foreign law for an internal contract.

301

302 **7. Definition of domicile and nationality in French law**

303

304 Domicile plays a very important role in the Conflict of Laws of England and the United States
305 and it occupied a like role in France until the adoption of the French Civil Code, which
306 introduced into the French Conflict of Laws the rule that status and capacity were to be governed
307 hence- forth by the law of the country to which the party in question owed allegiance.
308 Notwithstanding this innovation the notion of domicile occupies still an important place in the
309 French system of the Conflict of Laws, particularly in the matter of the jurisdiction of courts and
310 in succession. It will be applied also as a subsidiary rule to questions affecting status and
311 capacity if the national law of the party cannot be ascertained or the party is not a national of any
312 country.

313

314 The term domicile is defined at article 102 of the Civil Code which provides: "The domicile of

315 every Frenchman as to the enjoyment of his civil rights is at the place of his principal
316 establishment." The central thought of domicile, according to this article, is "the principal
317 establishment," whereas in Anglo-American law the ... court tends to predicate the existence of a
318 domicile of choice upon the notion of "home." The conception of domicile in the two systems is,
319 therefore, not identical. Domicile is regarded by the Court of Cassation as a question of fact, to
320 be determined by the trial judge without control. by the highest court. The decisions on the
321 subject, relatively few in number, have done little to assign a more concrete meaning to the
322 definition of domicile contained in the Code.³

323
324 French "authorized" domicile. Article 13 of the French Civil Code, as amended by the law of
325 June 26, 1889, provides: "An alien who has been authorized by decree to establish his domicile
326 in France, shall have the enjoyment of all civil rights. "The effect of the authorization shall cease
327 at the expiration of five years if the alien does not ask to be naturalized or if his application is
328 rejected." Article 13 in its original form was intended, it seems, to create a status intermediate
329 between that of citizen and foreigner, for a foreigner having obtained by decree the permission to
330 establish a domicile in France was to be entitled to all civil rights.

331
332 As modified by the law of 1889, the effect of an authorized domicile is completely changed. It is
333 to-day merely a step in the process of naturalization and is lost automatically if the application
334 for naturalization is not made within five years subsequent to the decree, or such application is
335 denied.

336 So, can a foreigner establish a domicile in France apart from the "authorized" domicile referred
337 to in article 13 of the French Civil Code? To this question the Court of Cassation has given a
338 negative answer. This conclusion is derived from the co-existence of articles 102 and 13 of the
339 Civil Code. As the former speaks only of the domicile "of every Frenchman," the inference is
340 drawn that it must have been intended to exclude foreigners. It is urged also that if foreigners
341 could establish a domicile without such authorization article 13 would be meaningless.
342 Notwithstanding this, it is well recognized that a foreigner may have a de facto domicile in
343 France. While it is not easy always to tell for what purposes such a domicile will have legal
344 significance in the French system of the Conflict of Laws, it is certain that such a domicile is

345 sufficient to confer jurisdiction on the French courts and for the application of the "renvoi"
346 doctrine.⁴

347
348 Much confusion has arisen in the matter of succession from the position taken by the French
349 Court of Cassation. The personal estate of a citizen of the United States having only a de facto
350 domicile in France must be distributed, it is said, in accordance with the law of his "legal"
351 domicile, which would be the domicile he had before taking up his residence in France. Usually
352 this will amount to an application of his national law. In view of the fact, however, that the
353 French courts understand these rules of the Conflict of Laws in matters of succession as referring
354 to the foreign law inclusive of its Conflict of Laws, they actually distribute the personal property
355 of an American citizen de facto domiciled in France, but formerly domiciled in the United States,
356 in accordance with the local provisions of the French Civil Code. In this situation the same result
357 is reached as if the French courts had applied the local law of the de facto domicile in the first
358 place. The rule that the law of the "legal" domicile controls is of importance, however, with
359 respect to French subjects domiciled in the United States. Their "legal" and de facto domiciles
360 coincide, so that the personal property of a French subject domiciled in New York at the time of
361 his death would be distributed in accordance with the New York statute of distribution.

362
363 The term domicile has other definitions: Domicile for political and fiscal purposes, commercial
364 domicile.

365 - At the time of the enactment of the Civil Code a person might have a special political domicile,
366 apart from his general domicile, by registration in a commune and residence there for one year,
367 which was lost also by one year's absence. This special political domicile exists no longer and
368 under the existing law political rights must be exercised at the ordinary domicile. The Court of
369 Cassation holds, however, that a French citizen may establish his domicile in a foreign country
370 without losing his French domicile for political purposes. For fiscal purposes, also, the notion of
371 domicile may not coincide in all respects with the definition laid down by article 102 of the Civil
372 Code.

373 - Besides a "principal" domicile a person may have under certain circumstances a "special"
374 domicile. The most noteworthy instance of this is the "commercial" domicile of a married

375 woman. A woman takes her husband's domicile on marriage, which remains her principal
376 domicile, but if she is authorized to engage in business, the place where her business is
377 conducted will constitute her "commercial" domicile. Bankruptcy proceedings, for example,
378 would have to be brought in this place, instead of at her principal domicile.

379

380 **8. Application of the conflict of laws rule in France**

381 There are 3 problems with the application of RCL: -The use of RCL has not always been
382 mandatory. How to know the content of the foreign law to apply? What are the safety valves to
383 the application of foreign law?

384

385 **8.1 Stricto sensu application of the Conflict of Laws Rule**

386 **- Mandatory Character of the Conflict of Laws Rule**

387

388 We must distinguish four hypotheses:

389 - The judge applies a law which is not the good one but which gives a solution "equivalent" to
390 the law designated by the RCL. The Court of Cassation refuses to break the judgment (judgment
391 of 13 April 1999), surely for reasons of economy of means (if the result is the same, the problem
392 of the rule applied is theoretical, in the absence of consequences practices, we will not bother the
393 justice).

394 - One of the parties invokes the law designated by the RCL -In this case, the judge is obliged to
395 answer on pain of cassation for failure to answer conclusions (form of miscarriage of justice). -A
396 party may invoke RCL for the first time on appeal (NCPC Article 565: new legal justifications
397 can be provided if the claims are the same). -If one of the parties so requests, the judge is obliged
398 to apply the RCL.

399 - None of the parties invokes the law designated by the RCL - There is in the litigation an
400 element of foreignness but the parts do not request the application of the RCL (oblivion
401 sometimes altogether)

402 **-Realization of the rule of conflict of laws**

403 The nature of the foreign law: legal fact or rule of law? The doctrine is divided. -If it is a fact, the
404 parties provide the proof and the discretion of the judges of the merits is sovereign. -If it is a rule
405 of law, the judge must look for it.

406

407 **9.Obstacles to the application of the conflict of laws rule**

408 **- Exceptions to public orders**

409 An exception because it is contrary to the principle of neutrality of the RCL. A process ≠ police
410 laws because the blocking is done in extremis, after the application of the RCL (for the laws of
411 police, it is done even before the RCL).

412 International public order is narrower than internal public order (example: the age of majority
413 may be ≠ in another country). There are 3 sources of public order: The principles of universal
414 justice having in France an absolute international value (prohibition of slavery, no racial
415 discrimination, ...). The political and social foundations of French civilization (monogamy,
416 secularism, property, the binding force of contracts, the right to divorce and food ...). A goal of
417 cohesion of the French society. Domestic legislative policies.

418 The foreign law designated by the RCL is rejected in favor of the law of the forum. But this
419 eviction is partial (only for the point deemed shocking, not for all the dispute).⁵

420 **-Fraud to the law**

421 It's simply the voluntary use of RCL to escape the application of the law.

422 Study case as example: Princess de Beaufremont judgment of March 18, 1878 (she changes her
423 nationality in order to divorce).

424 - Conditions of fraud Two cumulative conditions:

425 - A material element the voluntary and effective modification of a connecting element
426 (nationality, domicile,) or the category of attachment (Caron judgment of March 20, 1985:
427 transforming a building into movable property) The simulation is not a fraud.

428 - An intentional element the objective abnormality of the modification is not enough with the

429 abuse of right: it is necessary to prove the intention. The fraudulent intent must be the only one
430 that caused the change.

431 - Foreign law fraud is also sanctioned (this has not always been the case) because the case law
432 sees a fraud RCL (French law).

433 Sanction Inopposability of the amendment to the French judge or nullity? Nullity is impossible
434 (the French judge has no power to annul the decisions of a sovereign state in case of a change of
435 nationality for example).

436

437 **10. Study on the French courts**

438 As seen above, certain suits relating to partnerships and corporations must be brought before the
439 courts of the state where they have their seat (sieve social). As regards all other suits by or
440 against partnerships or corporations the ordinary rules relating to jurisdiction apply. Foreign
441 corporations and partnerships are deemed to have a domicile in France if they have a branch
442 there.

443 Articles 14 and 15 of the Civil Code embrace French partnerships and corporations as well as
444 citizens and the limitations upon the jurisdiction of the French courts with respect foreigners are
445 equally applicable to suits between foreign partnerships or corporations. Foreign corporations not
446 authorized to do business in France cannot sue in the French courts but be sued therein.

447 **11. Jurisdiction and service of process**

448 As stated above, the jurisdiction of the French courts, even in personal actions is never based
449 upon personal service of the defendant in the Anglo-American sense. For the validity of a
450 judgment it is necessary, however, that the defendant should have been properly cited. Personal
451 service is sufficient, though not necessary. If no personal service is made, the rules for citing the
452 defendant into court vary in accordance with his residence. If the defendant is domiciled in
453 France or is a resident of France, the sheriff may leave the writ with someone at the defendant's
454 residence.us If no relative or servant be found at the residence, he may leave it with a neighbor
455 and if the neighbor is unwilling to accept it, with the mayor of the town.

456 If the defendant has no known domicile or residence in France but has a known foreign domicile,

457 the writ must be served on the Procurer General, who must visa it and have it forwarded to the
458 defendant through the Foreign Office. If the foreign domicile of the defendant is unknown, the
459 writ may be nailed on the principal door of the court before which the suit is brought. The return
460 day of the summons is fixed by law-with respect to residents in the United States it is two
461 months and unless the legal requirements in this regard are strictly complied with ' the judgment
462 is void.¹⁰³ It is not necessary for the validity of the judgment, however, that the defendant shall
463 have actually received notice of the pendency of the action before such return day. With respect
464 to defendants living abroad it is sufficient that the writ was served upon the procurer General,
465 who is deemed the defendant's agent for the purpose of receiving the writ.

466 **12. Interpretation of the conflict of laws rule**

467 Summary: to qualify is to classify a question of law in a category (condition of form, substance,
468 effect, movable property ...). There are two problems:

- 469 - Qualification conflict: the two legal systems involved have some qualification \neq of the legal
470 question. \diamond According to which law are we going to qualify? (Some facts are qualified as
471 substantive conditions in one country, form in another, RCL are \neq)
472 - The conflict between the categories of attachment (the facts can fall into several categories, or
473 none). Bartin (particularism) raises the first problem of the conflict of qualifications and
474 proposes the qualification *lege fori*.

475 Study case: This is the Bartholo affair in 1889 (the fourth of the poor spouse in Anglo-Maltese
476 law). Problem in this case: at the death of the husband what are the rights of the widow on the
477 buildings in France? if we see a problem of matrimonial property, it is the law of the first
478 common domicile that applies (Malta). If one sees there a problem of succession, it is the
479 situation of the buildings that prevails (France, nothing for the widow at the time).

480 The solution of Rabel (German, 1933): to eliminate the conflicts of qualification by creating an
481 international system of qualification. But impossible (too many cases).

482 The recognition of the *lege fori* qualification by the Court of Cassation: Caraslanis judgment of
483 June 22, 1955 (the conflict of qualification must be decided "by the French judge according to
484 the conceptions of French law").

485 3- The qualification in suborder: one faith the designated foreign law, one applies his own
486 qualifications. Example: Stroganoff-Scherbatoff judgment (succession of a white Russian).

487

488 **13. Determination of the applicable conflict of law rule**

489 We thus note three arguments in favor of the qualification *lege fori* 1- Respect the sovereignty of
490 the State (Bartın). One should be interested in foreign law only if the law of the forum refers to it
491 (thus one qualifies according to the law of the forum). But the DIP does not pose a problem of
492 sovereignty (they are private interests). 2- At the qualification stage there is still no conflict of
493 law since the foreign law is not yet designated (its competence is still doubtful). 3 - To qualify a
494 situation is to interpret the law. The judge obeys the reasoning of the forum when he interprets. B
495 / Disadvantages 1- Break of the unity of the foreign law (one amputates the foreign law of a part,
496 which breaks its coherence, its spirit). 10 2- Risk of solutions □ according to the judges. But the
497 purpose of the DIP is the permanence of situations (a man will be married in France but not in
498 Greece!)

499 -The qualification in suborder: one faith the designated foreign law, one applies his own
500 qualifications. Example: Stroganoff-Scherbatoff judgment (succession of a white Russian).

501 **14. Interpretation of the Foreign Conflict Rule**

502 When the French conflict rule has given jurisdiction to a foreign law, the French judge must
503 generally consult the provisions of foreign private international law. The French judge must
504 interpret the foreign conflict rule to determine in which legal category the situation, and to which
505 connecting factor it is subject. The French judge must then assess the terms of the foreign
506 conflict rule, qualification and attachment, according to the conceptions of the foreign law. But,
507 the Court of Cassation refuses to control the interpretation, given by the judges of the substance,
508 foreign provisions of private international law. The forum conflict rule may give jurisdiction to
509 the law of a foreign state to govern the legal situation. But, among the provisions of this law,
510 there are material rules and provisions of private international law. It has been accepted that the
511 forum conflict rule refers to the entire foreign legal order. Foreign provisions of private
512 international law must therefore be taken into account. The seized judge consults the foreign
513 conflict rule to determine whether it accepts the jurisdiction that has been recognized. When the
514 foreign conflict rule admits its jurisdiction, the judge applies the provisions of foreign

515 substantive law.

516 When the foreign conflict rule declines its jurisdiction, in favor of the law of the forum or the
517 law of a third State, it speaks of a negative conflict of jurisdiction.

518 **15. Four characteristics of the French conflict rule**

519 **-Indirect rule**

520

521 Contrary to the material rules, it does not settle the substance of the conflict but fulfills an
522 intermediate step (to designate the law that will settle the substance of the conflict). Example of a
523 material provision: the Geneva Convention on International Contracts.

524 **-Bilateral rule**

525 The bilateral rule poses a criterion which will make it possible to designate as applicable the law
526 of the forum or a determined foreign law (equality of opportunity). The unilateral rule, on the
527 other hand, refers only to the law of the forum (it delimits its scope, beyond which it is the
528 competence of a foreign law, but there is no criterion as to which).

529 The advantage of the conflict of laws rule is that it immediately designates the applicable foreign
530 law, no need to fumble. And there is always an applicable law.

531 The disadvantages: non-respect of the sovereignty of the State (the judge of the forum who
532 applies the bilateral rule does not look at whether the law designated by the RCL is competent or
533 not) But unilateralism poses two problems: a long reasoning, complex detours, non-respect of
534 sovereignty in case of conflict of law (this refers to the *lege fori*, so we sit on foreignness and
535 sovereignty).

536 **-Abstract Rule**

537 The Savignian RCL poses broad attachment categories, which lead to an automatic solution.
538 Sometimes the designated law has little relation to the concrete situation. Examples: road
539 accident involving French people and a tree in Spain. Crash of an airplane, the place of the crash
540 is fortuitous or it determines the applicable law. Place of conclusion of a contract concluded on

541 the net. Temperament: international conventions make derogations from the usual RCL in order
542 to seek the law with which the situation has the closest ties. Examples:

543 a. The Rome Convention of 19 June 1980 on Contracts: it is presumed that the applicable law is
544 that of the place of performance, unless the judge considers that the situation has a closer
545 relationship with another law.

546 b. The Hague Convention of 4 May 1991 on traffic accidents: the *lex loci delicti* is rejected when
547 the accident involves only one vehicle and is registered abroad. Driver's liability (place of
548 registration), passenger's liability (habitual residence).

549 - **Neutral rule**

550 The neutrality of the RCL means that it does not look at the content or the objectives of the law
551 to determine itself. -The control of the public order does not affect this neutrality since it is
552 exercised after the RCL. A minimal control (only blocks the shocking laws).

553 **16. French regulation of international contracts**

554 In proposing to undertake the study of the meaning of the method of conflict of laws in
555 contractual matters, we do not intend to join our voice with those, mainly from overseas, who
556 claim to repudiate this process of resolving questions. private international law, which they
557 consider both too complex, too abstract, and therefore powerless to provide satisfactory solutions
558 in general.

559 It appeared to us that the authors who took an interest in the question, without distinction
560 according to whether they rank among the defenders of the purest subjective theses, or that they
561 affirm on the contrary the supremacy of the law on the contract, assigned The Lex contracted a
562 role, and sometimes retained a conception of the identity of the latter, which ended in
563 contradicting the appropriateness of this method to the subject. This is what we would like to
564 establish in the following paragraph.

565 **17. rationale for choice of method of conflict of laws in contracts**

566 There is little doubt that the method of conflict of laws is inappropriate when the so-called
567 conflicting laws are simply incorporated into the contract. According to this conception, that
568 certain decisions of the court of cassation seem to have adopted, the contract does not need the
569 support of any law to exist and develop its effects. It can therefore not be subject to any law⁶. It
570 must therefore be deduced that, if the parties referred to a given law, the purpose of the law is not
571 to regulate their agreement, but simply to supplement it, as it would have been if they had in full
572 copied the provisions. Consequently, any contradiction between the latter and the express
573 stipulations of the contract cannot be solved by looking for what has been the actual intention of
574 the parties.

575 Similarly, in the absence of an *electio juris* clause, one must ask whether the parties intended to
576 exclude the application of any law, or if they contracted in contemplation of one of them that
577 they simply omitted expressly designate.

578 In any event, the only question that arises is to discover, by interpretation, the exact will of the
579 contractors, and not to resolve a conflict of laws. Thus, adherence to the dogma of the autonomy
580 of the will, applied to international contracts, seems to have the logical consequence of excluding
581 the conflicting method in this matter.

582 But the adoption of this method by the authors who assert the primacy of the law on the contract
583 appears also singular when, more or less fully adhere to the theses of other others like Kelsen,
584 they define the contract as a legal norm, or as an act creating a legal norm, and consider that they
585 derive their potential effectiveness from the legal order in which they are inserted or to which
586 they are subject. On this point, in order to demonstrate that this option is not compatible with the
587 application to the subject of the conflict of laws method, it is necessary to examine the
588 consequences which attach to each of these two statements respectively.

589 **17. Questioning the Choice of Contract Conflicts Methodology**

590 In the statement that the contract is a legal standard, it is not the definition of the legality which
591 in itself is the source of the methodological difficulties which interests us here. However, it
592 seems to us necessary to clarify this notion, not only because its ambiguity may be the cause of

593 confusion, but also because, in doing so, we will be able to make some adjustments useful to the
594 understanding of our subsequent analyzes.

595 If one wants to keep the notion of legality a proper meaning, a relationship is legal because it is
596 concerned by the rules of law. However, the difficulty is not solved. At most she moved. How is
597 it necessary to understand that a relationship is concerned by the rules of law?

598 Here again, two answers are possible, depending on whether one considers the legal order in
599 question, or on the contrary, or that of the relationship to govern itself, that is, to say that one
600 thinks in terms of abstentions or voluntary shortcomings of the objective right or that one
601 wonders about the modalities of its realization.

602 The most common conception starts from the legal order in question, or, to use an expression of
603 the applicable private law: it is legal the situation that this right intends to regulate the one from
604 which it is not interested. It is thus essentially, that are most frequently considered as falling into
605 the latter category, de facto situations such as concubinage, de facto corporations, and perhaps
606 even possession in good faith, as well as situations of friendships.

607 If, in order to reach the conclusion that a situation is concerned by the applicable private law, it
608 cannot usefully be based on the indisputable will of the latter to govern this situation, it is
609 necessary to question the means by which this will can be realized. In other words, it is necessary
610 to set the starting point for reasoning, no longer the area covered by the legal system in question
611 but the procedure by which each question of law is apprehended by it.

612 In this respect, the situation which has come into contact with a given legal order will be legal.
613 will be that which has remained beyond its reach. It is certainly this view that some authors have
614 in mind when they say that "jurists do not measure how much the right is optional, even in the
615 sectors they proclaim of public order, and consider finding the right to do so". evidence in many
616 olcases, such as concubinage, family relations or friendships etc., or individuals have more or
617 less chosen to remain outside the law.

618 Thus, to accept the idea that the parties to a convention could place it outside the law, it should
619 be made clear that such a solution is only possible if, at any time, the parties do not turn to a

620 State jurisdiction where, according to this author, the judge thus seized would be led, by the sole
621 effect of the standards of qualification which he should then apply, to confer on the lawless
622 contract the jurisdiction which he lacks. The ultimate source of the legality of an international
623 relationship is simultaneously in all States whose courts may be called upon to make a decision
624 in its regard.

625 When it is said that the contract is a legal norm, or, more precisely, an act creating legal norms, a
626 very particular conception of the law is retained.

627 For there, indeed, it is meant to signify that the contractual norm belongs to a legal order gives to
628 the arrangement of which it participates. It is thus that in order to stick to the only internationalist
629 doctrine an author like Mr. Gothot was able to write by the contract, the individuals introduce in
630 their mutual relations the order that at another level, the law establishes between all members of
631 a legal order. As much as a law, a contract therefore belongs to a legal order, in the sense that it
632 constitutes one of the norms.

633
634 Through this, the legal order consists of a series of hierarchical norms at the lower end of which
635 are contracts and individual acts. By contracting, the parties act as organs of the community, by
636 virtue of the permission of the law, to which the norm, which results from their agreement, is by
637 the same subordinate.

638 The criterion of the legality of a situation results from the fact that it relates to the law. More
639 precisely, a situation, an act, is legal because of the objective meaning given to it by law.

640 By this, we certainly do not want to oppose what is taken into consideration by law, and what is
641 ignored by him. On the contrary, it is asserted that the law is not deficient, and that, consequently,
642 it does not lose interest in any concrete situation. One only intends to distinguish the subjective
643 meaning of the act or fact in question.

644
645 Indeed, if we have considered until now that the courts alone could ensure the connection of a
646 given question with the legal order in question, and that, consequently, their decisions alone
647 could be qualified as legal, it is because we have reasoned from phenomena of pure private law.
648 But if we were to adopt a more global approach, we would propose the following definition of

649 legality:

650 It is legal any situation constituted, and any standard enacted by the organs of a legal order
651 determines.

652 **18. CONCLUSION**

653 The transposition of the classification established by Mr. Mayer to the contractual standards is a
654 task made difficult by the diversity of both conventional figures and stipulations that may be
655 contained therein. This is the reason why it may seem a good method to adopt a progressive
656 mode of exposure for this purpose, which, starting from the simplest hypothesis, examines one
657 by one the complicating to introduce oneself.

658 From the point of view that interests us here, the simplest hypothesis is certainly that of the
659 instantaneous contract, such as a sale. The stipulations which fix the respective obligations of the
660 parties are by no means general, nor, consequently, abstract but, on the contrary, individual: they
661 concern the buyer or the seller, that is, a person normally identified. by name. Nor are they
662 hypothetical, but rather categorical, in that they immediately modify the situation of the
663 contracting parties by making them mutually creditor and debtor of each other.

664 No doubt some of their obligations are simply conditional. Thus, the seller will be held liable for
665 hidden defects only if a vice of this nature affects the thing sold⁷. But as we have said, the
666 condition is not to be confused with the hypothesis of the rule, because it does not correspond to
667 a reference to a type of situation but is constituted by a concrete and individual event. In addition,
668 the condition does not have the role, as the assumption to allow the identification of the recipient
669 of the standard, because it is known: the seller. It provokes only, if it is realized, the birth, or
670 rather the exigibility of the obligation of this one. The conventional stipulation is thus here most
671 definitely a decision.

672 This conclusion is not called into question, when the contract is in successive execution, such as
673 that which relates to the periodic supply of a determined product. This characteristic indeed does
674 not result in making the stipulation permanent. On the contrary, the supplier's obligation is
675 definitively established on the day of the contract; only its exigibility is staggered in time. It
676 follows that in this hypothesis, the conventional norm, which remains equally individual,

677 concrete and categorical, is still a decision.

678 The difficulties begin to appear only with respect to certain contracts with successive execution
679 that occur between a plurality of parties, as shown by the example of the partnership agreement.
680 In such a contract, the parties are not designated individually. They are only identified by
681 reference to their abstract quality of associates. No doubt this circumstance is indifferent in itself,
682 since it has been seen that, if the impersonality of the norm constituted a necessary character of
683 the rule, it was sometimes also that of the collective decision. Only because it is intended to
684 register in the long term, the contract of society does not intend to govern the situation of the
685 only current associates. It must also be able to define the rights and obligations of all those who,
686 in the future, and until the day of the dissolution of the group, will have this quality.

687 The concept of submitting a situation to a law is rarely used as part of the analysis conducted in
688 terms of conflicts of jurisdiction; it is, on the other hand, very frequently used by those who
689 apply the conflict of laws method. Thus, for example, the regime of property is subject to the law
690 of the situation, or the establishment of filiation is in principle subject to the personal law of the
691 mother.

692 Only the meaning of this concept of submission has evolved considerably as the very foundation
693 that has been successively attributed to the conflict rule is modified. And there is no doubt that a
694 proposition that the contract is subject to a law, in the sense we have just released.

695 As has been recently shown, the retrospective examination of the doctrinal conceptions of the
696 rule of conflict nowadays leads us to replace the classical opposition of universalists and
697 particularists with the quarrel between the old and the modern.⁸

698 We know that the universalist theses were intended to discover a principle of universal
699 determination of the empire of national laws that was imposed on all legislators, while the
700 particularisms intended to leave the care to the different states, each acting for his own account.

701 These doctrines, beyond the essential differences which can thus separate them, have as a
702 common point to treat the conflicts of laws like conflicts of competences of the national

703 legislators. And because it is always a matter of setting limits to the rule of law, private
704 international law is fundamentally for them only a classification right.

705 In these circumstances, the concept of submission used to describe the existing relationship
706 between the institution to be governed and the legal system designated by the rule of the forum
707 can only reflect the idea of allegiance. A situation subject to a law is a situation to which this law
708 is applicable because, by its nature, it belongs to it. But such an interpretation can only be valid
709 insofar as it is accepted that the rule of conflict of laws thus has a purely restorative function of
710 legislative powers.

711 There is no doubt, therefore, that this interpretation of the concept of submission is incapable of
712 accounting for the one we have identified with regard to contracts. There is no longer here the
713 idea of belonging that characterizes the link between the contractual norm and the legal order in
714 which it participates, either the contracting parties and the system of which they constitute the
715 organs. It would again be found that the method of conflict of laws is unfit for the regulation of
716 international contracts.

717 On the other hand, the conflict of jurisdiction method could be used because the submission of
718 the judge, as well as the decision he makes, to the law of the State which conferred on the first
719 one his powers, is also a translation of an authority report. Unless the examination of the
720 consequences of such a conclusion and its confrontation with the solutions of the positive law is
721 sufficient to demonstrate the evil basis of the assertion on which it rests from the submission of
722 the contract to the law which governs it.

723 In the case of international contracts, can the solutions adopted by French case law really be
724 presented as resulting, not from an arbitrary and necessarily incoherent application, both from
725 the principle of autonomy, from the theory of localization and from police law, but the
726 implementation of real bilateral conflict rules?

727 So far, we have limited ourselves to showing that an affirmative answer would be desirable, and
728 technically possible. It must now be established that it would also be accurate. Still, it is perhaps
729 not useless to specify, however, that this object which we fix to our investigations is exclusive of
730 all others: our analyzes will concern the decisions rendered by the French courts; they will not

731 deal with special contracts.

732 In other words, it will not be for us, to question each of these contracts and to consider all the
733 difficulties they can generate in private international law to propose the solutions that are adapted
734 to them. Besides that, such an undertaking would necessarily be deficient, if only because we can
735 never exclude the appearance of new contractual figures, still unknown to our law, it would very
736 appreciably exceed the object which, from the beginning, we have fixed our researches: a study
737 of the methods used in French positive law to ensure the regulation of international contracts, we
738 would move to the establishment of successive monographs dedicated to each of them. We will
739 have to confine ourselves to examining the only contracts that have given rise to court decisions,
740 and only from the point of view of the disputes they have actually caused. Only in this way will
741 we be able to identify the processes by which these disputes will have been resolved by our
742 courts.

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