ZDENĚK KUČERA

SURETYSHIP IN PRIVATE INTERNATIONAL LAW

ENGLISH TRANSLATION BY IVO DVOŘÁK

ACTA UNIVERSITATIS CAROLINAE IURIDICA 1967 MONOGRAPHIA VI

UNIVERSITA KARLOVA PRAHA

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TABLE OF CONTENTS

INTRODUCTION

The present study is a part of a more extensive work on conflict of laws relating to suretyship; it will be introduced by a chapter which attempts to define the concept of suretyship and, in particular, compares the provisions governing suretyship in certain jurisdictions of major importance in international trade.

An important factor for settling problems of conflict of laws is the essential nature of the obligation assumed by the surety. The special nature of this obligation is due to the fact that it is not an independent obligation, but one which legally depends on another, i.e. the principal obligation. It is an accessorial obligation. In addition to its accessorial nature, surety is characterized by the fact that the surety must be a different person than the principal debtor, who is liable for the performance of the principal obligation to the same extent as debtor, i.e. personally and with all his property, in case of the latter's failure to perform.

Another important factor affecting any study of suretyship under Czechoslovak private international law is the fact that, in contrast to the previous regulations and way of thinking, the new Czechoslovak Code of International Trade allows in its Section 195 — purposely, according to its introductory report — the surety's obligation to be established by a simple, unilateral declaration of the surety. However, this does not preclude the establishment of suretyship — as in the past — by a contract between

the surety and the creditor; this is the general practice under most legal systems (besides other ways of establishing surety, such as, e.g., ex lege). The Code of International Trade proceeds from the practice of international commerce, where the creditor demanding a security from the debtor in the form of a suretyship obligation is frequently satisfied by a suitable suretyship declaration issued by an acceptable person, and concludes his contract with the debtor without confirming the receipt of the surety's declaration or expressing his agreement therewith. In many cases it would be difficult to construe the creditor's agreement as his inferred manifestation of will simply on the basis of his behaviour. Suretyship is dealt with both in the Code of International Trade and the new Czechoslovak Civil Code (Section 52).

The institution of suretyship from the viewpoint of private international law has not previously been dealt with in Czechoslovak literature, and even in foreign literature concerned with private international law this question has received — with a few exceptions — little attention compared with other problems. For this lack of literature alone, it should not be expected that the present attempt to delve into this particular sphere will be successful in every respect. However, the author hopes that the outline of this very problem, the specification of the complications involved in its solution, and its separate treatment will have fulfilled their purpose, if they provide the incentive for a more detailed study of this particular question.

The author expresses his gratitude to Dr. Jaroslav Žourek, Director of Research of the Czechoslovak Academy of Sciences, Associate Member of the *Institut de Droit international,* for his kind and valuable advice and encouragement.

One sphere where the special nature of suretyship is reflected involves conflict of laws relating to this particular institution. Besides questions involved in conflict of laws, which relate to all other institutions of the law of obligations, in the case of suretyship we are faced with some additional problems, or rather some problems appear differently from such other institutions. These specific features and differences are due to the accessory nature of suretyship. Accessorines in this case means that at law surety is not independent, that legally its existence depends on the existence of another legal relation, i.e. the principal obligation. It is the accessoriness of suretyship, which gives every consideration of this institution from the viewpoint of conflict of laws a specific character.

This is manifest in the very first approach to the settlement of conflict of laws relating to suretyship. In the case of most of the other institutions of the law of obligations, we must first seek the criterion to be used in determining what law is to be decisive. In the case of suretyship — due to its accessory nature — this question appears differently. First, we must ask whether the applicable law relating to suretyship should be sought in this way at all, or if suretyship is to be governed by the law which is applicable to the obligation secured by surety, i.e. to the principal obligation. This question is properly defined as the principal question.[1]

(a) A SURVEY OF OPINION

When comparing the opinion of different authors on whether there is a separate law of suretyship, we find in a number of works and textbooks the rather general consensus that there is such a separate law. It may be said that at first sight this opinion may be considered as prevalent.[2]

1 See, e.g., Réczei L., *Internationales Privatrecht,* Budapest, 1960, p. 293.

2 See Bystrický R., *Základy mezinárodního práva soukromého,* Prague, 1958, p. 269; Lunz L. A., *Mezinárodní právo soukromé* (translation from Russian), Prague, 1952, pp. 229, 230; Raape L., *Internationales Privatrecht,* 4th edition, Berlin and Frankfurt

However, if we delve deeper into this problem, we find that this claim is not unequivocally accepted. Even recent decisions and legal opinion favour the application of the law of the principal obligation to surety or, at least, prefer the application of such law, even though under certain circumstances they admit the possibility of applying a different law.

As regards Czechoslovak law, an important change has taken place, which has altered the situation from which the above-quoted Czechoslovak authors had proceeded when speaking unequivocally of a separate law of suretyship. The new Act Concerning Private International Law and the Rules of Procedure Relating Thereto — No. 97/1963 — contains express provisions governing the law decisive for securing obligations. Under Section 11 of this Act, security covering obligations, and thus also surety, is governed in principle by the same law as the secured principal obligation, unless the intent of the parties or the nature of the case indicate otherwise. This particular provision will be discussed in greater detail below, but is mentioned at this particular point in order to make this survey of opinion on the existence of a separate law of suretyship as complete as possible.

The Hungarian author Réczei states in his textbook that some United States courts had maintained from 1875 until the outbreak of World War II, that surety should be governed by the same law as the obligation of the principal obligor. The reasoning behind this opinion was that surety was an accessory obligation.[3]

Rabel, too, points in his comparative work to opinion which derives from the accessory nature of surety the principle that surety is governed by the law of the principal obligation. He notes that the only English leading case still being apparently respected and several American decisions also favour this principle.[4] Of the modern authors advocating the same principle Rabel lists the Italians Fiore and De Amicis. At the same time, he himself decidedly advocates the opposite view.[5] Quite recent

a. M., 1955, p. 487; Schnitzer A. F., *Handbuch des Internationalen Privatrechts,* 3rd ed., Vol. II, Basel, 1950, p. 655; Wolff M., *Das Internationale Privatrecht Deutschlands,* 3rd ed., Berlin—Göttingen—Heidelberg, 1954, p. 155; Wolff M., *Private International Law,* 2nd ed., Oxford, 1950, p. 459; Lewald H., *Das deutsche internationale Privatrecht auf Grundlage der Rechtsprechung,* Leipzig, 1931, p. 258; Lerebours-Pigeonnière P., *Précis de Droit International Privé,* 6th ed., Paris, 1954, p. 399; Svoboda M., „Mezinárodní platební styk a problémy devizové ve světle mezinárodního práva soukromého", *Rozpravy ČSAV,* Prague, 1962, p. 35.

[3] Réczei, op. cit., p. 294.

[4] Rabel, *The Conflict of Laws, A Comparative Study,* Vol. III, Chicago, 1950, pp. 345—346.

[5] Ibid., p. 346, also footnote No. 6.

literature touching on this problem also places in doubt the certainty of the prevailing opinion that there is a separate law of suretyship. It points to the considerable diversity of views even in the simplest cases on whether surety is to be governed by its own law or by the law of the principal obligation, and the cases for or against either alternative are almost equally divided in the most important states, so that the practice seems to be to decide each case according to its circumstances rather than to give systematic preference to one opinion or the other.[6] Delaume, who is the author quoted, then cites decisions of several supreme courts, favouring both a separate law of suretyship and the law of the principal obligation. The fluctuating opinion existing in individual states is obvious from the fact that both groups of decisions refer to decisions of the Austrian Supreme Court and the Swiss Federal Court. The group of decisions favouring the law of the principal obligation also lists on this point a decision of the Danish Supreme Court.[7]

In France, the older authors favouring the law of the principal obligation include Bouhier.[8] Among the modern authors the same view is supported by Batifool although not fully. He admits the possibility that the surety's obligation may be governed by its own law; however, in view of possible complications related therewith, he recommends that unless the opposite is proved true, it should be assumed that the parties did not wish this to be so. Thus he advocates a presumtion favouring the law governing the principal obligation.[9] Batiffol's opinion has obviously affected French judicial thought, as indicated by the decision which another author, Francescakis, included in a collection containing several major decisions and his comments thereon. In this particular judgment the court considered the question of the law governing the relations between two banks, one of which provided surety at the request of the other. Although this relationship alone was obviously not qualified as surety but as a contract of commission whose object was the provision of surety, this was enough for the court to pronounce that with a view to the aforesaid fact, the agreement between the two banks was governed by the law governing the principal contract.

[6] Delaume G. R., "The Proper Law of Loans Concluded by International Persons: A Restatement and Forecast", *The American Journal of International Law,* 1962, No. 1, p. 84.

[7] Ibid., footnotes 84 and 85 on p. 84.

[8] Ibid., footnote No. 3 on p. 345 and Batiffol H., *Les conflits de lois en matière de contrats — Etude de droit international privé comparé,* Paris, 1938, p. 424, quote his *Observations sur la Coutume du Duché de Bourgogne,* 1742, I, ch. XXI, n. 117, p. 413, in which Bouhier lists decisions made by the parliament in Toulouse in 1655.

[9] Batiffol, op. cit., pp. 424, 425; also the same author, *Traité élémentaire de Droit International Privé,* 2nd ed., Paris, 1955, p. 673, No. 625.

Francescakis agrees with this decision, refers to Batiffol, and considers it normal to assume that both banks would have had expressly agreed on another law, if they had wanted to avoid the application of the law governing the principal contract.[10]

A separate law of suretyship is quite unequivocally advocated by German theory and judicature. Reference is usually made to several decisions of the former Reich Court. In its decision of May 23, 1883 (RGZ 9, 187) the Reich Court rejected the opinion of an appellate court that in the absence of an agreement to the contrary, it should be presumed that it is the will of the contracting parties to subject the accessory obligation of the surety to the law governing the principal obligation. The Reich Court rejected this opinion, especially if it were to be understood as a generally applicable principle, and stated that surety objectively involved one obligation with several subjective relations, which merely warranted the conclusion that objectively, that is as regards the subject and content of the performance due, the obligations of the principal obligor and the surety must be governed by one and the same law, which — in view of the accessory nature of surety — could only be the law governing the principal obligation. However, on the other hand, there was no reason to presume that the will of the parties and the surety in particular aimed at subjecting the obligation to the law governing the principal obligation to a still greater extent. Beside the grounds of the establishment of the principal obligation there was the contract of surety as a separate and independent legal act which, as regards the form, interpretation, validity and actionability of the rights arising therefrom, should be considered in accordance with the regulations to which it was subject by its own nature.[11]

While the above decision of the Reich Court seeks a hypothetical will of the contracting parties, another and more frequently quoted decision of the same court, dated April 23, 1903 (RGZ 54, 315), which provides the basis for German judicial practice and theory, reaches the same conclusion but does not seek a presumed will of the parties; instead, it proceeds exclusively from the accessory nature of surety. It states that this accessory nature implies that the content and scope of the surety's obligation with a view to the implementation of the principal obligation is governed by the local law of the principal obligation, while, on the

[10] Cour d'appel de Paris (1re Ch., 21. 5. 1957, Banque Franco-Serbe c. Danske Landmandsbank, with comment by Francescakis Ph., *Revue critique de droit international privé,* 1958, pp. 128 ff., and published in his book *Jurisprudence de droit international privé,* Paris, 1961, pp. 320—321.

[11] Letzgus E., „Die Bürgschaft", *Zeitschrift für Ausländisches und Internationales Privatrecht,* 1929, pp. 837—838.

other hand, as regards the surety's obligations arising from the contract of surety as such, i.e. the question under what conditions the surety is liable to the creditor, it is necessary to find the separate, local law of the suretyship. The Reich Court summed up these principles in a single sentence which has become famous and is often quoted: "The law of the principal obligation is decisive for what the surety has to perform, the law of the contract of surety for the question whether performance is to be made."[12]

The impact of this pronouncement has not been limited to Germany only. It is generally quoted in textbooks and, for example, affected the Hungarian draft of a Bill on private international law prepared by I. Szászy in 1947. Its provisions concerning surety settle in a similar manner the question of a separate law of suretyship and the scope of the application of the law of the principal obligation, adopting almost word for word the principle enunciated by the German court.[13]

(b) THE IMPORTANCE OF THE ACCESSORY NATURE OF SURETY

A more thorough study of the accessory nature of surety is necessary if we are to arrive at a correct answer as to the existence of a separate law of suretyship and if we are to evaluate properly the two divergent opinions on this issue.

Accessoriness is not a quality appertaining to suretyship exclusively. We come across accessoriness in connection with the securing of obligations both in the sphere of the law of obligations and in the sphere of the law of real rights. The obligations to pay interest or to pay a contractual fine are also defined as accessory, and the same is true of lien in its relationship to the obligation secured thereby.

If we study these individual accessory relationships, we find that their accessory nature shows certain differences.

There is first the difference in the subjects of these relations. While the subject of the obligation to pay interest and of the obligation to pay a contractual fine is the same as the subject of the secured obligation, in the case of lien the pledgor may also be a person different from the obligor, while in the case of surety, the surety must always be a different person than the obligor.

[12] „Das Recht der Hauptschuld ist massgeblich dafür, was der Bürge zu leisten hat, das Recht des Bürgschaftsvertrages, ob er zu leisten hat." — See Letzgus, op. cit., p. 838.

[13] Section 65 of the draft, whose German and French translation is given in Makarov A. N., *Quellen des internationalen Privatrechts,* 2nd ed., Vol. I, Gesetzestexte, Berlin-Tübingen, 1953.

However, there are additional differences between these accessory relations. In the case of an obligation to pay interest or to pay a contractual fine, the obligation is economically so closely tied with the principal obligation that we can hardly claim that it constitutes a legal expression of a special personal relationship. The obligation to pay interest actually involves payment for the provision of credit, which should also compensate the creditor for the fact that he cannot otherwise dispose of the sum he had lent to the debtor. Contractual fine also constitutes compensation — for damage caused by a breach of a contractual obligation. Considering the fact that these are relations between the same two subjects, it is proper to conclude that neither case constitutes a special personal relationship which would require the establishment of special legal relations, but that they constitute subsidiary, accessorial obligations attaching to the basic obligations to effect the principal performance under the respective contract. Thus the obligation to pay interest or a contractual fine forms a part of the legal relation established by the respective contract, but does not constitute a special legal relation.

Bearing thus in mind that a legal relation corresponds to an actual personal relationship, we find that in the case of surety and the principal obligation secured thereby, we are concerned primarily with the relation between the creditor and the obligor and the relation between the creditor and the surety. There are two relations which must be expressed in law by two separate legal relations. In contrast to interest and contractual fines, where we can speak of accessorial obligations which constitute a part of a certain legal relation arising from the principal performance, surety and the principal obligation secured thereby involve two separate legal relations which are closely linked by the fact that one of them — surety — follows the fate of the principal obligation towards which it is accessory.[14]

It is in this sense, that we can say that in the case of such accessorial relations the dependence in the substantive law varies in degree.[15] However, this formulation is not very exact. In the case of the dependence of various accessorial relations on the principal obligation, intensity is rather difficult to distinguish. The extinction of the principal obligation extinguishes the accessorial relation; a thus conceived dependence is always the same. However, the difference rests in the fact that

[14] See Blažke J., „Společné závazky. O nové pojetí koreality." *Nový právní řád,* No. 22, Orbis, Prague, 1958. The author concludes also in the case of solidary obligations, that they involve several legal relations.

[15] Lewald H., *Das deutsche internationale Privatrecht auf Grundlage der Rechtsprechung,* Leipzig, 1931, p. 256.

in the one case a duty arising from one and the same legal relation is involved, while in another case the dependence proceeds from two legal relations. Of course, this different background of substantive law is also reflected in the rules governing conflict of laws and is paralleled, as Lewald calls it, by a vis attractiva of the principal obligation, differing in strength.[16] As a result, there will not be, for example, any doubt that a contractual fine is governed by the law governing the principal obligation.[17]

Consequently, accessoriness must be accepted as being of some importance in settling conflict of laws relating to surety. At the same time, however, the above considerations indicate that this importance is not so far-reaching as to make us conclude that surety must invariably be governed by the law of the principal obligation. Although suretyship is not an independent legal relation and depends on the principal obligation, it nevertheless constitutes a legal relation differing from the principal obligation. The fact that accessoriness need not have too far-reaching consequences is indicated by the way the question of lien is dealt with in the rules governing conflict of laws. Although lien is as dependent on the existence of the principal obligation as surety, there is no doubt that lien is governed by its own law, which is, as a rule, the law of the place where the thing which is the object of the lien was located at the time the lien was established.[18]

Apart from accessoriness, there is no other reason for linking surety with the principal obligation under the rules governing conflict of laws. If we study in greater detail the actual economic relations behind surety, the reverse is rather true. Surety does not involve only those ideal cases where the surety, as the obligor's friend, offers security for the latter's obligation to help him obtain credit. Such cases are also frequent, but most often occur in simple relations between individuals on the national scale. However, in commercial relations and, in particular, in the rather complex sphere of international commerce, sureties do not act as mere friends of the obligors, but taking in this manner part in commercial transactions, they also follow the aim of making a profit. This becomes prominent especially in those cases, where sureties act as professionals, where provision of surety is the subject of their business activities; banks are a case in point. Then the economic accent of the respective transaction shifts to the relationship between the creditor

[16] Ibid., p. 256.
[17] See Bystrický, op. cit., p. 269.
[18] See, e.g., Bystrický, op. cit., p. 203; Schnitzer, op. cit., p. 523; Batiffol, *Traité*, p. 560; Raape, op. cit., pp. 566, 567 and 545.

and the surety. The seller is often not interested in the person of his customer, the decisive factor being the security provided by a reliable person for the payment of the purchasing price. This is especially true of cases where the seller is selling his goods under payment terms less advantageous for him, which place him in a position where he himself has performed but has not yet received the corresponding payment from the purchaser. Under such circumstances — especially if it is known that in the case of non-performance, execution against the obligor may be hopeless — the person of the obligor becomes less important and the creditor is interested in being able to turn to an economically strong surety.

It is therefore quite understandable that legal practice and theory in most cases tend to seek a separate law of suretyship. It is in conformity with actual economic relations, especially in the case of banks. These, in addition, tend to subject obligations to the law of their seat similarly as in the case of other subjects who conclude e n g r o s certain legal acts within the scope of their activities.

The Soviet author Lunz strongly opposes such interpretations, where, for example, an obligation arising from surety extended by the Soviet State Bank on the basis of a principal obligation undertaken by a Soviet commercial agency in a foreign country under the law of such country were also governed by that law. Surety in this case, Lunz claims, should be governed by a separately determined law, i.e. a law determined independently of the points of contact relating to the obligation of the commercial agency.[19]

In concluding this outline it should be noted that the Czechoslovak rules governing conflict of laws also admit of the possibility of determining a separate law for securing an obligation — including surety — although they are strongly influenced by accessoriness and in principle provide for contact with the law of the principal obligation.[20] A detailed analysis of this provision is given further below.

(c) THE LAW OF SURETYSHIP IN THE CASE OF CREDIT AND SECURITY OPERATIONS INVOLVING SUBJECTS OF INTERNATIONAL LAW

The study of the separate nature of the law governing suretyship also reaches into a sphere that borders on public international law. Theore-

[19] Lunz, o p. c i t., p. 230.

[20] Section 11 of the Act No. 97/1963 C. of L. (= Collection of Laws), concerning private international law and the rules of procedure relating thereto: "The law determined under Sections 9 and 10 shall also be applicable with respect to changes, security and consequences of breaches of obligations listed therein, unless the intent of the parties or the nature of the matter indicate otherwise."

tically, these situations are extremely interesting. They occur when the triangle creditor — debtor — surety is entered by subjects of international law alongside subjects who do not have an international character and derive their legal personality from a particular municipal law.

These cases occur quite frequently in modern economic life and may be expected to grow in number. They include, for example, guarantees for the obligations of the debtor states in the case of various government bonds. If one state provides guarantee for the obligations of another state, the relation between the debtor state and the creditor, who is a private individual or juristic person, is joined by other relations, namely between the guarantor state and the creditor, and between the debtor state and the guarantor state, i.e. a relation between two subjects of international law. An often quoted example are the well known Austrian government bonds guaranteed by the principal Allied powers, including Czechoslovakia.[21]

In this case we must ask what law governs the legal relation between the debtor state and the creditor and between the guarantor state and the creditor who is not a subject of international law, and what law is to be applied to the relation between the debtor state and the guarantor state and/or, if several states have extended guarantee, between such states.

If we disregard the views of some Western authors, who extend subjectivity under international law also to individuals — views which are strictly rejected by the socialist authorities on international law and have not found general acceptance among Western jurists either — the relations between the debtor state and the creditor and between the guarantor state and the creditor may not in principle be governed by any other law but a municipal one. Therefore, when discussing the law applicable to such cases, we must definitely exclude public international law. Unless an express provision is made for such relation (e.g. in the terms of the respective bond or the contract of suretyship), the applicability of the municipal law of the debtor or the guarantor states must be accepted, depending on the relation involved. It is difficult to assume that a sovereign state would submit to the law of another state in the absence of an express provision to the contrary.

While the relation between a state — which is a subject of international law — and the creditor — who is not — must be governed by

[21] The Geneva Protocols on the Financial and Economic Reconstruction of Austria, dated October 4, 1922; see also the Czechoslovak Act No. 401/1922 C. of L.

a municipal law,[22] the question of the law governing the relation between the debtor state and the guarantor state and/or states which are co-guarantors, is quite different. These are relations between sovereign subjects of international law and, consequently, unless there is an express provision to the contrary they must be governed by public international law. This opinion is also advocated in the most recent literature concerned with this problem.[23]

In fact, the argument raised in the case of the guaranteed Austrian bonds, that different legal systems governed the relations between Austria and its creditors and Austria and the guarantor states, found support in the settlement of these bonds agreed on at the Rome Conference in 1952 as the Austrian Debt Settlement Plan. Both relations are the subject of separate agreements. Annex I concerns the claims of the guarantor states against Austria, while Annex II constitutes an agreement between Austria and representatives of the owners of the bonds.[24]

Delaume states that nine different municipal laws are applicable to the relations between the creditors and Austria and between the creditors and the guarantor states, while the relations between the guarantors and between each guarantor and Austria are governed by international law.[25]

These instances, when the surety — the guarantor state — has an obligation towards a creditor who is a physical or juristic person and the national of another state, constitute cases of suretyship where the law governing the surety must be determined in accordance with the rules of private international law. As already indicated, the relation between the guarantor state and the creditor should be governed by the law of the surety, i.e. the law of the guarantor state. Using this connection, we arrive in both cases at a different law — the law of the debtor state for the principal obligation, and the law of the guarantor state for the guarantee. This also provides support of a kind for the theory of a separate law of suretyship.

We pass from the sphere of private international law into the sphere of public international law if in the case of guarantees of this kind both

[22] See the judgement of the Permanent Court of International Justice in the case of the Brazilian and Serbian bonds, 1929, Series A 20/21, p. 42, and the principle formulated therein, that "... any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country."

[23] See: Delaume. G. R., "The Proper Law of Loans Concluded by International Persons: A Restatement and a Forecast", *The American Journal of International Law*, 1962, Vol. 56, No. 1, p. 85; Wells E. J., "Guarantees in International Economic Law", *International and Comparative Law Quarterly*, Vol. 4, 1955, p. 430.

[24] See Delaume, op. cit., p. 85, footnote No. 88.

[25] Delaume, op. cit., p. 85; Wells, op. cit., p. 431.

subjects of the relation between the guarantor and the creditor are also subjects of international law, even though they may have only a limited international juristic personality. In contrast to the aforesaid instances, these cases are far more numerous, since they occur in connection with the activities of international banks, in particular the International Bank for Reconstruction and Development.

At this point we must briefly mention the problem of the character of these subjects. Views differ on the international juristic personality of these organizations. The question has also been discussed in Czechoslovak literature. It admits a limited measure of subjectivity of international organizations under international law, which is manifested within the scope of their statutory activity, so that it does not constitute the full subjectivity given only to states, but merely certain attributes of such subjectivity.[26] In matters of their statutory activity, this subjectivity is also manifested as a limited contractual subjectivity. Treaties concluded by these organizations within the scope of their statutes, in particular those concluded with their member states, with other states, or with other international organizations, are international treaties governed by international law. At the same time, however, the treaties are binding only for the organization which concludes them, not its member states. Thus the contractual subjectivity of these organizations is an independent subjectivity.[27]

This question, as it relates to the Council of Mutual Economic Assistance, was discussed in detail by Kalenský. He reached the conclusion that the Council was not a full subject of international law, but only had certain limited features of subjectivity under international law, which its original members had granted it in the endeavour to facilitate the fulfilment of its tasks.[28] These features include primarily the right to conclude international treaties, which the Council may conclude under certain circumstances and within the scope determined by its statute also with non-member states, the United Nations, and other international organizations.[29]

It seems proper to proceed from the fact that these international organizations are indeed subjects of international law, even though their international legal subjectivity is limited and is manifested within the scope of the statutes or international treaties under which they were

[26] Outrata V., Mezinárodní právo veřejné, Prague, 1960, p. 53.

[27] See Bystrický R., *Mezinárodní kulturní dohody a organizace,* Prague, 1962, pp. 81 and 82; also Outrata, op. cit., p. 53.

[28] Kalenský P., „Rada vzájemné hospodářské pomoci ve světle mezinárodního práva", *Rozpravy ČSAV,* Vol. 72, No. 10, Prague, 1962, p. 43.

[29] Kalenský, op. cit., pp. 33, 36—37, 40 and 42.

established, and is derived from the will of their founders, member states which themselves are full-fledged subjects of international law due to the very fact of their existence.

The activities of the International Bank for Reconstruction and Development include the granting of loans directly to its member states or to other subjects on the basis of a guarantee extended by the respective member state. The respective contracts are concluded by the Bank within the scope of Article III, Part 4, of the Articles of Agreement on the International Bank for Reconstruction and Development, dated December 27, 1945.[30] Under this Article, the Bank may provide under certain conditions guarantees on loans, participate in loans, or grant loans to any member or its political subdivision and to any commercial, industrial or agricultural enterprise on its territory. These include the condition under which, in cases where the borrower is not a member of the Bank (i.e. a state) on whose territory the respective project is realized, the payment of the principal of, and the interest and other charges on, the loan must be fully guaranteed by a member, a central bank or another similar institution which fully meets the requirements of the Bank.

Thus two categories of cases concerned with loans occur in the practice of the Bank. The Bank grants loans to its members and the relation thus established is one between a creditor and a debtor. In other cases the Bank grants loans to certain enterprises, i.e. subjects of a certain state. Then the relation between creditor and debtor must be joined by another relation — that between the creditor and the guarantor. The guarantor is a sovereign state. It is this second category which is of particular interest to us.

As regards the first category, we should point out that it involves a relation between a subject of international law and a subject with limited subjectivity under international law, primarily a contractual one. The relation between the two subjects is established by an international treaty and is governed by international law.[31] This conclusion is also in keeping with the respective loan agreements which indicate the intent of the parties that these agreements should not be governed by the law of a particular state. This is indicated by the express provision of the terms of the loan, which form a part of the agreement.[32] This provision

31 Delaume, op. cit., p. 68; Wells, op. cit., p. 428.

32 Direct loans to member states are governed by Loan Regulations No. 3 of June 15, 1956, which are expressly included in the loan agreement and contain this provision: Section 7.01: "The rights and obligations of the Bank and the Borrower under the Loan Agreement and the Bonds shall be valid and enforceable in accordance with their terms notwithstanding the law of any state, or political subdivision thereof, to the contrary . . .", see *United Nations, Treaty Series,* Vol. 280, p. 302.

is used to deduce the applicability of international law to these agreements, because no treaty or agreement can exist in a legal vacuum.[33]

The legal aspects of the second category, i.e. loans guaranteed by a member of the Bank, are more complex. In such loans the guarantor — a member state — is a subject of international law, while the creditor — the Bank — has limited subjectivity under international law. The latter party — the Bank — also appears vis à vis the debtor who in these cases is not a subject of international law.

As regards the relation between the guarantor and the creditor, the same principles apply as in the case of loans granted to member states. Since it is a relation based on an agreement concluded by the Bank with a member state within the scope of its contractual subjectivity under international law, i.e. by an international treaty, this relation is governed by international law.[34]

The terms governing guaranteed loans granted by the Bank include on this point a provision similar to that of Section 7.01 of the Loan Regulations No. 3. It shows the intent of the contracting parties to isolate their relation from the influence of any municipal law. What has been said above about the impossibility of a legal vacuum is again applicable; a guarantee agreement must be governed by international law.[35]

On the other hand, a Loan Agreement between the Bank and a debtor who is not a subject of international law should be governed in principle by the law of a state. The wording of the above quoted Section 7.01 of Loan Regulations No. 4, might raise doubts on this point. It does not distinguish between the borrower and the guarantor, and, on the contrary, equally precludes the applicability of any municipal law to the relations involved in both the Loan Agreement and the Guarantee Agreement. Does this constitute a violation of the aforesaid principle that agreements between a subject of international law (in this case an organization with a limited subjectivity under international law) and a subject which does not have this character must be based on the municipal law of a state?

[33] Delaume, op. cit., p. 68.

[34] Delaume, op. cit., pp. 69, 76; Wells, op. cit., p. 428.

[35] Loans guaranteed by a member state are subject to Loan Regulations No. 4 of June 15, 1956, which are expressly included in the Guarantee Agreement and provide in Section 7.01: "The rights and obligations of the Bank, the Borrower and the Guarantor under the Loan Agreement, the Guarantee Agreement and the Bonds shall be valid and enforceable in accordance with their terms notwithstanding the law of any state, or political subdivision thereof, to the contrary..." See *United Nations, Treaty Series,* Vol. 260, p. 376.

There is indeed a trend to internationalize to some extent these agreements or at least isolate them from municipal laws. A certain transitional legal system is being sought for agreements between international and private persons, which is neither municipal nor international law; the term used is quasi-international law. It is especially the Austrian jurist Verdross, who is well known for his theory of the existence of quasi-international agreements between international and private persons which create a new legal order established by the concurrent will of the parties, i.e. an agreed lex contractus governing in detail the relations between the contracting parties.[36]

Similar views had been expressed quite some time before Verdross. Thus, as early as in 1875, a French court voiced the opinion that in concluding a contract with a foreign private person, the state has the possibility to conclude the contract either under its own law or under the foreign law, or, finally, to create by contract a special law devised in particular to govern the first contract.[37]

However, we cannot accept the existence of such a quasi-system. Every person who is not a subject of international law bases his legal capacity on a particular municipal law which grants him such capacity. Proceeding from such municipal law, this person may depart from certain provisions of the municipal law — if they so allow — when concluding legal acts, or may even choose a different municipal law to govern a particular legal relation. But such person may not be granted an independent capacity to formulate a law, a capacity detached from any municipal law, which allows this person to create by its own will special legal systems. This cannot be done even if such a person's will is joined by the concurrent will of a state.

We must proceed from these considerations also when interpreting the aforesaid provision of Loan Regulations No. 4, relating to guaranteed loans. One of the Bank's reports states that the internationalization of the loan agreement is warranted to the extent which isolates it from the effects of municipal laws; however, at the same time it points out that this is not the same as if the loan agreement were an international treaty which would be governed by international law.[38]

It may well be that the special relations arising from the conclusion of these loans may warrant that the loan agreement should not to be

[36] Verdross, "Protection of Private Property under Quasi-International Agreements", 6 *Nederlands Tijdschrift vor Int. Recht,* 355 (1959), p. 358, quoted in Delaume, op. cit., p. 69, footnote No. 3.

[37] Trib. civ. Seine, March 3, 1875, Sirey 1877. 2.25 in the case Etat Ottoman v. Comptoire d'Escompte.

[38] See Delaume, op. cit., pp. 69—70.

influenced by municipal law and should be governed by the same principles as the guarantee agreement concluded with the Bank by the state whose national is the borrower and on whose territory the borrower performs his activities. The specific nature and needs of international economic relations have forced practically all states to allow private persons to choose a different municipal law to govern their relations, and not insist even on the observance of the mandatory provisions of their own law or of a different law, which would govern such relations under their rules concerned with conflict of laws. Of course, the validity of this choice is always based on a particular law which permits it, and it can never be warranted by the mere existence of the concurrent will of the contracting parties. If the parties are thus given the possibility to choose a different law than would otherwise be decisive, it would seem reasonable — in view of the specific character of the respective relations — that the parties could choose, instead of a certain other municipal law, other rules to govern their relations, even though such rules may be contrary to the mandatory provisions of the otherwise decisive law. In the case of the guaranteed loans there is the added fact that the borrower bases this choice on the consent of his state because the provision of Section 7.01 of Loan Regulations No. 4 forms a part of both the loan agreement between the Bank and the debtor, and the guarantee agreement between the Bank and the guarantor state.[39] Should the whole thing perhaps be formulated so, that the parties who are able to choose a certain municipal law for their contract, should also be able to choose international law instead of a municipal law for the contract? It is not necessary or even posible to go that far. International law governs relations between subjects of international law or at least between subjects which have limited subjectivity under international law and within its scope primarily their own international contractual subjectivity. This is not true of the borrowers in the case of guaranteed loans. It is not even justified by practical needs because especially in this particular sphere contemporary international law is not as complete as the detailed systems of municipal laws, and thus the differentiation between international and municipal laws has preserved its importance. Reference is made to the statement that with the exception of the special transactions of the International Bank for Reconstruction and Development, parties in other cases expressly prefer municipal law, which means that con-

[39] See the report of the Bank mentioned in footnote No. 38 above: "... while the borrower could not contract itself out of the application of municipal law, the Bank and the guaranteeing member may do so in respect not only of their own relationship but also (with the borrower's consent evidenced by the borrower's acceptance of Section 7.01) of that between the Bank and the borrower."

temporary loan agreements do not tend towards Verdross's quasi-international law.[40]

Agreements on loans granted by the Bank to other subjects than member states do not become agreements governed by international law through the acceptance of Loan Regulations No. 4. But by choosing for such agreements — with the consent of the guarantor state — the applicability of provisions excluding the effects of a municipal law (Section 7.01), the parties arrive materially at the same result as the Bank with the guarantor state in the related guarantee agreement which is governed by international law.

This type of guarantee thus constitutes an institution of international law. As regards its appurtenances, it naturally meets the fundamental general principles common to guarantee — or surety — which may be derived from a comparison of individual municipal laws. It occurs only in international contracts, and its principles cannot be found in customary international law. It is also characterized by accessoriness; its essential prerequisite is the existence of the principal obligation for whose fulfilment the guarantor has extended the guarantee.[41] The guarantees accepted by states towards the International Bank involve an obligation going beyond the usual obligation of the guarantor and at the same time placing the guarantor state into the simultaneous position of a joint debtor. It may be compared with the obligation of a guarantor who pledges himself as "surety and payee".[42]

These guarantee agreements also contain some additional obligations not related to the usual function of surety. The Bank and the guarantor state undertake to co-operate in realizing the purposes of the loan. To this end, they undertake to provide each other with information on the general state of the loan. The guarantor state undertakes in particular to provide information on the economic and financial situation prevailing in its territory as well as on its international balance of payments. The guarantor state also undertakes to facilitate the free access of the Bank's representatives to any part of its territory for purposes concerning the

[40] See Delaume, op. cit., pp. 86—87.

[41] Wells, op. cit., pp. 429, 432.

[42] An example of such guarantee is the Guarantee Agreement between the International Bank and Costa Rica of September 18, 1956. Its Article II, Section 2.01, states: "Without limitation or restriction upon any of the other covenants on its part in this Agreement contained, the Guarantor hereby unconditionally guarantees, as primary obligor and not as surety merely, the due and punctual payment of the principal of, and the interest and other charges on, the Loan, the principal of and interest on the Bonds, the premium, if any, on the prepayment of the Loan or the redemption of the Bonds, and the punctual performance of all the covenants and agreements of the Borrower, all as set forth in the Loan Agreement and in the Bonds." — *United Nations, Treaty Series,* Vol. 260, p. 370.

loan.[43] These pledges cover up the ability of the Bank and, in particular, the financial circles of its most powerful member states to interfere in or dominate the economy of the weaker member states, and to misuse the Bank for gaining political influence in other states. The Bank has been criticized for this activity and has been denounced by the socialist countries.[44]

The study of the legal problems relating to the loan and guarantee operations of international banks is also of considerable importance for the international economic relations of the socialist states. The socialist states associated in the Council of Mutual Economic Assistance — acting in the interest of promoting the development and extension of the international socialist division of labour and the continued expansion and consolidation of their trade and economic relations — concluded an Agreement on Multilateral Clearing in Convertible Roubles and on the Establishment of the International Bank for Economic Co-operation in Moscow on October 22, 1963 (Notice No. 175/1964 C. of L.); the Statute of the International Bank for Economic Co-operation forms an integral part of the Agreement. In contrast to the true nature of the activities of some other international banks, this particular bank pursues its activities on the basis of the full equality and recognition of the sovereignty of all its member states, which enjoy equal rights in considering and solving problems related with its activities (Article IV of the Agreement).

In the case of the International Bank for Economic Co-operation, too, the question of its subjectivity and character as an international organization must be considered. The Bank is a juristic person (Art. 2, par. 1, of the Statute) and enjoys legal capacity on the territory of each contracting party — for the purpose of performing its functions and achieving its objectives — together with the privileges and immunities essential for the same purposes; the same privileges and immunities are enjoyed by the representatives of the member states on the Board of Directors and to the Bank's officials (Art. XI of the Agreement).

It may be deduced from the Agreement and the Statute that, just as in the case of the Council of Mutual Economic Assistance, the Bank is an international organization whose member states have endowed it with a limited subjectivity under international law; it may, in particular, conclude under certain circumstances and within the scope of the Agreement and the Statute agreements which would have the character

[43] See Article III, Section 3.02, pars (a) and (c) of the Agreement mentioned in footnote No. 42.

[44] Bystrický R., *Mezinárodní obchodní úmluvy a instituce,* Prague, 1955, pp. 205—209; „Mezhdunarodnye ekonomicheskie organizatsii", *Spravochnik Akademii nauk SSSR,* 2nd ed., Moscow, 1962, p. 166.

of international treaties and would therefore be governed by international law. This appears, for example, from Art. IX of the Agreement, under which the Bank may effect clearing arrangements in convertible roubles with states which are not parties to the Agreement. The terms of such clearing arrangements are determined by the Board of Directors in consultation with the interested states. This provision therefore envisages the conclusion of agreements between the Bank and individual states, which would be international treaties. Under Section 17 of the Statute, the Bank may co-operate with organizations whose activities correspond to the purposes of the Bank, or may even become their member. This activity may occasionally require the conclusion of international treaties with different international organizations. The Bank's international contractual subjectivity also ensues under certain circumstances from the provisions of Art. 2, par. 2 (f) and Art. 28 (a) to (j) of the Statute.

Under Art. 16 of the Statute, the Bank may extend guarantees for the financial obligations of the banks of the member states, other juristic persons, as well as physical persons. Such operations are envisaged by Art. 24 of the Statute. In addition to guarantees extended for the obligations of other subjects, the Bank may undoubtedly also demand security for its own loans (Art. 19 of the Statute) through guarantees of other subjects for the obligations of the Bank's debtors. In both cases the other party may be a state or another international organization with limited subjectivity under international law, such as another international bank. The legal act providing such guarantee should be a treaty which could not be governed by a municipal law but by international law. A guarantee thus established would therefore be an institution of international law. However, international law need not apply to the relation arising from the guaranteed obligation, if one of the parties is a subject of a particular state, e.g. its national bank.

There is as yet no experience with guarantee operations of the Bank, but the diversity of international economic life and the different forms of economic contacts between states with different socio-economic systems may result in the aforesaid situations, which, in the end, provide evidence *sui generis* for an independent law of suretyship.

INDIVIDUAL CRITERIA FOR SETTLING CONFLICT OF LAWS RELATING TO SURETYSHIP

CHAPTER II

(a) LAW DETERMINED BY THE PARTIES

In the case of suretyship, as a legal relation arising from obligations, the determination of the decisive law by the parties to the legal relation is of major importance.

Most laws view surety as a contract, irrespective of whether suretyship is included in Civil Codes under the provisions governing the law of obligations in general — usually in the category of "security for obligations" [45] — or whether it is regulated as a special type of contract in the special part of the law of obligations.[46] Under Czechoslovak law, too, surety may be established by a contract between the creditor and the surety, although even a simple, unilateral expression of the surety's will establishes surety.

Thus, when concluding a suretyship contract, the parties may also agree on the law to govern it.

Practically all municipal laws allow a choice of law. Therefore we need not repeat what has already been said on this point in recent Czechoslovak literature dealing with private international law.[47] Consequently, the author will limit himself, when discussing the choice of law, as well as other points of contact common both to suretyship and other obligations, only to those points which are important for the topic of the present treatise.

A basic change in the rules governing the choice of law was introduced by the new Act Concerning Private International Law. It adopted unequivocally the concept of a free choice of law instead of the concept of material choice which marked the provisions of the previous Act No. 41/1948 C. of L. The present Act permits the parties to set aside by their choice a law which would otherwise be applicable as a whole under the rules governing conflict of laws, irrespective of whether the provisions involved are optional or mandatory.[48]

45 See the Czechoslovak Civil Code of 1950 or the present Code of International Trade.

46 See the German BGB, or the French, Italian and other Romance civil codes.

47 Kalenský P., *Obligační statut kupní smlouvy v mezinárodním obchodním styku*, Prague, 1960, pp. 70 ff.

48 See Section 9 of the Act No. 97/1963 C. of L.

A choice of law in matters of obligations, in particular in international commercial relations, must be welcomed because, in view of its universal acceptance in all legal systems, it offers the most reliable method for the parties to establish legal security for their relations. This applies primarily to cases where the parties made provisions for the decisive law and agreed on it expressly.

However, in practice we often find that the decisive law was not expressly agreed. This is not surprising because elsewhere, too, e.g. in the case of sales contracts, where such agreement is to be strongly recommended, the parties quite frequently conclude contracts without expressly providing for the decisive law. A choice of law is usually provided for in printed forms of contracts, which are mostly used by large firms only. But standard forms are, as a rule, not used for suretyship contracts, and even in the case of bank guaranties, the forms or printed texts of the guaranties issued by the banks do not state that the obligations of the bank, ensuing from its declaration, are governed by a particular law. This may perhaps be explained by the fact that the bank issuing the declaration does not expect that it would not meet its obligation, should this contingency arise, and that it would thereby initiate a dispute. These bank guaranties rather lay stress on specifying in exact detail the terms which must be fulfilled to establish the bank's obligation to perform under its guaranty. It is especially in the case of obligations under guaranties extended by banks, that the optional nature of the majority of provisions regarding suretyship comes into effect, so that detailed rules replacing only the subsidiary provisions of the respective substantive law make it relatively unimportant, which law is decisive for the obligation established by the guaranty. It should suffice to point out that the possibility of departure from the legal provisions makes it possible, in particular, to replace subsidiary surety in a specific case by direct surety, and allow the surety to waive the traditional objections appertaining to him; thus the differences existing in individual legal systems with respect to suretyship can be overcome.

Nevertheless, parties should determine the decisive law when extending surety in order to provide for greater legal security. The new Czechoslovak Act Concerning Private International Law by its provisions in fact forces Czechoslovak subjects to do so when they extend surety for obligations governed by another law, if they want their obligation arising from surety to be governed by Czechoslovak law.[49]

Just as in the case of any other manifestation of will, also in the case of a manifestation of will determining the application of a certain law

[49] See Section 11 of the Act No. 97/1963.

to a legal relation may be made otherwise than expressly, i.e. such manifestation may be assumed also from another behaviour of the party to the respective relation. This also applies in Czechoslovak law.[50]

Such choice of law made concludently contains the danger of an artificially construed, tacitly manifested will of the parties — also in cases where such will does not exist — that their relation should be governed by a particular law. This is evidenced — in the case of relations between an advanced capitalist state and a developing country, concerning precisely suretyship — by a recently published decision of the Provincial Court (Landgericht) at Frankfurt am Main.[51] There was no appeal and the decision stands.

In this particular case a West German enterprise concluded a contract with a firm in the developing country on the installation of some large equipment. The payment of the last instalment to the German enterprise was to be secured by a statement of guaranty issued by a foreign bank. The bank issued the statement in which it undertook to pay to the German bank of the respective enterprise to the credit of this enterprise a certain sum upon the latter's first written notification that the buyer had not paid the last instalment under the terms of the contract.

In the litigation, the West German court considered the question whether the statement of guaranty of the foreign bank was a non-surety guaranty governed by German law, or a surety declaration governed by the foreign law. The court reached the conclusion that the parties had tacitly subjected the guaranty to the German law. In stating the grounds of its decision the court said that the statement of guaranty had been proposed by the German bank and drawn up by it in the German language. The foreign bank being sued accepted the draft and translated its German text into English. The court argued that by extending the guaranty drawn up by the German bank, the foreign bank submitted to the law of the person according to whose legal system the guaranty had been formulated, which in this case was German law. Another argument used to justify the decision was that the correspondence had been maintained exclusively with the German bank which was also designated as the place of payment.

This is obviously an arbitrarily construed decision. The court considered as most important the fact that in the preparatory stage, the text of the guaranty had been drawn up in German. It completely ignored the fact that the final and legally binding wording of the guaranty had been

[50] See Section 9, par. 1 of the Act No. 97/1963.

[51] *Aussenwirtschaftsdienst des Betriebsberaters, Recht der internationalen Wirtschaft,* 1963, No. 2, pp. 58—59.

English. It also failed to consider the fact that a much more important factor in this case was the legal system of the bank extending the guaranty, because every bank doing so must be presumed to have the intention to govern the guaranty by the law of the place of its seat, since guaranties constitute one of the normal business activities of a bank and involve for it a serious obligation, while the beneficiary draws primarily advantage from a guaranty.

This forced construction of a non-existent contractual consensus would not be possible, if the bank extending the guaranty had added to its statement a clause that the obligations arising from its statement were governed by the law of its choice.

While a tacit choice of law — disregarding cases of the aforesaid nature — constitutes a true manifestation of will to specify a decisive law, this is not the case with what is known as a hypothetical choice of law. Two situations can develop in this latter case: the court either uses this artificial method to subject, forcibly, the respective legal relation to a certain law and thereby reaches an unjust conclusion serving particular interests, or attempts to find the decisive law in the law which is most closely associated with the relation in question or which is in keeping with a reasonable settlement of the case, etc., and declares that this is the law the parties would have had to choose had they considered a choice. In this second case it is correct to call things by their proper name rather than to construe a non-existent contractual will of the parties.

The Czechoslovak rules governing conflict of laws provide no basis for a hypothetical choice of law[52] and its use would undoubtedly be contrary to the law.

In his work on suretyship in German private international law, the German author Rilling deals, in the case of law determined by the parties, with the notorious problem of the vicious circle; it evolves from the situation, where the parties have agreed on a law decisive for their contract, but this decisive law is to be used to determine the validity of the agreement regarding the determination of the decisive law.[53] Rilling believes this vicious circle can be broken, if we replace the will of the parties by the most important connecting factor of the obligation, which, in his opinion, should be a point of contact that can be determined without the aid of a concrete law; this factor may be determined by the will of the parties or in another manner. He thus sees in the

[52] Kalenský, *Obligační statut,* p. 130.

[53] Rilling K., *Die Bürgschaft nach deutschem internationalem Privatrecht,* thesis, Tübingen, 1935, p. 33.

manifestation of the will of the parties a certain factual moment, one of the means of determining the most important connecting factor of the obligation.[54]

This concept of the choice of law is close to Batiffol's. The French author states that by choosing the decisive law, the parties localize their contract, and that the choice of law constitutes only one form of localization or a mere factor, which the judge simply need not respect.[55]

This opinion is criticized by Kalenský, because it extends the possibility of arbitrary decisions in the sphere of the so-called hypothetical choice also to an expressly manifested choice, and thereby undermines legal security.[56]

Just as Rilling, Batiffol, too, sees his solution as the way out of the aforesaid vicious circle, because the parties do not choose the decisive law and their choice is a factual element localizing the contract.[57] He otherwise settles the question, as to which law serves as the basis for the validity of the agreement of the parties regarding the choice of law, by referring to the lex fori.[58] This view is disputed by Kalenský who advocates precisely the law to which the choice of the parties makes reference.[59] In doing so, he also refers to the Convention relating to the law applicable to international sales of tangible movables, adopted at the Seventh Session of the Hague Conference of Private International Law in 1951.[60] On the other hand, Bystrický argues that the lex fori should be applied to determine whether the parties in fact had the right to choose a particular law and that the court may turn to a foreign law not on the basis of the will of the parties but only on the basis of the provisions of its own law, which state the essentials for endowing the manifested will of the parties with certain legal effects.[61] This argument based on the lex fori is the most acceptable one. Irrespective of the element of chance raised as an objection against the opinion based on the lex fori, it is rather difficult to imagine how in dealing with a case where the will of the parties refers to a foreign law, a Czechoslovak arbitrator or judge could, figuratively speaking,

54 Ibid., p. 34.
55 Batiffol H., *Les conflits de lois en matière de contrats,* pp. 38—39.
56 Kalenský, op. cit., p. 107.
57 Batiffol, op. cit., p. 46.
58 Ibid.
59 Kalenský, op. cit., p. 106, footnote No. 59, p. 98.
60 Kalenský, op. cit., p. 103; the Convention provides in its Article 2 as follows: „... Les conditions relatives au consentement des parties quant à la loi déclarée applicable sont déterminées par cette loi."
61 Bystrický, *Základy,* pp. 241—242; lex fori is also advocated e.g. by Raape, op. cit., p. 433.

dive into the waters of a foreign law without previously touching the springboard of his own law. In any case, there is no doubt that the will of the parties does not stand above the law and that the choice of law made by the parties must proceed from a particular law. This choice constitutes one of the facts to which the law attributes legal consequences.[62]

Authors who deal with the problems involved in the choice of law, as well as the legal provisions governing it, are usually, and often primarily, concerned with choice of law made by two contracting parties.[63] In such cases the decisive law is determined by the concurrent manifestation of the will of the two parties and applies to the legal relations established by the contract.

In a study of the problem of suretyship in conflict of laws, the question arises, as to whether it is possible for the decisive law to be determined by one party only, and if, therefore, it may be chosen by the obligor also in cases involving obligations established by a unilateral legal act. As already indicated, under the Code of International Trade, a suretyship obligation can also be established by a unilateral declaration of the surety. Thus the answer to this question under Czechoslovak law is quite important and is of essential significance for suretyship.

The author believes that this question should be answered in the affirmative. Where surety is established by a unilateral legal act, the surety may unilaterally choose the law which is to govern his obligation.

If such unilateral choice of law were not permitted, difficult situations might develop in view of the provision concerning security of obligations, contained in the new Czechoslovak Act Concerning Private International Law.[64] Under this rule, the manner in which an obligation is secured is governed by the law of the secured obligation, unless the intent of the parties or the nature of the matter indicate otherwise. Where an obligation is secured by a contract, the parties may agree on another law. Even though the aforesaid rule speaks of the intent of the parties (i.e. it uses the plural), which might be interpreted as indicating a contractual consensus, the person who provides surety by a unilateral declaration should also be given the possibility to choose unilaterally the law which is to govern his obligation. Otherwise a Czechoslovak subject who uni-

62 Bystrický, *Základy,* p. 241; Kalenský, op. cit., p. 95; Lunz, op. cit., p. 183; Raape, op. cit., p. 433; Wolff, *Private International Law,* p. 414.

63 See Section 9, par. 1, of the Act No. 97/1963: "The contracting parties may choose the law ..."

64 Section 11 of the Act No. 97/1963 provides: "The law determined under Sections 9 and 10 shall also be applicable with respect to changes, security and consequences of breaches of obligations listed therein, unless the intent of the parties or the nature of the matter indicate otherwise."

laterally stands surety for an obligation governed by a foreign law would find himself at a disadvantage.

When listing the types of different points of contact, the Soviet author Lunz expressly specifies the law chosen by the person who made the legal act or — in the case of contracts — the persons who concluded the contract.[65] He thereby supports the possibility of a unilateral choice of law.

Although the Czechoslovak law expressly mentions only choice of law by the contracting parties, this should be understood as covering the most frequent cases; it does not, however, preclude — but rather includes — the possibility of the decisive law being also determined by a unilateral manifestation of the will of the person who thereby establishes an obligation.

(b) THE LAW OF THE PLACE OF CONCLUSION OF THE CONTRACT

In the case of suretyship, too, the law of the place where the contract was concluded is used as a connecting factor. In his comparative work, Rabel notes that American courts generally refer to this law.[66] Beale, too, lists several decisions in which American courts decided various questions relating to suretyship under the law of the place where the contract had been concluded.[67]

Among the authors concerned with suretyship, this connecting factor is rejected by Rilling, who objects that the place of the conclusion of the contract is purely fortuitous.[68] His objection is quite justified in view of the present-day conditions of international trade. Most contracts are concluded in absentia, making the determination of the place where the contract was concluded a complicated problem of qualification. It is well known that various laws differently govern the question of the moment when a contract is established and thereby also of the place of its conclusion. There are many theories on this point — e.g. the theory of dispatch, of declaration, of receipt, etc.[69] In concrete cases, the question of the place where the contract was concluded in the end depends on the position held by the law of the deciding court. As regards the place of the conclusion of a suretyship contract under American law, a distinguishing factor is the character of the contract. If it is bilateral, the place of conclusion is determined according to the normal rules

[65] Lunz, op. cit., p. 75.
[66] Rabel, op. cit., p. 348.
[67] Beale J. H., *A Treatise on the Conflicts of Laws,* Vol. 2, New York, 1935, § 346.8, pp. 1221—1222.
[68] Rilling, op. cit., p. 26.
[69] See, e. g., Kalenský, op. cit., pp. 210—211.

governing bilateral contracts. If the contract is unilateral — which is most frequent — and becomes binding only when the principal debtor is granted the requested credit, the place of conclusion is the place where the credit was granted (in the form of delivery of goods, or of a loan to a third person or to the principal debtor in connection with surety).[70]

The use of this point of contact dates from the earliest period of the history of private international law.[71] At that time its use was important and facilitated the promotion of trade. Its acceptance helped the consideration of legal relations according to a single law irrespective of the different personal statutes of the parties involved.[72] Undoubtedly, the application of this criterion best suited the economic conditions then prevailing. Under such situation the place of the conclusion of a contract was not fortuitous. Contracts were most often concluded between parties who were present at the conclusion either at the place where one of them had the seat of his business, or in one of the large marketing centres where the international trade of those days was concentrated.

The growth of international trade, especially in connection with the growth of transport and postal services, including subsequent progress in telecommunications, has brought about a situation where today the overwhelming majority of commercial transactions are concluded in the absence of the contracting parties and thus involve extreme complications in determining the place of their conclusion. The complexity of this problem appears even in cases where the parties are present at the conclusion of the contract — e.g. on board of a ship or plane, where the parties meet, etc. Today even the traditionally observed reference to the law of the place of the stock or commodity exchange, or a trade fair, with respect to deals concluded there has lost importance. In view of the great number of present-day trade fairs, this criterion would most often be fortuitous. There is no rational reason why, e.g., a contract between a Czechoslovak firm and a British businessman concluded at the Leipzig Trade Fair should be governed by the law of the German Democratic Republic, if both parties themselves had failed to choose the decisive law when concluding their contract. The new Czechoslovak Act Concerning Private International Law did not take over this point of contact.

The law of the place of conclusion of the contract still plays an important role as a point of contact in many municipal laws. In addition

70 Beale, op. cit., § 342.1, pp. 1068—1069; also see *Restatement of the Law of Conflict of Laws,* § 324.

71 See Kalenský, op. cit., pp. 21—22.

72 Schnitzer, op. cit., Vol. I, p. 125.

to the aforesaid American judicial practice this is true, for example, of French judicial practice,[73] of Austrian rules,[74] as well as of other laws.[75] Even Soviet law provides for the law of the place of conclusion of the contract as the decisive and only point of contact for obligations arising from contracts concluded in foreign trade in the absence of an agreement of the parties to the contrary. The place of conclusion is determined under Soviet law.[76]

Under certain circumstances the place of the conclusion of the contract, or of the legal act, may also be important in the case of suretyship for determining the law which meets a reasonable settlement of the legal relation. The accessorial nature of suretyship may also be an important factor in this respect. For example, this may happen if the place where surety was extended is identical with the place of conclusion of the contract establishing the principal obligation, provided that the creditor, the principal debtor and the surety are all present at the same time. In such a case — provided that the parties to the principal contract are not domiciled in the same state — surety would be connected also under Czechoslovak rules governing conflict of laws with the law of the place of conclusion of the principal contract and, at the same time, the place of the provision of surety, if a different contract is involved, than one expressly specified in Section 10, par. 2, of the Act No. 97/1963 (e.g. also a contract of loan might be involved). In such a case, the principal contract should be governed by the law of the place of conclusion of the contract — and so should surety — unless the intent of the parties or the nature of the matter indicate otherwise (Section 11 in connection with Section 10, par. 3, of the Act No. 97/1963).

(c) THE LAW OF THE PLACE OF PERFORMANCE

As in the case of all matters concerning obligations, in the case of surety, too, German jurisprudence and, in particular, German judicial practice continue to insist in the overwhelming majority of instances on the law of the place of performance as the point of contact.[77] Although this contact is typical primarily of German law, it has also appeared — as regards surety — in American judicial practice.[78] As regards what is

[73] See Batiffol, *Traité,* pp. 617 and 636.
[74] Sections 36 and 37, ABGB.
[75] For their survey see Kalenský, op. cit., pp. 197 ff.
[76] Article 126 of the Principles of the Civil Law of the USSR and the Union Republics of 1961; Article 566 of the Civil Code of the Russian Soviet Federal Socialist Republic of 1964.
[77] See, e.g., Lewald, op. cit., p. 258.
[78] Rabel, op. cit., p. 348.

known as the effects of the contract, the law of the place of performance was used as a point of contact also by Swiss courts, but was subsequently abandoned.[79]

German law thus uses also with respect to surety the same hierarchy of points of contact as it applies to other relations arising from obligations: an expressly or tacitly manifested choice of law, so-called hypothetical choice of law, and, finally, the law of the place of performance; there is one difference, namely that the hypothetical choice is used quite rarely because the contract involved is unilaterally binding.[80] One of the principal objections raised against this point of contact is the doubtful result, since each contracting party is subject to another law. In spite of this objection, German courts have used this particular point of contact.[81] In view of the unilateral character of the obligation in the case of surety, this split does not result in undesirable consequences.

Surety is usually used to secure a pecuniary obligation. Under German law, the place of performance of a pecuniary obligation, just as of all other obligations — unless otherwise provided — is the place of residence or the place of business of the debtor, notwithstanding the fact that in case of doubt, the debtor must deliver pecuniary payments to the place of the residence or the place of business of the creditor at the former's own risk and cost.[82] The same applies under Austrian law.[83] Thus, under German law, reference to the law of the place of performance in principle results in the application of different laws for surety and for the principal obligation. If the same point of contact were used by another law, e.g. Czechoslovak law, which is case of doubt provides for the domicile of the creditor or his place of business as the place of performance of a pecuniary obligation, the principal obligation and surety would be governed by the same law.[84]

In connection with reference to the law of the place of performance and, in the case of a law, which makes the domicile of the obligor, or his place of business — i.e. places that may be located in different states — the place of performance of both the principal obligation and

79 Kalenský, op. cit., p. 218; Schnitzer, op. cit., pp. 573—575.

80 Lewald, op. cit., p. 258.

81 The decision RGZ VI of April 23, 1903, 54, 316 states: „Für das örtliche Recht bei Vertragsleistungen ist nach der besonderen und vom Reichsgericht in konstanter Rechtsprechung angenommenen Lehre, sofern nicht ein anderer Parteiwille erkennbar ist, der Erfüllungsort des Vertrages massgebend, der bei gegenseitigen Leistungen für beide Vertragsteile auch ein verschiedener sein kann."

82 Sections 269 and 270, BGB.

83 Section 905, ABGB; Articles 324 and 325, par. 2, HGB.

84 Section 224 of the Code of International Trade.

surety, it is also necessary to consider a question related with the accessorial nature of the suretyship obligation. If the debtor fails to meet the principal obligation, the surety must meet the secured obligation in the same manner as the principal debtor should have done. German courts have dealt with this question, and a decision of the Reichsgericht of April 6, 1910, i.e. one issued already under the BGB (RGZ 73, 262), points out that the scope of the principal obligation under Section 767, par. I, of the BGB does not fully cover the scope of all the aspects of the principal obligation. In particular, the provision that the state of the principal obligation is decisive for the surety's obligation should not be interpreted as meaning that the surety's obligation must be fulfilled in the same place as the principal obligation, the above decision states, adding that this also applies to sureties having the same status as the debtor (selbstschuldnerischer Bürge), even though some judgements issued on the basis of the general provincial law (das Allgemeine Landrecht) decided otherwise as regards the contractual determination of the place of performance of the principal obligation.[85] It may be assumed that under normal circumstances the surety's obligation does not include the duty to perform his obligation in the same place as the principal debtor should have done. The creditor may sometimes be interested in accepting the performance in a particular place. In such case the surety would have to undertake expressly to perform his obligation in the same place as the principal debtor.

Although German courts have insisted on the place of performance as point of contact, decisions have been exceptionally issued, which departed from this principle. In one case the Reichsgericht applied to surety (R ü c k b ü r g s c h a f t) assumed by a German national domiciled in Germany, German law on the grounds that this was the law of his personal statute, i.e. the law of his domicile.[86] Another Reichsgericht decision, issued on January 21, 1926, is careful in formulating its opinion, by speaking of the law of the place of business, which is at the same time the place of performance of the obligation.[87]

While German courts — with a few exceptions or careful formulations — hold to the place of performance as a point of contact, German legal theory is far from uniform in this respect. The law of the place of performance in the case of surety is unequivocally advocated by Letzgus.[88] Lewald, too, holds this opinion, stating that, as a rule, the obligation statute is determined according to the place of performance,

85 RGZ II of October 5, 1883 and July 13, 1892, RGZ II 10, 282 and 30, 299.
86 Decision of October 12, 1905, RGZ 61, 344.
87 Letzgus, op. cit., pp. 839—840.
88 I b i d., p. 840.

but also pointing out that some decisions have referred to the personal statute of the surety.[89] The opposite view is held by Rilling. His main objection is that the place of performance is a legal concept requiring qualification. This introduces the problem of qualification disputes related with the question, under which law should the place of performance be determined in the first place.[90] Rilling recommends that these difficulties can be avoided and suggests that the place of performance should be understood to mean the place where the performance is realized in its substantive relation; thus its determination can be done on the basis of purely factual factors without resorting to any law.[91] A similar position was taken by a Swiss court at a time when Swiss court decisions still used to apply the law of the place of performance. This court argued that the place of performance, used as a point of contact in private international law should always be the place at which the performance is actually to be made.[92]

It seems, however, that this is not the way to avoid qualification problems either. If the parties failed to provide for this contingency expressly in their contract and, in fact, never thought of it, the answer as to where the performance should be effected must be sought in a particular law. It is rather doubtful, when so doing, to distinguish between the place of performance determined by a law and the actual place of performance. Such a differentiation obviously proceeds from the suspicion that law does not govern personal relationships as such, but rather that it creates fictions which do not correspond to reality. This should not, after all, be assumed, although exceptions are possible; of course, in some instances it need not be the law, but the parties themselves, which, abusing their contractual freedom, specify in their contract a place of performance which is a fiction and has no real connection with their relations. Thus, purely factual factors or circumstances are not enough for determining the place of performance, because the question of the importance to be assigned to such factual moments must also be settled under a particular law.[93]

Much has already been stated against the place of performance as a suitable point of contact for suretyship. It may be added that this point of contact is as unsuited for suretyship as it is for other obligations. The acceptance of the place of performance as the only point of contact for suretyship would result in situations which would be contrary to

89 Lewald, op. cit., p. 258.
90 Rilling, op. cit., pp. 23—24.
91 Ibid., p. 24.
92 BGE 24 II 554.
93 Letzgus, op. cit., p. 845.

a reasonable settlement of legal relations especially under those laws, which for some obligations (pecuniary) locate the place of performance in the domicile or the place of business of the creditor.

(d) THE LAW OF THE CREDITOR'S DOMICILE

According to Rabel, most American judicial decisions are characterized by the decisive role played by the creditor's domicile.[94] This seems rather surprising at first sight. Most treatises dealing with the problem of conflict of laws relating to suretyship do not even consider this point of contact. They either ignore it completely or briefly and strongly reject it.[95]

Rabel's finding of the importance the creditor's domicile has in American judicial practice requires a brief consideration of this particular point of contact as well. The reference by American courts to the creditor's domicile is, in fact, not limited to suretyship cases alone. Rabel states that the law of the creditor's domicile is usually also applied to the principal obligation, with the courts sometimes stressing and sometimes not mentioning this fact.[96]

This reference to the law of the creditor's domicile is apparently linked with the views on the localization of the obligation. In so far as an obligation can be localized, one would tend to link the obligation with the debtor's domicile because there the debtor can be most easily sued and the claim against him enforced, but according to American views, an obligation is to be localized — for some purposes — in the creditor's domicile. While Wolff states that it is done for fiscal reasons and should not be applied to other legal spheres,[97] it seems, according to Rabel's findings, that the creditor's domicile is of much greater importance in the United States than in Europe.

In the case of suretyship, this point of contact results in its practical application to the subjection of surety to the same law as the principal obligation, if that, too, is governed by the law of the creditor's domicile.[98]

This point of contact is probably limited only to some cases of American judicial practice and does not seem to be applied elsewhere. Its use should not be considered as correct, especially in the case of surety,

94 Rabel, op. cit., pp. 348—349.

95 E.g. Rilling, op. cit., p. 27: „Der Wohnsitz des Gläubigers muss dabei für die Betrachtung ganz ausscheiden. Der Schwerpunkt des Schuldverhältnisses liegt beim Schuldner; dieser ist viel enger mit der Obligation verknüpft als der Gläubiger. Es kommt also nur Wohnsitz oder Heimat des Schuldners in Betracht."

96 Rabel, op. cit., p. 349.

97 Wolff, *Private International Law*, 1950, p. 543.

98 Rabel, op. cit., p. 350.

in view of the fact that it is a relation where the surety has all the duties and the creditor, for all practical purposes, has only rights.

It seems that this particular point of contact found its way into American law through the consideration of claims as intangibles (choses in action), i.e. as part of the creditor's property like any other tangible thing. Referring to the ancient rule "mobilia personam domini sequuntur (mobilia ossibus inhaerent)", French jurists formulated the principle "nomina personae creditoris inhaerent". This rule, long accepted in France, has been abandoned by modern French jurisprudence and judicial practice. However, it was accepted by Story and, under his influence, also by some English authors. This is probably the source of the use of this point of contact in American judicial practice.[99] The Czechoslovak law does not accept this point of contact.

(e) THE LAW OF THE SURETY'S DOMICILE

The debtor's domicile cannot be accepted as a suitable point of contact generally applicable in the law of obligations. It would be unsuitable especially in the case of synallagmatic contracts, where both parties have the status of debtor. As in the case of reference to the law of the place of performance, the contractual statute would be split; the obligations of each contracting party would be governed by the law of its domicile.

However, this point of contact is much more suitable in the case of an obligation where the duties arising from the obligation rest exclusively or mostly on one of the contracting parties only. Thus, reference to the law of the debtor's domicile, i.e. the surety in suretyship obligations, offers itself precisely in this latter case.

This point of contact is found both in literature and judicial decisions concerning surety. This is true in particular of Swiss jurisprudence and judicial decisions. Schnitzer states that the law of suretyship is the law of the place of the debt (Schuldort), i.e. the place where the surety owes his performance, which usually means the surety's domicile.[100] It should be noted that Schnitzer and the judicial decisions quoted by him distinguish between the "place of the debt" (Schuldort) and the "place of performance" (Erfüllungsort).[101] The "place of performance", which is also called Ausführungsort, is understood as the place where the performance is to be carried out (e.g. the construction of a project

[99] Wolff, op. cit., pp. 539—540.
[100] Schnitzer, op. cit., p. 655.
[101] Ibid., p. 572.

abroad by a construction firm whose seat is in Switzerland), while the "place of the debt" is meant as the place of the debtor's business or the place where he exercises his profession. It is the law of the place of the debt of the characteristic performance (das Recht des Schuldortes der charakteristischen Leistung), i.e. the place where the person bound to a characteristic performance owes such performance, which generally governs the obligations arising from the respective contract.[102] The place of the debt should be the place in which the person who bound himself to a characteristic performance has the centre of his activities and in which he permanently performs his economic activity.[103]

However, the argument that the place of the debt is inherent in the obligation, that it constitutes its organic part which the parties cannot change, and is thus actually superior to the place of the actual performance, which may be determined by the will of the parties and is therefore concrete but is not organically linked with the contract, seems rather unconvincing.[104] Both places are equally important for a concrete obligation. Without actual performance, the obligation would be unfulfilled and would not accomplish its role in economic relations. From this viewpoint, the place of the actual performance is as essential a part of the obligation and is as inherent in it, as the "place of the debt". No difference can thus be made between them, which would warrant reference to one of them. The concept of the "place of the debt" is rather vague and if, in practice, it means the place of the debtor's domicile or the place of his business, etc., the whole thing is just a matter of terminology; it is therefore simpler to speak of reference to the law of the debtor's domicile, than to operate with this vague term which requires special explanation.

In German literature — in contrast to the prevailing judicial decisions — the law of the surety's domicile is advocated by Rilling. He conceives the reference to the law of the place of domicile as reference to the law to which the legal relation arising from surety is most closely related. The law of the most important relation is considered by Rilling as the general point of contact universally applicable to all relations arising from obligations. He views reference to the most important relation as possible without the aid of a specific law because, as he argues, the most important relation is manifested either by the will of the parties or in another manner (in the given case by domicile), which means that it is a concept which can be determined without a concrete

102 Ibid., p. 572.
103 Ibid., pp. 570—571.
104 Ibid., p. 573.

law.[105] Rilling thereby obviously wants to overcome the problem involved in the fact that even the concept of domicile requires legal qualification. But even reference to the place of domicile cannot be done irrespective of a particular law, nor is it possible to proceed according to purely factual moments whereby the most important relation is to be manifested. Rilling himself states that if the debtor has no domicile, the law of the place where he is staying should be applicable, which means that he operates with legal terms.[106] If, according to Rilling's recommendation, the most important relation can be ascertained from purely factual aspects, then it should not be necessary to qualify such aspects to the extent that domicile and the place of stay must be distinguished.

Reference to the law of the surety's domicile is indeed a most suitable reference, in particular because the scope of the legal relation arising from surety involves unilateral duties of the surety. This brings surety very close to obligations arising from a unilateral legal act where the decisive law is usually the law of the debtor's domicile (see, e.g., Section 14 of the Act No. 97/1963). It should be added in this respect, that under the Czechoslovak Code of International Trade surety can be provided by a unilateral legal act.

By referring to the law of the debtor's domicile, where the debtor has his court of general jurisdiction and where claims against him can best be enforced, we arrive at the application of the law of the court to matters of surety. This is undoubtedly most desirable from the viewpoint of the deciding court and at the same time ensures that the decisive law will be properly applied.

A number of procedural rules governing competence according to what is called the forum of the property proceed from the concept of the location of the claim as a property value in the place where the debtor is domiciled. This, too, speaks in favour of the debtor's domicile as a point of contact in the case of unilateral obligations.

It must be admitted — and this is also an advantage of this particular point of contact — that when determining the place of domicile, one may rely to a considerable extent on the factual state of affairs and it is usually not necessary to settle complicated problems of qualification as may arise, if the place of performance or the place of the conclusion of the contract are used as points of contact. However, this should not obscure or dismiss the fact that domicile, too, is a legal concept, which means that when determining the place of domicile, legal qualification is also essential; but, except for extraordinary cases, the legal rules in

105 Rilling, op. cit., p. 33.

106 Ibid., p. 35.

these matters do not result in qualification disputes. It should be realized that very few points of contact are established by purely factual elements and may be used without often unconscious legal qualification.

In conclusion, it may be said, that the surety's domicile or his place of business constitute the most important point of contact which in the overwhelming majority of cases helps to determine the law corresponding to the reasonable settlement of the respective legal relation. This question will be discussed in greater detail in the part devoted in this treatise to points of contact relating to surety under Czechoslovak law.

(f) THE LAW OF THE STATE PROVIDING SURETY

In cases where a state provides surety for the obligations of other subjects, the concept of state sovereignty supports the argument that the relation established by this act should be governed by the law of the aforesaid state. This involves those relations, which are not governed by international law, i.e. when the creditor is also a subject of international law, or a subject endowed at least with a limited subjectivity under international law.

This conclusion also corresponds to the immunity of a state, because a sovereign state cannot be subjected, without its own consent, to the rules adopted by another legislator. This conclusion must therefore be accepted, as evidenced by the opinion expressed on this point by the courts of a number of states (French, English, American) as well as by the Permanent Court of International Justice.[107]

When, subsequently, some courts in the capitalist states abandoned this principle as a result of distinguishing between the action of a state acting on the same level as a private commercial person iure gestionis, and action where the state proceeds in the exercise of its sovereign rights iure imperii, such distinction must be rejected, as socialist authors have done in their works.[108]

It is naturally up to the sovereign state to decide, whether in

[107] See the decisions listed by Kalenský, op. cit., p. 253, by Batiffol, *Traité,* p. 641, and *Contrats,* p. 106; however, in this last instance, Batiffol also quotes the decision of the French Court of Cassation of May 31, 1932, which abandoned this principle and did not differentiate in this respect from other contracts under private law. Batiffol approves of this decision.

[108] Bystrický, *Základy,* pp. 170—172; Lunz, op. cit., pp. 76, 165—166, 194—196; Žourek, „Vynětí státu z pravomoci cizích soudů a úřadů", *Studie z mezinárodního práva,* II, Prague, 1965, pp. 56—60; Žourek, „Quelques observations sur les difficultés rencontrées lors du règlement judiciaire des différends nés du commerce entre les pays à structures économiques et sociales différentes", *Journal du droit international (Clunet),* 86, 1959, No. 3, pp. 640—665.

a concrete case it will voluntarily submit to the law of another state with respect to its own obligations. This, however, is an exception from a universally valid principle.

(g) OTHER POINTS OF CONTACT

Of the other points of contact mention must be made of citizenship and the deciding court.

Under Italian law of conflict of laws reference is made in the case of contractual obligations to the common citizenship of the contracting parties. This criterion is placed immediately behind the choice of law. If the parties do not have the same citizenship, reference is made to the law of the place of conclusion of the contract.[109]

This point of contact does not appear either in American or English judical decisions and plays no important role in French decisions either.[110] It did figure, however, with some importance in a number of German decisions, which gave it preference over the law of the place of performance, thereby avoiding a split in the statute of the obligation.[111] As regards surety specifically, a Reichsgericht decision has already been quoted, which applied German law to surety (Rückbürgschaft) assumed by a German national residing in Germany on the grounds that it was the law of his personal statute, i.e. of his domicile and of the state of his citizenship.[112]

The Czechoslovak law of conflict of laws does not use citizenship at all as a point of contact in the sphere of the law of obligations.

As regards the application of the law of the deciding court, it should be noted that, in general, this point of contact is used only exceptionally in cases, where a foreign substantive law cannot be used for reasons of public order or because its content cannot be ascertained, or in the case of some questions of qualification. Its regular use would be contrary to the very purpose of private international law.[113]

Finally, there is one more point of contact used for surety in particular, which proceeds from the special, accessorial nature of surety. It is the law of the secured obligation. However, we shall not consider it at this particular point, for its use may be conceived from two aspects. On the one hand, it is considered in connection with the question of whether there is a separate law of suretyship, which has already been

[109] Article 25 of the *Disposizioni sull' applicazione delle leggi in generale* of the Italian *Codice civile.*

[110] Batiffol, *Contrats,* pp. 94, 95, 96.

[111] Ibid., p. 97; Kalenský, op. cit., pp. 248, 249.

[112] See footnote No. 86.

[113] See Bystrický, *Základy,* p. 79; Kalenský, op. cit., pp. 250—251

discussed. On the other hand, if we proceed from the argument that the law governing surety should, in principle, be sought separately, it is still possible to consider this points of contact as one of several, whose use should meet the reasonable settlement of the respective legal relation. It is from this aspect, that it will be discussed in the next part of the present treatise, which is concerned with the rules governing conflict of laws as they apply to surety under Czechoslovak law.

SURETY UNDER THE CZECHOSLOVAK RULES GOVERNING CONFLICT OF LAWS

CHAPTER III

(a) THE EXPRESS PROVISIONS OF THE LAW

Private international law, including the law of obligations has been fully codified in Czechoslovakia for quite some time. However, surety was not expressly mentioned in the previously valid Act No. 41/1948 C. of L. It should be noted that other municipal laws do not contain an express provision governing points of contact in case of surety either. It is interesting that provisions relating to surety are so rare in codifications of private international law, that the only positive provision dealing with surety in foreign codifications is to be found in Articles 212 and 213 of the Codigo Bustamante.[114]

No other provisions dealing expressly with surety could be found in foreign laws of conflict of laws. The problems of conflict of laws relating to surety were also expressly dealt with in Article 65 of the Hungarian draft codification of private international law, prepared by I. Szászy.[115] This provision states that the content and scope of the surety's obligation, i.e. the question what the surety should perform, are considered according to the law decisive for the principal obligation, while the question, whether the surety is liable for the obligation of the principal debtor and under what conditions, is considered according to the law governing the contract between the creditor and the surety. This, in fact, is a literal transcription of the well-known German principle of division between o b and w a s in the case of surety. This Hungarian draft, which proceeds from the principle of a separate law of suretyship, does not, however, expressly specify a point of contact. Thus, the law of suretyship, which is conceived as a contract, is to be sought according to the general rules governing the determination of the decisive law for contracts that are subject to the law of obligations.

The fact that foreign laws do not contain rules expressly specifying

[114] Article 212: A regulation prohibiting the surety to bind himself more than the principal debtor belongs to international public order.
Article 213: Regulations concerning legal and judicial surety fall under the same category.
Quoted from Makarov, *Quellen des internationalen Privatrechts,* Vol. II.

[115] See Makarov, *Quellen,* Vol. I.

points of contact for suretyship underlines the advanced nature of the new Czechoslovak Act Concerning Private International Law and the Rules of Procedure Relating Thereto, No. 97/1963 C. of. L., which expressly deals with the question of securing obligations, and thus also surety.[116]

The new Czechoslovak Act connects the matter of securing obligations with the law of the secured principal obligation. However, at the same time, the provision of Section 11 indicates the admissibility of a separate law to govern surety. A more detailed interpretation of Section 11 follows.

(b) INTERPRETATION OF SECTION 11 OF THE ACT CONCERNING PRIVATE INTERNATIONAL LAW

Section 11 of the Act No. 97/1963 must be interpreted in connection with the interpretation of Sections 9 and 10 of the same Act, to which Section 11 refers and from which it proceeds.

Sections 9 and 10 deal with conflict of laws relating to the principal obligations which may be secured. Their provisions cover all contracts establishing obligations.

First of all, contracts are governed by the law which the parties themselves choose (Section 9). As already said, in contrast to the Act No. 41/1948, the parties are in no way restricted in their choice of law. They no longer need to consider the question, whether the chosen law is not contrary to the mandatory provisions of the law which would otherwise govern their legal relation. It is no longer even required that the legal relation have an important link with the chosen law. The only limitation of this otherwise perfect freedom of the parties to choose the decisive law is the provision of Section 36 concerning public order, which could be used to prevent a possible abuse of the freedom of choice of the decisive law.

If the decisive law is not determined in the aforesaid manner, the obligations between the parties are governed by the law whose application is in keeping with a reasonable settlement of the respective obligation (Section 10, par. 1). This rule constitutes the key principle of the rules governing conflict of laws with respect to obligations. The Act then applies this principle to the individual types of contracts. For some types of contracts it expressly specifies the point of contact (Section 10, par. 2). The formulation of this provision indicates that — as the law envisages — by applying these points of contact, we arrive, as a rule, at the law which is in keeping with a reasonable settlement of the respective obligation. The Act does not make the use of these points of contact absolutely mandatory; there may be cases, where, against the

116 See the wording of Section 11 in footnote No. 64.

rule, the application of the specified point of contact does not result in a reasonable settlement of the obligation. In such cases, the Act does not preclude the application of a different law than indicated by the specified point of contact. However, in the case of most of the contracts listed in Section 10, par. 2, it is hard to imagine a case where a reasonable settlement of the respective obligation would require the use of a different point of contact. In the case of the last category of contracts listed under subpar. (g) — contracts involving multilateral barter transactions — no specific point of contact is given, and instead the need of a uniform law governing such contracts is indicated.

The remaining contracts subject to the law of obligations and not listed in Section 10, par. 2, are governed uniformly by Section 10, par. 3. These contracts, too, are subject to the guiding principle of a reasonable settlement, and the provision formulated in the Act is designed for normal cases. In concrete cases, also these contracts may be governed — in the interest of a reasonable settlement — by a different law than that determined by the points of contact specified in the Act. Since this particular provision covers en gros and in a uniform manner a great variety of contracts, departures from the Act will in this case be certainly more frequent than in the case of Section 10, par. 2.

The Act provides for these cases, as a rule, the following three points of contact: (1) the law of the state in which both parties are domiciled or have their seat; (2) the law of the place of conclusion of the contract, if both present parties do not have their seat (domicile) in the same state, and (3) the law of the seat (domicile) of the party accepting the offer to conclude the contract, if the contract is concluded between absent parties which do not have their seat (domicile) in the same state.

The use of the first of these three points of contact, i.e. the law of the state where both parties have their seat (domicile), will most often result in the application of the law which will be in keeping with a reasonable settlement of the respective obligation. However, the other two criteria must be used carefully. It is these two criteria, covering a wide range of contracts not specifically listed, which must be applied more than in other cases only "as a rule"; this means that they must be carefully scrutinized as to whether they can truly result, in every concrete case, in the application of a law corresponding to a reasonable settlement of the respective legal relation, or whether such law must be chosen according to other criteria.

The aforesaid procedure should be used, e.g., especially for loans where it is practical to secure the obligation by surety or otherwise. Loan is not listed among the types of contracts for which the Act expressly specifies the points of contact. The law of the seat (domicile)

of the person who grants money or goods determined generically, i.e. the creditor, is in keeping with a reasonable settlement of the obligation as much as, in the case of a sales contract, the law of the seat (domicile) of the seller. The creditor's action, i.e. the supply of money or goods determined generically, to the debtor, is a characteristic performance for the contract of loan, which distinguishes it from other contracts. The creditor bears a much greater risk, connected with the debtor's ability to pay, as well as the difficulties of enforcing his claim. This speaks in favour of the law of the creditor's seat (domicile) as a point of contact. However, Section 10, par. 3, recommends, according to the circumstances of the case, e.g. the law of the seat (domicile) of the party who accepted the offer to conclude the contract, as the decisive law; in view of the frequent changes in the position of the parties as offerors in the preparatory, written negotiations preliminary to the conclusion of the contract, this may lead to a fortuitous result. The law thus determined is then recommended under Section 11 also as the law applicable to the manner in which the loan is secured.

When interpreting Section 11, we must proceed — with respect to the relations settled therein — from the principle of a reasonable settlement of the obligation as the key principle of the rules governing conflict of laws involving obligations. Section 10, par. 1, constitutes the basic provision expressing a principle whose significance, as will be shown, is not limited to the law of obligations alone. It is a rule superior to the other rules governing conflict of laws in the sphere of the law of obligations, which represent its application to the individual types of obligations. As the result of abstraction from numerous, repeated cases occurring in practice, these rules cannot achieve the intended result, i.e. the reasonable settlement of the respective obligation, in every single case. Thus, Section 10, par. 1, offers the possibility to correct in such a concrete case the undesirable result, which would be obtained by the unconditional use of the point of contact intended by the law to help achieve the desired settlement in most cases.

A closer scrutiny of Section 11 will show that the procedure of applying it to legal relations resulting, e.g., from the fact of securing an obligation, is the same as the procedure of applying Sections 9 and 10 to the principal obligation to which the respective security is added.

In the case of secured obligations we must first examine, whether the intent of the parties does not indicate the applicability of a particular law to the security, which may differ from the law governing the principal obligation. This corresponds, in the case of a principal obligation, where the decisive law is determined under Sections 9 and 10, to ascertainment as to whether the parties had made a choice of law.

When, in the case of securing obligations, the parties make clear their intention that a certain law is to be applied, this amounts to a choice of law. For, if the intent of the parties is to have any legal meaning, it must be manifested. If the parties to a legal relation, arising from the securing of an obligation, manifested the intent that the security be governed by a particular law, they in fact manifest their will to subject the security to such law, i.e., they choose a particular law.

If the parties did not manifest any intent as to the decisive law, we must examine, whether the nature of the matter does not indicate that a different law than the law of the principal obligation is to apply to the security extended to the obligation. What is to be understood under the term "the nature of the matter" used in Section 11? If we reach the conclusion that the nature of the matter, in the case of a relation established by the fact that an obligation has been secured, implies that the security is to be governed by a particular law, this must necessarily mean that it is in keeping with a reasonable settlement of such relation if the relation is governed precisely by this law. It cannot be assumed that the application of the law implied by the nature of the matter would result in another than a reasonable settlement of the legal relation.

The procedure is the same as in the case of the principal obligation. There, too, if the parties failed to choose a law, a law in keeping with a reasonable settlement of the obligation should be applied under Section 10, par. 1.

If we fail — in the case of the principal obligation — to find that the application of some other law would be in keeping with a reasonable settlement of the obligation, we apply the law indicated by the point of contact specified in the Act; similarly, if, in the case of security, we do not conclude that the nature of the matter indicates the application of another law, the Act directs us to apply the law of the principal obligation. Just as the points of contact listed in Section 10, this, too, is in most cases in keeping with a reasonable settlement of the legal relation arising from the security. We shall discuss further below, whether this assumption of the Act is correct.

There is also the possibility of using the reverse procedure in cases where the parties failed to choose a law. We first apply the law indicated by the specified point of contact, and only if the achieved result seems to be inappropriate, do we examine, whether the application of another law is not in keeping with a reasonable settlement of the legal relation. This procedure seems to be more acceptable in practice — because of its greater simplicity — than the opposite procedure which is more demanding but is correct. However, we must expect legal practice to strive for greater simplicity, so that the principle of a reasonable settlement or

the nature of the matter should be used to set matters right in exceptional cases. Thus there is a tendency to view points of contact as the basic assumptions of the proper way of ascertaining the law which is in keeping with the reasonable settlement of the respective legal relation, while, in fact, they serve merely as examples and guidance for ascertaining such law.[117]

We shall now deal with individual questions important for the interpretation of Section 11.

aa) Determination of the Decisive Law by the Choice of Law

We shall first discuss the ascertainment of the decisive law from the intent of the parties, i.e. the choice of law.

Section 11 speaks of the intent of the parties. By this it means primarily the concurrently manifested will of both parties to the obligation established by the provision of security for an obligation, in this case the provision of surety. This provision creates no problem, where surety is established by contract between the surety and the creditor under the principal obligation. It is a normal choice of law by agreement between the parties.

As already mentioned, under the Code of International Trade, surety may also be given by a unilateral declaration of the surety. We must ask, whether Section 11 should not be interpreted as meaning that, in this case, the decisive law cannot be ascertained from the intent of the parties, because there is only the intent of one party — the surety — while the intent of the other party — the creditor of the principal obligation — need not even be manifested for surety to be established.

Already when discussing choice of law, we admitted the possibility of a unilateral choice of law for an obligation established by a unilateral legal act, namely through Section 9, which distinguishes the new Act from the Act No. 41/1948, whose Section 9 contained a more suitable formulation.[118] Where surety is established by a unilateral legal act, reference to the law indicated by the manifested intent of the surety may also be warranted by the argument that by mentioning the intent of the parties, Section 11 means those parties, whose intent is relevant to the establishment of the legal relation concerned. If in some cases of surety the manifestation of the will of one party only is legally

[117] Bystrický, *Základy,* p. 297; also see the introductory report on the Act No. 41/1948 relating to Sections 44 to 48 of the Act.

[118] Section 9: "The parties may subject their legal relation to a particular law . . ."

relevant to the establishment of the respective legal relation, such manifestation must be sufficient for determining the law that is to govern this relation.

In practice, the surety would in most cases specify the law of his domicile as decisive. In such case, the application of this law is also supported by the provision of Section 14 (whose relation to Section 11 in cases of surety established by a unilateral declaration will be discussed below).

In these cases the chosen law of the surety's domicile could be applied for another reason as well. It can be easily shown that the law of domicile ensues from the nature of the matter and is in keeping with a reasonable settlement of the obligation. The manifested intent of the party to subject his obligation to the law of his domicile would constitute only one factor which, together with another factor, i.e. the fact that the obligation was established by a unilateral act, in which case the law refers in general to the law of the debtor's domicile, would lead to the conclusion that the law of the surety's domicile is best in keeping with a reasonable settlement of the obligation.

However, there is no need to refer to the law of the surety's domicile in this roundabout way, since it can be referred to directly as the law unilaterally chosen by the surety. Even if the possibility of a unilateral choice of law in the case of unilaterally established obligations were not accepted generally, the provision of Section 11 would still contain an exception for cases to which it applies. In contrast to other obligations established unilaterally, this exception would also be warranted by the nature of the relations affected by the provision of Section 11. In many cases the surety has undoubtedly a justified interest in having his obligation governed by a different law than the principal obligation, especially if the law of the principal obligation is not the law of his domicile. On the other hand, in the cases governed by Section 14, we would rarely meet with a situation, where the debtor would want his obligation governed by a different law than the law of domicile specified therein. If, in an exceptional case, the debtor would nevertheless have a justified interest in the application of another law and would so express himself, then, provided, of course, that the possibility of a unilateral choice of law were perhaps not to be accepted, the thus manifested will could at least be applied as a factor leading — in the analysis of the legal relation — to the consideration as to whether the law referred to by the will of the obligor should be applied from the viewpoint of a reasonable settlement of the obligation, instead of the law determined in accordance with the point of contact specified in the Act.

(bb) The Nature of the Matter — Reasonable Settlement

Apart from the intent of the parties, the nature of the matter is important for the application of the provisions of Section 11. As already mentioned, no difference should be made between the law ensuing from the nature of the matter and the law which is in keeping with a reasonable settlement of the relation between the parties. This is also indicated by the fact that the principle of the reasonable settlement of the relation between the parties is the key principle superior to all the rules governing conflict of laws in the sphere of the law of obligations, including the provision of Section 11. In view of the decisive importance of the principle of reasonable settlement for surety as well as for all other obligations, it is only fitting to discuss it in some detail.

The concept of reasonable settlement is not original in the new Act No. 97/1963, nor was it in the previous Act No. 41/1948. The term had already been used in the so-called Vienna draft of the law concerning private international law, prepared by the Austrian Ministry of Justice in 1913.[119] The Act No. 41/1948 did not mention reasonable settlement as frequently as the subsequent Act No. 97/1963. The latter Act mentions reasonable settlement also in other places, outside the sphere of the law of obligations, namely when dealing with questions important for the whole range of private international law. Thus the Act expressly speaks of a reasonable settlement when settling the validity of legal acts in Section 4 and when dealing with renvoi in Section 35. These provisions concern all legal relations with a foreign element. They indicate the intent of the Act to govern every legal relation with a foreign element by a law which is in keeping with a reasonable settlement of the relations between the parties.

Thus we reach the conclusion that what has already been said of the superiority of the principle of reasonable settlement as the dominant rule governing conflict of laws relating to obligations applies to the whole sphere of private international law.

The whole range of points of contact listed by the Act No. 97/1963, all of which are designed to indicate the law which is in keeping with a reasonable settlement of the respective legal relation, show that a reasonable settlement of the legal relation as such is not a point of contact but the goal to be achieved by the use of a particular point of contact, as well as a guide indicating that the point of contact should be determined so as to achieve that goal.

The instruction how to proceed must be drawn directly from the Act

[119] The introductory report on the Act No. 41/1948, regarding Sections 44 to 48.

which for some relations under the law of obligations (Section 10, pars. 2 and 3) lists the points of contact as a kind of legal model, indicating at the same time and expressly the possibility of using a different criterion in atypical cases, while elsewhere it specifies points of contact which appear as if they were ex lege in keeping with a reasonable setlement of the respective legal relation.

If we study the individual points of contact, we see that, e.g., in the case of certain contracts the Act lays stress on that party to the contract, whose performance is characteristic for the legal relation involved and which distinguishes it from other legal relations, and refers to the domicile of such a party; in the case of other contracts it does not lay stress on the party to the contract and his performance, but rather on the object of the legal relation and refers, e.g., to the place where the respective object is located (e.g. in the case of contracts concerning real property). In still other cases, involving matters of personal status and family affairs, the stress is on citizenship, etc. The process whereby the Act arrived at the determination of these points of contact, which in the intent of the Act, should be in typical cases in keeping with a reasonable and — as it states in connection with renvoi — a just settlement of the legal relation, must be identical also for cases where the points of contact are not given or when it is concluded that the point of contact specified in the Act is not in keeping with the requirement of a reasonable and just settlement in a concrete case. The only possible procedure in this respect is the analysis of the legal relation down to its individual elements which relate it to different laws. This will show that in every legal relation with a foreign element there are several, but at least two, relations that connect it with several, but at least two, different laws. These relations may differ in their strength, importance and significance. What must therefore be done, is to distinguish these relations according to the degree of their importance and to apply that law, with which the legal relation involved is tied most closely and significantly. Such point of contact will undoubtedly be most reasonable, and the application of any other law would not be wise.

It is necessary to explain the term "just settlement" which appears in Section 35 of the Act in the combination "reasonable and just settlement of the relations involved". What justice is involved in the law of conflict of laws? We must exclude any assessment of whether this or that law is more just, for this would be contrary to the purpose of private international law to promote international co-operation, as well as to the peaceful co-existence of states, the principle of sovereign equality of states and the related inadmissibility of criticism of the legislative acts of a state by the agency of another state. Nor can a just settlement be

arrived at by ascertaining the concrete rights and obligations of the parties, arising from the legal relation under consideration, under every law related thereto, and, by comparing the results, choose the law which would seem more just for achieving the desired end, that is a just settlement. It is obvious that in one case the result may be more advantageous for one party and in another case for the other party. A certain regulation of social relations is just according to one law, while another law considers as just a different set of regulations. This, after all, depends on certain class interests which one or another legislator follows by his acts. The law of conflict of laws is not concerned with such material justice. There the term "justice" has a different meaning. This difference is known in the theory of private international law which distinguishes justice under substantive law from justice under the law of conflict of laws.[120] This latter justice must simply be understood as a settlement achieved by the application of the law to which the legal relation concerned is most closely linked.[121]

If a just and reasonable settlement of a legal relation is to be achieved by applying the law which has the most important link with the legal relation concerned, we must ask, by which criterion we are to judge the intensity of the importance of this or that link. There is no uniform answer to this question. It depends on the consideration of every concrete case, which bears in mind all the existing circumstances of such case. In the case of some legal relations, the intensity of the importance of the link with a particular law will be given by the importance of the element which constitutes the link. Then this link will be chosen as the point of contact, even though several other elements may link the legal relation with another law. For example, in the case of a sales contract, the domicile of the party on whom depends the performance characteristic of this contract, i.e. the seller, surpasses by its importance all other possible elements, such as the place of conclusion of the contract, the place of performance, the domicile and citizenship of the buyer, etc.,

120 Kegel G., *Internationales Privatrecht,* München and Berlin, 1960, pp. 26—27; the author distinguishes between *internationalprivatrechtliche Gerechtigkeit* and *materiellprivatrechtliche Gerechtigkeit.*

121 When seeking the decisive law, the interest in obtaining material justice may exceptionally be realized by the application of the Czechoslovak law, if the effects of the application of a foreign law would be contrary to public order (Section 36 of the Act No. 97/1963), or if the effects of the application of the Czechoslovak law better meet the idea of a just settlement of life situations involving a special interest in such a settlement (in the case of a child domiciled in Czechoslovakia under Sections 23, par. 2, and 24, par. 1, of the aforesaid Act, in the case of adoption under Section 26, par. 3, and in cases of divorce, invalidation of a marriage, or determination of whether a marriage exists or not, under Section 22, pars. 2 and 3 of the aforesaid Act).

which can link the legal relation involved with another law. Therefore, the law of the seller's domicile will be applied, even though all the other elements link the legal relation with another law. This is the rule, but exceptions are possible.[122] The superiority of a relation linked by such an important element of the legal relation should not, as a rule, be negated even by the cumulative effect of the links provided by other elements with a certain other law. However, in other instances such cumulative effect may be applied for ascertaining the most important link. This may be the case with different unnamed contracts, where the performance of one or another party can hardly be proclaimed as more important and characteristic of the respective legal relation. This method of ascertaining the most important link may be used, e.g., for barter contracts, which involve special difficulties in finding the proper point of contact. As already indicated, as an exception to the rule, we may arrive, on the basis of the preponderance of elements providing the links with a particular law, to the conclusion that the application of another law than the one specified by the point of contact listed in the Act is in keeping with a reasonable settlement of the legal relation concerned. If we are to be consistent and apply the conclusions made from the importance of the principle of reasonable settlement to the whole sphere of private international law, we must admit this possibility in exceptional cases everywhere, even in cases where the Act does not indicate it by the expression "as a rule". However, this possibility will scarcely ever arise in relations other than obligations.

(cc) Criticism of Section 11

We have tried to explain how we understand reference to the law which is in keeping with a reasonable settlement of a legal relation. With this understanding in mind, we can now consider reasonable settlement of the obligation arising from surety and at the same time take a critical view of Section 11 of the Act No. 97/1963.

Section 11 has a rather broad scope. In addition to matters of securing obligations, it also covers changes of obligations and the consequences of breaches of obligations. These are all relations which considerably differ from each other.

When an obligation is violated, additional rights and obligations arise between the parties, which would otherwise not appear. The party who broke the obligation may be asked by the other party primarily to fulfil the obligation; under certain conditions, the other party may also cancel

[122] Bystrický, *Základy*, p. 275.

the contract. Quite naturally, these rights are considered according to the law of the respective obligation. No other solution is possible. The other party — if he suffered damage by the breach of the obligation — may also demand compensation. This right, too, is undoubtedly governed by the law of the respective obligation. This appears from the formulation of Section 15. Any express provision relating to the settlement of conflict of laws involving the effects of breaches of obligations is rather superfluous, but the manner in which it is formulated in Section 11, might lead to misunderstanding,[123] for we must reject the idea that the parties would have the possibility to subject these matters to another law or that this might ensue from the nature of the matter.

Changes of obligations involve primarily the assignment of an obligation, the assumption of an obligation, and accession to an obligation. The question of the law governing the assignment of an obligation is quite difficult, and it is acceptable for this act to be governed by a different law than the law of the assigned obligation. However, it is recommended — also in Czechoslovak literature — that the assignment of an obligation be governed by the same law as the assigned obligation.[124] Assumptions of obligations and accessions to obligations may also be governed by a different law than the respective obligation, depending on the circumstances.[125] However, as in the case of assignment, in the case of these two changes of obligations, too, the reference specified in Section 11 may be accepted.

The term "securing obligations" covers several legal institutions connected by their economic purpose. In addition to surety, they include, in particular, mortgage and sub-mortgage, lien, liquidated damages, guarantee by assignment of a right, and banker's security, which the Code of International Trade governs as a separate type of contract, i.e. at least as an accessorial security.

Doubt may arise with respect to some of these institutions, whether conflict of laws relating to them is not governed elsewhere in the Act.

Thus, mortgage and lien are ranged among rights in rem. We may therefore ask, if they are not covered by Section 5 of the Act. However, according to its express wording, Section 5 applies to rights in rem only

[123] The obviousness of this formulation was apparently also realized by the authors of the introductory report on the Act No. 97/1963, who explained it by the endeavour to avoid any possible doubts, for there are cases, where a party tries to apply the lex loci delicti instead of the lex causae. However, this concern does not seem to be warranted, especially in view of the wording of Section 15.

[124] Bystrický, *Základy,* p. 266; Batiffol, *Traité,* pp. 587, 673, 674; Raape, op. cit., p. 469; Schnitzer, op. cit., pp. 582—584; Wolff, *Private International Law,* pp. 538, 544.

[125] Bystrický, *Základy,* p. 269; Schnitzer, op. cit., p. 585; Wolff, op. cit., p. 458.

if the Act does not provide otherwise, which is precisely the case of Section 11. It is rather difficult to deduce from the systematic inclusion of Section 11 among the provisions relating to obligations, that the scope of this provision (concerning ways of securing obligations) should not cover such typical institutions of securing obligations, as mortgage or lien, provided that as rights in rem they are in effect against all third persons. The reservation contained in Section 5 ("unless the present Act provides otherwise") applies not only to the provisions included among the provisions governing rights in rem, but also to provisions included elsewhere in the Act. It is therefore necessary to consider the provision of Section 11, governing, within the scope of secured obligations, also mortgage and lien, as lex specialis with respect to Section 5. This would mean, however, that the Act considers, with respect to mortgage and lien, the law of the principal obligation as the law in keeping with a reasonable settlement of the respective legal relation. The author believes that this argument is untenable. The location of the thing constitutes, in view of the character of these rights, which are in effect not only between the parties but also against third persons, such an important and decisive element, that the link it provides with the law of the location of the thing is much more important than links with other laws, including the law of the principal obligation. The nature of the matter or the reasonable settlement of the legal relation in the case of mortgage or lien are in keeping with the law of the place where the respective thing is located. This point of contact will thus not be an exception in the case of the aforesaid institution of securing obligations, as would seem under Section 11, but the rule. Reference to the law of the place where the mortgaged thing is located is considered proper also in Czechoslovak literature.[126]

The provision of Section 11 is also lex specialis with respect to the provision of Section 14 (which governs legal relations established by unilateral legal acts) as regards cases of surety established by the unilateral declaration of the surety.

As indicated, Section 11 deals in a single provision with so widely differing relations as those established by changes, breaches and securing of obligations. Once matters of securing obligations were included among the rules governing conflict of laws, which undoubtedly represents a step forward, distinguishing the Czechoslovak Act No. 97/1963 from similar legislation of other states, they should have been governed by a separate provision. This would have made it possible to take into account also the

[126] Bystrický, *Základy,* p. 203; also see Schnitzer, op. cit., p. 523, Raape, op. cit., pp. 545, 566; and Batiffol, *Traité,* p. 560.

specific features of the individual institutions of securing obligations. In addition to the aforementioned mortgage, we may point in this connection, e.g., to banker's security, in which case the seat of the bank would undoubtedly be of special significance for the respective point of contact.

(dd) The Law of the Principal Obligation and the Law of the Surety's Domicile (Seat)

In the case of obligations arising from surety, the link with different laws can most often be provided by the following elements, into which the legal relation established by surety may usually be broken down: the surety's domicile, the surety's citizenship, the creditor's domicile, the place of conclusion of the suretyship contract or the place where the surety made his unilateral declaration, the place of performance of the surety's obligation, the currency in which the obligation is to be performed, and the dependence of surety on the principal obligation.

If we are now to classify the aforesaid elements according to the intensity of the importance of the links they provide with a particular law, we may refer to what has already been said in the analysis of the individual points of contact occurring in literature and judicial decisions with respect to surety. In this sense, we may consider as less important the links provided by the creditor's domicile, the place of conclusion of the contract or the place where the surety made his declaration, and the place of performance. The same may be said of the currency in which the obligation is to be performed. We have not come across a case where it would be considered as an important factor for determining the decisive law applying to surety; it might perhaps find limited application only for determining the amount of the obligation in the case of special currency measures. Similarly, no special attention need be paid to citizenship. In contrast to legal relations of a personal nature, as well as those ensuing from family and probate matters, the Czechoslovak law of conflict of laws does not assign any importance to citizenship in the sphere of the law of obligations. This leaves us with the links provided by the accessoriness, the dependence of surety on the principal obligation and the surety's domicile (seat), and it is these links on which we must concentrate our attention.

The choice between points of contact which will result in a reasonable settlement of the relations involved in surety, is thus reduced to the question, whether surety is to be governed by the law of the principal obligation or the law determined according to the surety's domicile. The importance of the accessorial nature of surety as a point of contact has

already been discussed above in the part dealing with the question of the existence of a separate law of suretyship.

We must, however, add that by applying the law of the principal obligation to surety, we cover by a single law both the principal obligation and the obligation arising from surety, as well as some other relations, such as the relations between co-sureties, if one obligation is secured by more than one surety, or the relations between the surety and the owner of a thing mortgaged as security for the same obligation, provided that the mortgage, too, as a means of securing obligations, were subjected to the law of the principal obligation.

A uniform legal regulation of economically connected relations undoubtedly has its practical advantages. For this reason, the Czechoslovak Act No. 97/1963 strives precisely for such a regulation. Apart from the provisions governing the means of securing obligations, this endeavour is also apparent from the provisions dealing with multilateral barter transactions, where these transactions are subjected to a single law — against the opinion of Czechoslovak legal literature which, in spite of their economic and legal links, considers the individual contracts as separate, and argues that each of them has its own, contractual statute.[127]

However, this endeavour may sometimes get into conflict with the principle of reasonable settlement. Economic links, even the dependence of a legal relation on the existence of another legal relation, do not yet warrant reference to a uniform law. Surety involves relations between the creditor and the surety, i.e. a person differing from the debtor. When determining the point of contact, it is therefore also necessary to assess the importance of the surety's status. The full weight and duties of the respective obligation rest on the surety. When, in the case of surety, we speak of the creditor's duties, these involve a certain behaviour, the performance of certain acts which are necessary for the creditor to preserve his rights towards the surety. The sanction for failure to observe these duties is the extinction or lessening of the surety's obligation. Thus, the surety's performance characterizes this particular legal relation. This one-sided nature of the relations in the case of surety undoubtedly results in situations, where — even though surety is mostly construed as a contract — the participation of the creditor in the establishment of this contract is so passive, that in many instances it is very difficult to infer the concurrent expression of his will. This development, as already mentioned, was brought to its climax in the Czechoslovak Code of International Trade which in its definition of surety admits its establishment also by the surety's unilateral act

[127] Bystrický, *Základy*, p. 290.

alone, without the necessity of the creditor's expressed consent. This practical development is also an argument in favour of stressing the position of the surety as regards points of contact.

In addition to the practical endeavour to achieve a uniform regulation, which is useful primarily because it facilitates the work of the deciding agency, but which should not be the decisive factor in rules governing conflict of laws, reference to the law of the principal obligation may also find support in the argument that, if a person provides surety for another person's debt, he thereby also submits to the law which governs such debt. This argument was, in fact, raised a long time ago.[128] Since then, however, this idea has been surpassed. Today the main objections would be raised primarily by the banks which seem to appear most frequently as sureties.[129] If a legal regulation, and that also applies to the Czechoslovak Act No. 97/1963, tries to subject the obligations arising from surety to the law of the principal obligation, it may be expected that this will occur in practice only rarely with those sureties who will not provide for the decisive law by expressly agreeing thereon. Undoubtedly, the banks will try to preclude such point of contact by expressly determining the applicable law which, quite naturally would be the law of their seat. We must therefore expect — and it is even recommendable — that Czechoslovak banks, too, will in the future include in their guarantees, to which this point of contact refers, provisions determining the law of their seat, i.e. Czechoslovak law, as the law governing the guarantee (security) irrespective of the law of the principal obligation. In view of this fact, the point of contact specified in Section 11 for securing obligation cannot be expected to be often applied in practice.

Thus we reach the conclusion that in normal cases of surety, it is the law of the surety's domicile or seat, which is in keeping with a reasonable settlement of the respective legal relation. The author believes that it is this point of contact to which the Czechoslovak law should give preference over the law of the principal obligation. No breach of law will be involved, he also believes, if in the case of surety, more than in other cases, the reference to the law of the principal obligation, recommended by the Act No. 97/1963, will be corrected on the basis of the guiding principle of the Act, i.e. the principle of a reasonable settlement of the legal relation, by a duly warranted application of the law of the surety's domicile or seat. In the case of surety more than in any other case, a correct procedure is necessary for interpreting and applying the

[128] By the French author Bouhier, mentioned above in footnote No. 8.

[129] See Bystrický, *Základy*, p. 270.

respective rule of the law of conflict of laws, which presupposes that the point of contact recommended by the Act should not be viewed as a legal presumption determining a law which is in keeping with a reasonable settlement, but as an aid which the Act tries to provide.[130] At the same time we must bear in mind that in most cases this aid is effective and may be relied upon, but in this particular case must be accepted critically.

This should be understood as meaning that in normal cases the law of the surety's domicile will, as a rule, be in keeping with a reasonable settlement of the respective relations. It also means that there is nothing to prevent the use of another point of contact on the basis of the principle of reasonable settlement in a concrete case and if there are grounds warranting it; this would primarily apply to the law of the principal obligation.

The application of the law of the principal obligation may also be warranted when the circumstances of a case indicate a much closer tie between surety and the principal obligation than normal. This may be documented, in particular, in cases where the principal obligation is concluded and surety is provided in the presence of all the parties, e.g. where the creditor, the debtor and the surety attach their signatures at the same time to the same document. In such cases the law of the principal obligation could sometimes also be applied to surety as a tacitly chosen law, especially if the surety attaches his declaration to the document establishing the principal obligation, which contains the provision concerning the choice of law.[131]

The application of the law of the principal obligation to surety ensues from the accessoriness, i.e. the dependence of surety on the legal relation between the creditor and the principal debtor. For the sake of completeness, it is therefore necessary to ask, whether the point of contact can be affected by the legal relation between the surety and the principal debtor. As already indicated, the surety assumes his obligation towards the creditor usually on the basis of a certain legal relation existing between him and the principal debtor; most often such relation is established by a contract of commission. However, this internal relation

130 See Bystrický, *Základy,* p. 297.

131 Rabel, op. cit., p. 352, recommends — in the spirit of American decisions and provided there are no indicators to the contrary —application of the law of the principal obligation in the following situations: (a) the surety and the principal debtor conclude the obligation by signing the same document or otherwise jointly; (b) the principal obligation is governed by the law of the creditor's domicile; he himself recommends the application of the law of the principal obligation in yet another case, namely (c) if the surety intervened under a contract with the principal debtor, of which the creditor knew.

between the surety and the principal debtor cannot, in principle, influence the point of contact because the creditor need not even know about it. But even if he did know, the reason why the surety assumes his obligation does not affect the relations between the creditor and the surety.

(ee) Other Possible Points of Contact

Apart from suretyship, there may be another legal relation between the creditor and the surety, with which surety is connected. In international trade it is primarily surety assumed by commercial agents. Such surety may be assumed by the commercial agent in the actual agency contract with respect to all deals negotiated by him, or he may assume surety only in the case of a certain deal which he negotiated. In these cases, where surety is assumed in close connection with the activities of the agent, there exists a very important link between surety and the relation existing in addition between the agent and the principal. This relation is established by the commercial representative's contract. Therefore, it will be in keeping with a reasonable settlement of such cases, if surety is governed by the same law as the relation based on the commercial representative's contract.

(ff) Conclusion

Concluding the consideration of the question of points of contact relating to surety under Czechoslovak law, we have arrived at the opinion that the application of the law of the surety's domicile or seat should be given preference over the application recommended by the Act No. 97/1963.

The wording of Section 11 notwithstanding, we may — without violating the provision of Section 11 or without forced interpretation — arrive in every case of securing obligations, including surety, at a point of contact which is fully in keeping with a reasonable settlement of the legal relation involved. It is obvious that connecting surety with a law which differs from the law of the principal obligation may result in certain complications which we could avoid by applying the law of the principal obligation. This we shall discuss further below. However, these difficulties cannot provide the decisive argument against the principle of a separate ascertainment of the law applicable to surety. It is this principle, too, which is, in the end, accepted by the provision of Section 11 of the Act No. 97/1963.

In addition to cases where surety is established by a legal act — either a contract or a unilateral declaration — surety may sometimes be established ex lege. In other cases, surety is assumed for certain obligations towards a court or an official agency. It is universally recognized that surety established ex lege is governed by the law under which it was established, while judicial or official surety is governed by the law of the court or the official agency towards which it was assumed.[132]

In these cases there is often concurrence between the law governing surety and the law of the principal obligation.

Thus, for example, under the Code of International Trade, surety is established ex lege in cases provided for by Section 423, under which parties to a multilateral barter transaction, who have their seat (domicile) on the territory of the same country, are jointly and severally liable for the performance of the obligation of each of them towards parties who have their seat (domicile) on the territory of another country. In this case the establishment of surety ex lege is conditional upon the obligation of the parties being governed by Czechoslovak law, i.e. the Code of International Trade. Then there is concurrence between the law of the secured obligation and the law of surety. Otherwise, surety ex lege for the obligations of these parties may come into consideration only if it is established under the law governing their obligations; such surety ex lege would then be governed by this rather than by Czechoslovak law.

However, there can also be cases where statutory surety and the secured obligation will be governed by different laws.

For example, under Section 638 of the Code of International Trade, members of an association which is a juristic person are liable for the obligations of the association only to the extent of their respective shares, unless otherwise indicated in the register in which the association is entered. In such cases it is quite possible that surety will be established ex lege and will be governed by Czechoslovak law (i.e. the Code of

[132] See Rabel, op. cit., p. 352; Letzgus, op. cit., p. 853.

International Trade), even though the obligation of the association will be governed in a concrete case by a foreign law. It may similarly happen in a case envisaged by Section 720 of the Code of International Trade, that a person who uses another person for the performance of his duties under the aforesaid Code, and such other person causes damage to a second party by a breach of duty other than those governed by the Code, is liable to the second party for the damage. The statutory surety of such person, established under the aforesaid Section 720, will be governed by Czechoslovak law, while the obligation of the person he had used to compensate the second party for the caused damage may be governed by other than Czechoslovak law.

The determined law governing surety does not settle all the problems of this legal relation. There, too, when defining the scope of the application of the decisive law, aspects common also to other legal relations, as well as aspects specific of surety and ensuing from its accessorial nature will find their application.

Just as in the case of other legal relations, it is necessary to consider separately questions of capacity to assume a suretyship obligation and the question of the form of surety.

(a) THE CAPACITY TO ASSUME SURETY

In the case of surety, questions related with the capacity to assume obligations are rather practical. The notorious senatus consultum Velleianum restricted married women in any intercession whatever, including the assumption of the obligation arising from surety. Under the impact of Roman law, these restrictions are still applied in some municipal laws even today.

In some instances there is a question of qualification as to whether the provisions of this kind concern legal capacity or form. Thus, e.g., under the general law (gemeines Recht), surety assumed by a woman became effective only after the woman had been given judicial advice before waiving her objection in accordance with the senatus consultum Velleianum.[133] Similarly, under other legal systems, a wife had to make her declaration assuming surety in court, but the court had no right to approve the declaration or cancel it.[134] These provisions are considered as formal provisions which do not govern legal capacity.[135] It follows therefrom that they need not be observed, if such form of assuming surety is not required under the law of the place; in fact, quite often it could not probably even be observed. The assumption of surety would in this case be valid irrespective of the provisions of the surety's personal statute.

133 Rilling, op. cit., pp. 48, 49.
134 Article 5 of the Württemberg Act of May 5, 1828.
135 Letzgus, op. cit., p. 847, and the there quoted decision RGZ 9, 176.

Under Swiss law, the husband must have the consent of his wife for assuming surety, and vice versa. Schnitzer considers this rule as a special provision on legal capacity. In his opinion, the consent of the other spouse is necessary for the establishment of any surety governed by Swiss law. The otherwise applicable principle of reference to the law of citizenship cannot be applied in this case.[136]

Under Czechoslovak law, the capacity to assume the obligation arising from surety will be governed, as in the case of capacity to perform other legal acts, by lex patriae; if surety is to be assumed in Czechoslovakia, it is sufficient, if a foreign national has the capacity to perform this act under Czechoslovak law (Section 3 of the Act No. 97/1963). A foreign regulation requiring the consent of the husband for the assumption of surety by his wife due to her unequal status could not be applied because of Section 36 of the aforesaid Act, concerning public order.

(b) THE FORM

The question of form and its settlement in the provisions governing conflict of laws is important as regards surety in view of the importance assigned to the form of surety in a number of laws.

Some laws, under which surety is established by a contract concluded between the creditor and the surety, require a written form only for the surety's declaration. They do not require a written form also for its acceptance by the creditor. When applying the principle of the application of the law of the place where the legal act was performed to the form of the act, complications may arise in view of the difficulties involved in the determination of the place of conclusion of the contract. According to a Reichsgericht decision, the contract of surety is considered as concluded in the place where the creditor accepts the surety's declaration. For this reason, the surety's declaration must have a form required in such place, irrespective of the law of the place where the declaration was made.[137] This view, which strictly refers the form of the legal act — the issuance of the surety's declaration — in the case of a contract between absent parties to the law of the place of conclusion of the contract, cannot be accepted. The difficulties arising when determining the place of conclusion of the contract between absent parties have already been pointed out. Rilling, too, does not agree with the aforesaid opinion of the Reichsgericht. He points out that the provision concerning the

[136] Schnitzer, op. cit., pp. 657—658.

[137] Rilling, op. cit., p. 51; the decision involved is RG 62, 79.

form of the surety's declaration exists to protect the surety from assuming ill-considered obligations. However, since Rilling, too, refers to the law of the place of conclusion of the contract when considering the form of the respective legal act, he considers the place where the surety made his declaration as the place of conclusion of the contract of surety.[138]

This opinion cannot be accepted either. It constitutes an artificial construction which is undoubtedly contrary to the practice of German and other laws in determining when and by whom a contract between absent persons is concluded. However, the result this criticism of the Reichsgericht decision wants to achieve is proper and meets the needs of international legal contacts. The way out is not, of course, in a heavy-handed reference to the place of conclusion of the contract, which must be artificially determined in the case of absent parties to the contract, but in an analysis of the individual manifestations of the parties' will, which resulted in the contractual consensus, as done by Section 4 of the Act No. 97/1963. It is sufficient to observe the form prescribed by the law of the place where the parties manifested their will. This provision clearly refers — in the case of the form of the surety's declaration — to the form prescribed by the law of the place where the declaration was made, while as regards the form of the acceptance of the declaration, it refers to the form prescribed by the law of the place where the creditor accepts the surety's declaration. Quite understandably, it is no longer a matter of form, whether the validity of the obligation arising from surety requires the acceptance of the surety's declaration by the creditor. This is a matter touching upon the very essence of surety, namely whether the establishment of this legal relation requires a bilateral manifestation of the will of the parties, or whether it is established by a unilateral act alone.

If the law of the place of the issuance of the surety's declaration is applied to the question of the form of such declaration, it is necessary to apply — in addition to rules directly governing the question of form — also those provisions of the same law, which state how a lack of form may be corrected.

The great diversity of the laws of the individual German states and provinces prior to the unification of German civil law resulted in interesting decisions dealing with situations which today can no longer occur, but from which general conclusions can nevertheless be drawn. Mention has already been made of a decision which stated that a rule of Württemberg law, under which a wife must make her declaration assuming surety before a court, was a rule relating to form, which need

[138] Ibid., p. 51.

not be observed in Baden, where the contract had been concluded, because in other cases, too, where legal regulations required the observance of a certain form for the validity of a particular legal act (e.g. a grant), this was done for the purpose of protecting the parties from hasty decisions, without, however, the respective provisions losing for this reason their formal nature. This nature was not excluded even in cases where a specific form was not prescribed for all legal acts of such kind, but only for acts of a certain category of persons.[139]

As already indicated, the question of the form of surety is a rather important one and is recognized as such in most laws. Provisions regarding the written form of the surety's declaration are often the only provisions of mandatory nature in the whole set of legal provisions governing surety.[140]

The importance of the form of the legal act establishing the obligation arising from surety is connected in individual laws with a question of importance also for other legal institutions, where the rules governing the form of an act try to protect inexperienced parties from a hasty assumption of burdensome obligations, namely the question, whether such a rule, which is of mandatory nature, expresses a principle whose observance must be enforced by the application of the reservation of public order. Thus, e.g., Schnitzer states with respect of Swiss law, that because of the protective character of the provisions concerning surety, the form prescribed by Swiss law had to be observed in the case of all sureties assumed in Switzerland. He believes that in these cases the inner link with Swiss law is so strong that a less strict form would be inconsistend with the Swiss concept of law.[141] This must be understood as meaning that the aforesaid rule applies to all sureties assumed in Switzerland, i.e. even those to which a different law is applicable. On the other hand, according to the same author, a surety assumed abroad would also be valid under Swiss law, if it was assumed either in the form required by the law of such surety, or by the law of the place.[142] Similarly, a recently published decision of the Swiss Federal Court recognized that the form prescribed for the surety's declaration by German law was acceptable for a surety assumed in Germany, and reached the conclusion that the demand of an authenticated form under Article 493 OR, even though this was a mandatory rule, was not a re-

139 See footnote No. 135.

140 With respect to German law, this is said of Section 766 BGB by Rilling, op. cit., p. 52; as for Czechoslovak law, see Section 195 in connection with Section 722, par. 2, of the Code of International Trade.

141 Schnitzer, op. cit., p. 657.

142 Ibid., p. 657.

quirement of Swiss international public order, and its non-observance did not warrant the refusal to issue an exequatur with respect to the German decision.[143]

German literature states on this question, in connection with the question of circumvention of the legal provisions, that Section 766 BGB, concerning the form of surety, protects those who are inexperienced; however, a person who travels to another country to conclude a legal act using the legal forms of such country, should not be considered inexperienced, and in such a case, the provision of Article 30 EG BGB would not be considered.[144] In this connection it may also be pointed out that the German author Neuhaus uses the question of the form of surety to support his recommendation that the violation of the purpose of the law should be prevented not only if the violation is done on purpose, but also if it occurs accidentally, irrespective of the level of intelligence of the parties involved.[145] It should not be overlooked that in commercial life parties make use of the differences existing between individual laws, e.g. through choice of law among other things. It is therefore hard to accept a general declaration that any such action is inadmissible.

Czechoslovak law of conflict of laws attaches special importance to the written form of legal acts. Under Section 4 of the Act No. 97/1963, it is not enough to observe the form prescribed by the law of the place where the will to act was expressed, if the law governing the contract stipulates a written form of the act as a condition of its validity. In view of the fact that provisions prescribing a written form for surety are of a mandatory nature in many laws, the aforesaid provision of the Czechoslovak law will also be applied in those cases of surety, which are governed by a law stipulating a written form for the assumption of the obligation arising from surety. The same will undoubtedly be true of cases where surety is governed by Czechoslovak law, although under the Czechoslovak provisions, surety may also be assumed by a unilateral act. Even though Section 4 speaks of the law governing the contract, it will be in keeping with the purpose and meaning of this provision, if it also applies to cases of surety assumed by a unilateral act. This is

143 ATF 84, I, 119, Clunet, No. 2, Vol. 88, 1961, pp. 496—501.

144 Rilling, op. cit., p. 55.

145 Neuhaus P. H., *Die Grundbegriffe des Internationalen Privatrechts,* 1962, p. 131; the author quotes by way of example a case, where a German national makes to another German national an oral declaration assuming surety, while they stroll across the French or Dutch frontier. This oral form is valid according to the law of the location (Article 2015 of the Code civil, or Article 1861 BW) but is insufficient under German law. The author believes it unjust, if the decision regarding the validity of such act depended on the degree of knowledge of comparative law possessed by the person who made the declaration.

indicated by the introductory report on the Act No. 97/1963, which explains the provision calling for the observance of a written form stipulated by the decisive law by noting that the effects involved are very serious for the parties and that written form protects the parties against undertaking ill-considered legal acts; for this reason, the report points out, it would be unwise to admit these consequences of the substantive provisions without observing the prescribed form. Surety, too, involves rather serious consequences. It would not be in keeping with the purpose of this provision, if it applied to surety governed by a foreign law, under which it is established by contract, but were not to apply to surety under Czechoslovak law. Otherwise, the principle locus regit actum in Czechoslovak law of conflict of laws is optional with respect to form, beside the law decisive for the validity of both the legal act and its effects.

c) DIVISION OF THE LAW OF SURETY UNDER GERMAN DECISIONS

We have already quoted the decision of the Reichsgericht, which ruled that the law of the principal obligation was decisive for what the surety was to perform, while the law of the contract of surety was decisive as to whether he was to perform.[146]

This division between ob and was, which limits the applicability of the law of surety and defines its scope as against the law of the principal obligation, has become notorious and is accepted by most German literature. It was also literally incorporated in the aforementioned Hungarian draft of a Bill concerning private international law.[147] Lewald compares the relationship between the principal obligation and the obligation arising from surety with the relationship between a reinsurance contract and an insurance contract under insurance law. Both contracts are mutually independent as regards the rules of conflict of laws covering them; this means that both can be governed by different laws, but the content of the insurance contract and thereby also indirectly the law which governs the insurance contract, are important for the scope of the reinsurer's obligation.[148]

German literature concurs that the law governing the principal obligation should be determined separately, i.e. according to the law of conflict of laws of the court, rather than according to the law of conflict of laws governing surety, if the latter law is different.[149]

[146] See footnote No. 12 above.
[147] See above in footnote No. 13.
[148] Lewald, op. cit., p. 259.
[149] Kegel, *Das internationale Privatrecht im Einführungsgesetz zum BGB*, Stuttgart, 1961, p. 574.

According to the aforesaid German division, the law of surety should obviously govern the following questions, which fall under the set of problems involved in the question "whether the surety should pay": the establishment of surety, the question of invalidity, the necessity of form, the surety's objections, the extinction of surety. The law of the principal obligation, which is to govern "what the surety should pay", should be applied primarily to questions concerning changes occurring in the content of the obligation due to a breach of contract, default, impossibility of performance, the amount of claim and the duty to pay interest.

Rilling does not approve of this distinction. He favours the view that surety should be governed in all aspects by its own law which is determined separately. He admits only indirect influence of the law of the principal obligation. If the law of surety makes the surety's obligation dependent on the principal obligation, as regards the content and scope of the former, it is only natural that the law governing such principal obligation, too, is important for, and affects the establishment of, the obligation arising from surety. Rilling criticizes the Reichsgericht and the advocates of its opinion for breaking the logical chain "the surety's obligation — the law of surety — the principal obligation — the law of the principal obligation" by leaving out both or one of the middle links.[150]

Rilling's criticism is correct. The same view is held by Frankenstein who states that only the law of surety can determine whether and to what extent the surety's obligation is connected with the obligation of the principal debtor. The law of the principal obligation is decisive for the content of the surety's obligation only if, according to the law of surety, the surety's obligation depends on the obligation of the principal debtor.[151]

We must agree that it is not the law of the principal obligation but rather the law governing the obligation arising from surety, which determines what the surety should perform. Because the positive provisions of individual laws relating to surety bind the surety to the same performance as the principal debtor, the scope of the surety's obligation must be sought in the law governing the principal obligation. However, it is not necessary to resort to a division of the law of surety as German judicial decisions do.

Under the Czechoslovak law of conflict of laws it is natural and indisputable that the law decisive for surety, as determined under Section 11 of the Act No. 97/1963, governs all questions of the legal relation arising from surety, and, quite obviously, that within its scope and in

[150] Rilling, op. cit., pp. 14—15.

[151] Frankenstein, *Internationales Privatrecht (Grenzrecht)*, vol. 2, 1929, p. 348.

the just indicated sense, also the law of the principal obligation will be indirectly applied. If it is necessary to determine the law governing the principal obligation, this question cannot be settled, even under Czechoslovak law, otherwise than by a separate point of contact chosen under the law of the deciding agency, relating to conflict of laws, rather than under the law of surety, if the latter is not identical with the lex fori. This solution is also indicated by the express reference of Section 11 to the provisions of Sections 9 and 10 of the Act No. 97/1963. A different procedure could have the untenable result, that the same agency would consider the same obligation under a different law, if in one case it dealt with the question of the decisive law in connection with its decision on the surety covering such obligation, while in another case it was called on to decide about the obligation itself. There is no need to stress in particular that the law decisive for the obligation arising from surety — which is quite natural and also ensues from the express provision of Section 4 of the aforesaid Act — governs both the validity of the legal act establishing surety, and its effects.

QUESTIONS OF CONFLICT OF LAWS SPECIFIC FOR SURETYSHIP

CHAPTER VI

(a) BENEFIT OF DISCUSSION

Some jurisdictions consider the surety's obligation a subsidiary one. Under their provisions the creditor cannot move against the surety at will without having previously proceeded to execution against the property of the principal debtor. Under Czechoslovak law, the creditor must, at least, call on the principal debtor in writing, demanding the performance of the latter's obligation. Should the creditor proceed against the surety without first having taken against the principal debtor the steps prescribed by the provisions governing surety, the surety may successfully oppose such move by pleading the benefit of discussion (beneficium ordinis, excussionis). Under Czechoslovak law, which differs on this point from other jurisdictions, the creditor has no claim against the surety in the absence of a previous call on the debtor to perform.

Because the benefit of discussion enters the picture in the case of a judicial enforcement of the creditor's claim against the surety, it appears in practice as a procedural means of defence. This poses the question, whether the plea of discussion is one of procedural law; if it were so, the plea would be governed, under the law of conflict of laws, by the law of the procedural place. It should be noted, though, that almost universally, the plea of discussion is accepted as a matter of substantive law, which means that it is not governed by the law of the procedural court.[152] This argument is also accepted in English and American laws.[153]

Most jurisdictions accept that the plea of discussion should be governed by the law of surety. When dividing the law of surety, the German Reichsgericht considers the benefit of discussion (Einrede der Vorausklage) to be a question falling within the category of ob and therefore subject to the law of surety.[154]

In his work, Rilling also deals with the possibility of other answers

[152] Rilling, op. cit., p. 62; Letzgus, op. cit., pp. 848—849.
[153] Rabel, op. cit., pp. 353—354.
[154] RG 54, 316; 9, 188; 10, 282; 34, 15; Rilling, op. cit., p. 65.

to the aforesaid question. He lists as another possibility the law of the principal obligation and a law which would be applicable to the creditor's duties towards the surety, if the contract between the two parties were considered bilateral, while the creditor's duties would be governed by a different law than that applicable to the surety's obligation. This theory of a separate law applicable to the creditor's duties towards the surety proceeds from the idea that the obligations and duties of each party should be governed separately by the law of such party. This would split the suretyship relation similarly as in the case of reference to the place of performance in synallagmatic contracts, in particular the sales contract. This solution is rather unsuitable, mainly because in suretyship, the creditor's duties are relatively minor and only involve certain acts necessary for preserving the creditor's rights against the surety. The only sanction for their non-observance is the extinction or limitation of the surety's obligation. For these reasons, Rilling basically rejects this possibility; firstly, because German law does not recognize the creditor's duty to sue the debtor, and, secondly, because the surety's obligation holds a dominant position in the relationship between the surety and the creditor. Rilling also rejects any reference to the law of the principal obligation.[155]

The Italian author Fiore, who argues that the creditor's rights towards the surety should be governed by the law of the principal obligation, reaches the conclusion, that the law of the principal obligation should also govern the benefit of discussion. He includes this benefit in the scope of the surety's obligation. Since the law of the principal obligation determines the content of the surety's obligation, it should also govern the surety's pleas.[156] This argument indicates that in contrast to the Reichsgericht, which includes the benefit of discussion in the o b category, Fiore considers this questions as one, which the German court would list among the w a s category in suretyship. This shows how vague and disputable decisions may sometimes be as to what questions should belong into the o b or w a s categories under the German division.

Letzgus criticizes Fiore for overlooking the fact that the starting point in this respect is the separate (under the law of conflict of laws) obligation of the surety, whose content is governed by the principal obligation only to the extent determined by the law of surety, i.e. not directly according to the law of the principal obligation.[157] This German

[155] Rilling, o p. c i t., pp. 63—64.

[156] Fiore P., *Le Droit International Privé*, (French translation from Italian by Charles Antoine), Vol. III, Paris, 1903, pp. 319—321.

[157] Letzgus, o p. c i t., p. 849.

author, too, thereby opposes the division introduced by the Reichsgericht, because he admits that the principal obligation has an effect on the scope of the surety's obligation only to the extent allowed by the law governing the suretyship.

Thus, the conclusion must be derived for the Czechoslovak law of conflict of laws from what has been said above, that the question of whether the creditor must observe certain procedure before proceeding against the surety, is governed by the law decisive for surety. In practice, the Czechoslovak law of conflict of laws would be called on to deal with this problem only if surety is governed by a foreign law which recognizes the benefit of discussion. Czechoslovak law itself does not recognize this benefit. There is perhaps no need to point out that, quite naturally, for the purposes of the Czechoslovak law of conflict of laws, the question of the benefit of discussion is also one of substantive law.

(b) THE SURETY'S PLEAS

The law governing surety also determines what objections the surety can plead against the creditor. There is no doubt on this point.[158] If the decisive law enables the surety to make the same pleas as the principal debtor, the law of the principal obligation may therefore be indirectly applied; e.g. if the surety pleads prescription of the principal obligation, the prescription is, quite naturally, governed by the law of the principal obligation.[159]

It is proper to mention in this connection the application of such facts, which are important for the existence of the principal obligation and which can bring about its extinction; this is especially true of set-off. Doubts may arise on this point, if the law governing surety makes it possible for the surety to refuse performance until the creditor sets off his claim against the claim of his debtor, while this possibility is not given to the surety under the law of the principal obligation (e.g., as Rabel states, this is not possible under American law). Rabel doubts whether the question of using this possibility should be governed by the law decisive for surety, and believes that it should be considered under the law which governs the relation between the surety and the principal debtor.[160] However, in this case, too, it will be proper to apply to this question the law governing surety.[161] This solution will be proper also under Czechoslovak law.

158 Kegel, op. cit., p. 574; Lewald, op. cit., p. 259.
159 Lewald, op. cit., pp. 259—260.
160 Rabel, op. cit., pp. 354—355.
161 Also see Rilling, op. cit., p. 66.

(c) THE RELATIONSHIP BETWEEN THE SURETY AND THE CREDITOR

(aa) Subrogation

The provisions governing suretyship in all jurisdictions are characterized by the protection of the surety who performed for the debtor. Older jurisdictions ordered the creditor to cede to the surety his rights against the principal debtor (beneficium cedendarum actionum). Modern jurisdictions know subrogation — i.e. by meeting the obligation of the principal debtor, the surety is automatically subrogated as a matter of law to the creditor's rights against the debtor.[162]

Subrogation must be distinguished from the assignment of a claim. Subrogation involves a transfer of the claim ex lege. Some jurisdictions require a valid ground for the assignment of a claim, and the assignment often involves the execution of another legal act which must be distinguished from the former. Such other legal act would be governed by its own law, while the assignment may be governed by another law, recommendably the law of the assigned claim.[163]

In the case of the old beneficium cedendarum actionum, the ground for the assignment of the claim was the statutory duty of the creditor to assign his claim to the surety. This duty undoubtedly falls within the scope of the relationship between the creditor and the surety and is therefore governed by the law decisive for the surety. The assignment itself should then be governed — as recommended — by the law of the assigned claim, i.e. the law of the principal obligation.

The aforesaid distinction does not apply to subrogation. It is eliminated by the legal provision which replaces both the negotiation between the parties on the assignment, and the assignment as such. However, subrogation does not involve merely a replacement of the manifestation of the parties' will by a legal provision; it involves a considerable difference from the assignment of a claim. In the case of subrogation, the creditor's rights are passed on directly ex lege, irrespective of the will of the parties; subrogation does not involve an assignment or transfer of the rights concerned, but their transition.

From the viewpoint of conflict of laws, we must solve the question of the law governing subrogation in cases where the law of surety differs

[162] According to A. Koban, *Der Regress des Bürgen und Pfandeigentümers nach österreichischem und deutschem Rechte,* Leuschner und Lubensky's Universitäts-Buchhandlung, Graz, 1904, p. 4, footnote No. 4, the term "subrogation" originated in Canon Law.

[163] See Bystrický, *Základy,* pp. 266—267; Schnitzer, op. cit., p. 584; Raape, op. cit., p. 470; Wolff, *Private International Law,* p. 544.

from the law of the principal obligation. This question would become practical, if one law admitted subrogation, while another law did not recognize it and would, e.g., merely order the creditor to assign his rights to the surety, i.e. if it recognized only the beneficium cedendarum actionum. When comparing legal provisions governing surety under various jurisdictions, the author failed to find a law which would not provide for subrogation in these cases. Beneficium cedendarum actionum was in force under the general law (gemeines Recht) in Germany before the codification of civil law; today it probably no longer exists under any jurisdiction.

The aforesaid question might come under consideration rather with respect to other, secondary rights connected with the claim of the satisfied creditor, whose purpose is also to secure the creditor's obligation. There we could find cases where, in contrast to the more frequent regulations, under which also such secondary rights pass onto the surety by the very fact of his having paid the debtor's obligation, it might in some instances be necessary for the creditor to assign these rights to the surety by a separate act. It is in this sense, too, that this question of conflict of laws is formulated in one of the most recent textbooks on private international law, where the author states that the creditor can have his claim covered by other security from the debtor, and the surety is not indifferent as to whether such security would also benefit him, if he had satisfied the creditor in place of the principal debtor.[164] In the case of these secondary rights it is not only important how the question of their transfer or assignment is considered — in addition to the law of surety — by the law of the principal obligation, but also how it is considered by the law governing these rights directly, which may differ from the two other laws (e.g. in the case of mortgage on real property).

The starting point for dealing with the question of subrogation in a conflict of laws may be the fact that subrogation involves a certain intervention by one law into the sphere of another law, i.e. by the law of surety providing for subrogation into the sphere of the law of the principal obligation. This is connected with the idea that this intervention should be somewhat balanced by making the law of surety providing for subrogation respect such provisions, which would be otherwise applicable only in the case of transfer of the claim on the basis of the law of the principal obligation.[165]

These considerations give rise to the opinion that the question of sub-

[164] Réczei, op. cit., p. 294.
[165] Rilling, op. cit., p. 74.

rogation is governed by the law of surety, but that, in addition, it is necessary to observe the provisions included in the law of the principal obligation for the protection of the debtor, e.g. those concerning the notification of the debtor.[166]

Lewald argues that subrogation, which he calls cessio legis, should also be governed by the law of surety, but ties its application to the condition that under the law of the principal obligation acts required by such law from the parties for assignment may be replaced by the statutory instruction of the law of surety. This procedure, he believes, should be followed, if the law of the principal obligation requires for the transfer of a claim by legal action only the concurrent will of the assignor and assignee; the opposite procedure should be followed, if the law of the principal obligation in addition requires notification of the debtor to make the assignment perfect. Lewald argues that the effect of subrogation depends on whether the law of the principal obligation admits it, which, he says, is also possible, when under this law the statutory transfer does not take place in the same, concrete case.[167]

The view that the transfer of the principal obligation to the benefit of the paying surety is governed both by the law of surety and the law of the principal obligation, which must also order the statutory transfer, is also held by Kegel.[168]

Other authors hold that the question, whether the creditor's claim is transferred ex lege to the paying surety, should not be governed by the law of surety, but the law of the principal obligation.[169]

Among German judicial decisions, the question of the law governing both the beneficium cedendarum actionum and subrogation was considered by the aforementioned decision of the Reichsgericht,

166 Wolff, op. cit., p. 152; Letzgus, op. cit., p. 852.

167 Lewald, op. cit., pp. 276—278; the author points to a decision of the Swiss Federal Court of February 28, 1913, which he considers characteristic. It was not directly concerned with surety, but with the question of subrogation to the rights of an injured party against the tortfeasor in a case of indemnification of the injured under accident insurance regulations. The injury was suffered by a German national who had a claim against the Swiss Railways under Swiss law. He was indemnified under German regulations concerning accident insurance, under which the claim of the injured against the tortfeasor was transferred ex lege, the claim being governed by Swiss law. The Federal Court recognized this transfer because the claim was transferrable under Swiss law and because a transfer ex lege, although it would not have taken place under the Swiss law in this particular case, was not contrary to the principles of Swiss law, and the debtor was not damaged by the change of creditors. Lewald uses this case to underline as a decisive principle, that the effect of a transfer ex lege depends on whether the law governing the claim recognizes in principle transfers of claims ex lege.

168 Kegel, op. cit., pp. 574, 577.

169 Frankenstein, op. cit., p. 350; Schnitzer, op. cit., p. 657.

dated April 23, 1903, RG 54, 311. The question of whether the surety is entitled to the beneficium cedendarum actionum against the creditor, just as the question of subrogation, is governed by the law decisive for the surety's obligation. It is this law, which determines, whether the claim against the debtor will pass to the surety and whether the principal debtor must suffer such transfer with the effects related thereto under the law governing the transfer. However, Lewald, who also quotes this decision, gives preference to the aforementioned decision of the Swiss Federal Court.

The aforesaid Hungarian Bill concerning private international law provided in Section 62, that the question, whether certain claims were transferred to another person under a legal provision without the creditor's instructions, should be considered under the law governing the legal relation existing between the creditor and the third party who had satisfied his claim.

Other views were expressed by Jitta, who favours the law of the principal obligation but on the grounds that instead of becoming extinct, the principal obligation exists further as a guarantee for another creditor,[170] and by Fiore, who also favours the law of the principal obligation, arguing that subrogation should be governed by the same law as the legal fact which makes the subrogation admissible, which, in his opinion, is the law governing the performance of the obligation.[171] Still another opinion was voiced by Rolin, who argues that the decisive law should be the law of the place where the surety makes his payment, but in the case of identical nationality of the parties concerned, recommends the application of their municipal law, which is then in keeping with the nature of the matter.[172]

The author considers as most interesting the opinion expressed in the aforementioned Swiss decision favoured by Lewald. In addition to the applicability, in principle, of the law governing surety to the question of subrogation, it is correct to admit also the effect of the law of the principal obligation, which must — only in principle, without such necessity arising in a concrete case — allow the possibility of an ex lege transfer of the claim. This condition would probably be met by almost every municipal law. A complication might arise in a case, where the law governing the claim would expressly prohibit its transfer. Then it would probably be necessary to respect such prohibition; in many cases even the opposite position could not be advanced against the law of the

170 See Letzgus, op. cit., p. 851.
171 Fiore, op. cit., p. 322.
172 See Letzgus, op. cit., p. 851, and Rilling, op. cit., p. 67, footnote No. 5.

principal obligation. However, if the parties were to exclude by agreement the assignment of the claim, subrogation would take place. In such a case the character of subrogation, which differs in substance from cession, would have to be applied. Subrogation constitutes the transfer of a claim occurring e x l e g e, irrespective of the will of the creditor or the debtor, and, consequently, they cannot prevent this effect of the surety's payment even by agreement. There is no reason why the surety's interest should give way to a private agreement between the creditor and the debtor. If the law of the principal obligation requires that the debtor be notified of the payment of the obligation by the surety, and of the resulting subrogation, this provision must be respected, or else the surety would have to suffer the effects of the failure to make such notification.[173]

Some secondary rights are, in some instances, attached to the secured claim (such as mortgage, lien, etc.). It is then necessary to settle the question, which law is to determine, whether by paying the secured claim, the surety is also subrogated to such secondary rights, or whether he may merely demand their assignment from the creditor. These rights may originate either from the debtor himself, or from a different person. Since, especially in the latter case the situation becomes more complicated, it will be useful to discuss this problem within the scope of the discussion concerning the surety's relation to persons who secure the performance of the obligation by other means.

(bb) The Internal Relation between the Surety and the Debtor

A claim to which the paying surety is subrogated will continue to be governed by the same law as before subrogation. In addition to the right of subrogation, there is in most cases yet another legal relation between the surety and the debtor, on the basis of which the surety had assumed his obligation, such as the relation arising from a contract of commission or agency of necessity. This relation, known usually as the internal relation between the surety and the debtor, is governed by its own law, which may differ from the law governing the principal obligation and thus also the relation between the surety and the debtor due to subrogation. There is a certain inter-action between these relations. Subrogation is to make the surety's right of recovery against the debtor as

[173] The author believes that this is in keeping with the solution favoured by Bystrický in *Základy,* p. 270, who states that the separate law of surety is applied to the question of whether the surety enjoys the benefit of subrogation, but on p. 268 deems it necessary to comply with the demands raised by the respective law (concerning the notification of the debtor, etc.).

effective as possible, but the application of the creditor's rights, to which the surety was subrogated, is limited by this inner relation between the surety and the debtor.[173a] Even though the surety's claim against the debtor, to which the surety was subrogated, will be governed by its own law, i.e. the law of the principal obligation, the surety cannot obtain more on its basis, than that to which he is entitled under his inner relation to the debtor, so that the law governing this relation will also find its application.

(cc) The Surety's Right to Demand Discharge from the Suretyship Obligation or Security before Payment

In some cases and under certain laws, the surety may demand from the debtor, in advance of any payment to the creditor, to be discharged from the suretyship obligation or, at least, to be given security for the eventuality that he will have to satisfy the creditor. These relations exceed the scope of the suretyship relation, which is a relation between the surety and the creditor. For this reason, it would not be proper to give preference — in the case of conflict of laws — to the law governing surety. If there is a special, inner relation between the surety and the debtor, it is proper that the law of such relation also governs the aforesaid right of the surety to be discharged from his suretyship obligation or to be given security. However, otherwise it would be proper for this right of the surety to be governed by the law of the principal obligation. This procedure is supported, e.g., by the argument that the surety may assume his obligation without the consent of the principal debtor, or even against his will.[174] However, the law of surety should be recognized as having a certain influence to the extent, that the surety is entitled thus to act against the debtor only if such right is also recognized by the law governing surety, and the surety cannot demand more than that which he could claim under the law of surety.

In conclusion, it should be added at this point, that also the other duties of the surety and the debtor, arising from their relation (e.g. the surety's duty to notify the debtor that the creditor claims payment from him, the duty to notify the debtor that he has paid the creditor), should be governed by the law of the principal obligation, or by the law which governs the inner relation between the surety and the debtor.

[173a] Koban, op. cit., p. 82, 83.

[174] The author does not agree with Rabel, op. cit., p. 356, who claims that it is desirable for the surety's right to be governed by the same law as his obligation to pay.

(d) RELATIONS BETWEEN THE SURETY AND PERSONS OTHERWISE SECURING THE OBLIGATION

As already noted, by paying the principal obligation, the surety is subrogated to the secondary rights connected with the claims of the satisfied creditor and also serving the purpose of securing the obligation. These rights may be governed by a law different from that of the principal obligation or from the law of surety.

Similarly as in the case of subrogation to the right arising from the principal obligation, we meet also in the case of subrogation to the secondary rights with views taking into consideration the law governing such secondary rights. We may accept as quite self-evident the principle that subrogation to the secondary rights linked with the principal claim can take place only if, by paying the principal obligation, the surety was also subrogated to the right arising from the principal claim.[175]

As in the case of subrogation to the paid claim, in the case of subrogation to the secondary rights, too, it is important to know how to deal with a situation where the law of surety provides for subrogation to the secondary rights, but the law governing these rights does not permit subrogation. This problem may be rather acute in the case of secondary rights, since in the case of mortgages, in particular those placed on real property, the lex rei sitae is applicable. One opinion is so concerned with the interest of a paying surety, that it favours subrogation to be governed in this case by the law of surety, irrespective of any opposite argument raised by the lex rei sitae.[176] On the other hand, there are authors who hold that the law of the secondary right must allow subrogation, or, in some cases, always give preference to the lex rei sitae.[177]

The author believes that it would be unrealistic not to respect the lex rei sitae in these cases. It would therefore be proper to accept a solution which in these cases, too, proceeds from the inter-action of the two laws, i.e. the law of surety and the law governing the secondary right. The question of whether the creditor has the duty to transfer to the paying surety such secondary rights, or whether such rights pass to the surety automatically by the very fact of payment, is governed in principle by the law of surety. However, it is necessary that subrogation also be allowed by the law governing the secondary right. As already indicated, the creditor's duty to transfer to the surety all legal aids and

[175] Rilling, op. cit., p. 76.
[176] Ibid., p. 79.
[177] Pillet A., *Traité Pratique de Droit International Privé,* Vol. I., Grenoble—Paris, 1923, p. 763; Frankenstein, op. cit., p. 350.

means of security is governed by the law of surety.[178] If subrogation to the secondary rights is automatic, the aforesaid duty, as well as the creditor's duty to agree with the necessary entries in public registers, etc., merely serves a better enforcement of the surety's rights and comes fully within the scope of the legal relation between the surety and the creditor. However, sometimes it will be at the same time necessary to observe, e.g., the requirements of form prescribed by the law which governs the secondary right.

Under Czechoslovak law — just as under many other jurisdictions — a person, who secures the performance of an obligation otherwise than by assuming surety, is also subrogated to the creditor's rights, including secondary ones, on payment of the secured obligation. For example, if the owner of a mortgaged thing, who himself is not the debtor, pays the secured obligation, he is subrogated to the creditor's claim including the secondary rights, i.e. also the creditor's claim against the surety who had stood surety for the same obligation. On the other hand, by paying the obligation, the surety is subrogated to the creditor's mortgage.

In such cases we must ask, whether the person who first satisfied the creditor can claim the whole obligation from the other person, or whether he has any right at all of recourse against him.[179] If there does exist between them some inner legal relation, it will be proper for this question to be governed by the law of such inner relation established in connection with the provision of security for the same obligation.[180]

If there is no inner relation of this kind between the two persons, it will be proper to settle the case in accordance with the two laws that come into consideration, i.e. the law of surety and the law of the secondary right involved. If both their provisions concur, both laws will be applied cumulatively. However, if the provisions differ, it will be proper to settle the question in accordance with the law governing the security provided by the person against whom the recourse is sought, while the person seeking the recourse will be entitled thereto only if recourse is allowed by the law governing the security provided by him; in the same manner, he cannot obtain on the basis of this claim more, than would be due to him under the law governing the security provided by him.

This solution seems to be the fairest because nobody can lose or gain

178 Bystrický, *Základy,* p. 270.

179 For example, under Swiss law, the owner of a pledge has, in principle, the right of recourse against the surety only under certain conditions, while, on the other hand, the surety may indemnify himself from the pledge to which he is subrogated (Article 507, pars. 1 and 4, OR).

180 Also see Rilling, op. cit., p. 102.

more than is provided for under the law which governs his duties towards the creditor.[181]

(e) CO-SURETY

Many complicated problems may arise in cases where surety for the same principal obligation is assumed by several persons. The questions which must be settled in this respect may be divided into questions evolving from the relations between the co-sureties and the creditor, questions ensuing from the relations between the co-sureties and the principal debtor, and questions arising from the relations between the co-sureties.

(aa) Effects of Suretyship between Co-Sureties and the Creditor

In cases where several sureties guarantee the same obligation, a number of complex questions would not arise, if all sureties were governed by the same law as the principal obligation, or, at least — even where the principal obligation were governed by a different law — if the relations between the sureties and the creditor, i.e. all sureties, were governed by one law. The tendency in these cases will unquestionably be to subject these relations to the same law.

Some facts may frequently give rise to deductions, that it will be in keeping with a reasonable settlement of the legal relations involved, if they are governed by the same law. Such facts include, e.g., situations where the sureties assumed suretyship simultaneously, where their declarations appear on the same document, or where they are attached to the same document containing the contract establishing the principal obligation. In such cases it will be sometimes possible to assume a will manifested by implication, to subject the suretyship obligations to the same law. However, the question may arise as to what specific law is to be applied, if a concurrently manifested will to apply a certain law cannot be assumed. It would then be proper to apply the recommendation contained in the provision of Section 11 of the Czechoslovak Act No. 97/1963, and refer to the law of the principal obligation.

Nevertheless, situations may occur, when it will not be possible even to assume the manifested will to subject the obligation to a certain law or to the law identical with the obligations of the other sureties, nor

[181] The author does not accept the argument raised by Rilling, op. cit., p. 102, who recommends the same settlement as in the case of recourse between co-debtors who are bound equally in their mutual relation. This solution may be favoured for certain positive law, which does not expressly settle this problem, but there is no reason, why it should be transposed into matters involving conflict of laws.

will it be in keeping with a reasonable settlement to subject the suretyship obligation to the law of the principal obligation. This may happen, when the surety, in assuming his obligation, does not even know that somebody else has engaged himself as surety for the same obligation. Because in some cases it is necessary to determine separately the law governing surety, the individual sureties securing the same obligation may each be governed by a different law.

Some jurisdictions govern the relations of co-sureties to the creditor in such a way that all the sureties are jointly and severally liable for the whole amount of the secured obligation, while other jurisdictions allow them the benefit of division, and still others provide that every surety is liable only for a particular share of the obligation.

The law governing every suretyship obligation will also determine, whether a co-surety is liable for the whole obligation or whether he can plead benefit of division, or whether he is liable only for a share of the obligation. The law governing the suretyship obligation will be applied in the same manner to all other questions which may arise between the creditor and a co-surety who had assumed the obligation.

It is unlikely that the questions arising from these different provisions will be confusing and insoluble; nevertheless, it will be in the interest of a simple regulation of legal relations, to apply a uniform law — if the co-sureties knew of each other when assuming their obligation — namely the law of the principal obligation, unless the will of the parties indicates otherwise.

(bb) Effects of Suretyship between Co-Sureties and the Principal Debtor

The main problem which may arise between co-sureties and the principal debtor concerns the law determining, what a co-surety, who under the law governing his suretyship obligation is liable only for a share of the secured obligation but pays more to the creditor, can demand from the principal debtor.

In this case, we must distinguish between what the co-surety was obliged to perform and what he performed in excess. As regards the share for which he was liable, he may demand indemnification from the debtor on the basis of subrogation, as already discussed. As regards the excess payment, we must proceed from the fact that in those jurisdictions, which limit the co-surety's liability to a share of the principal obligation only, the effects of subrogation are modified by this limitation in the case of payment, so that the principles applying to subrogation cannot be applied to the excess payment.

If a special, inner legal relation exists between a co-surety and the

principal debtor, under which surety was assumed, the law governing such relation should be applied to the above problem. Otherwise, the author believes, this problem should be settled under the law of the principal obligation, while the law decisive for the suretyship obligation of the co-surety should be applicable to the extent, that the co-surety must not be placed in a better position, than would ensue for him under such law.

It must be admitted, that the complex nature of this situation favours, where possible, the application of the law governing the principal obligation to the obligations of the co-sureties.

(cc) Effects of Suretyship between Co-Sureties

Complicated situations may also arise between co-sureties. If several sureties guarantee the same principal obligation and if their suretyship obligations are all governed by the same law, there is no doubt, that the same law should also govern their mutual relations.[182]

Difficulties will occur, if the suretyship obligation of every surety is governed by a different law. If the co-sureties have settled their relations by a special agreement, the agreement will be governed by its own law. However, in this case, too, the problem may arise of, how to determine the law governing such agreement, if the sureties themselves did not choose it. In these cases, where the suretyship obligation of each surety is governed by a different law, every surety has a different domicile, and the obligation of each surety is equally burdensome, it will be difficult to determine the law, with which the agreement is most closely linked. Under certain circumstances, the law of the place of conclusion of the contract might be important, provided the contract was concluded with all the parties present at the same time, or another law, with which all the sureties are linked by a common factor. In any case, all the sureties are linked by the fact that they assumed surety for the same principal obligation, and it would be therefore most suitable to apply the law of the principal obligation to the aforesaid agreement of the co-sureties, unless a different law can be determined.

However, a real problem arises, where the co-sureties failed to settle their relations by a special agreement and the suretyship obligation of each of them is governed by a different law. In practice, this involves primarily the question of the recourse available to a surety, who satisfied the creditor, against the other co-sureties.

The author agrees that in cases involving several co-sureties the

182 Kegel, op. cit., p. 574.

advantages of a uniform law are greatly increased.[183] Nevertheless, differences in the laws governing the suretyship obligation of the individual co-sureties are recognized,[184] so that it will not always be possible to follow the recommendation that their relations be governed by a uniform law, primarily the law of the principal obligation.[185]

Thus, there is no way of avoiding the difficulties arising on this point. According to one proposal, the solution is to depend on the question of whether the surety knew that another surety had guaranteed the same obligation. In such case, the relation between the co-sureties should be governed by the law governing the suretyship obligation of the surety who assumed his obligation later. The argument is, that the decision of such surety was also affected by the idea that in the case of his paying the obligation, he could proceed against the other surety, if he was entitled to such recourse under the law governing his obligation. The surety who assumed his obligation earlier did not know there would be another surety against whom he could proceed for indemnification, and, consequently, he must give way to the other surety.[186] If the co-sureties did not know of each other, the provisions of the two laws that come into consideration, i.e. the laws of their suretyship obligations, should be compared and a solution satisfactory to both parties should be sought. If the comparison shows that under one law, the co-sureties are liable to the creditor jointly and severally for the whole obligation and have the right of recourse towards each other, while under the other law they are liable ex lege only for a share of the obligation and cannot proceed against each other for indemnification, it is recommended that for reasons of equity the surety, who under his law is liable jointly and severally and who pays the whole obligation to the creditor, should nevertheless be entitled to seek recourse against the co-surety who, under his law, is liable only for a share of the obligation and has no duty to indemnify his co-sureties.[187]

However, a solution which depends on whether one surety knew of surety extended by another person for the same obligation, when assuming his suretyship obligation, is not convincing. In particular, there is no reason why the surety, who engaged himself earlier, should be liable to a co-surety who engaged himself later, under the law governing the obligation of the latter surety, rather than under the law of his own surety.

183 Batiffol, *Les conflits de lois en matière de contrats,* p. 425.
184 See, e.g., Rabel, op. cit., p. 358; Letzgus, op. cit., p. 853; Frankenstein, op. cit., p. 349.
185 Batiffol, op. cit., pp. 425—426.
186 Rilling, op. cit., p. 98.
187 Ibid., pp. 99—100.

The best solution in these cases would be to decide about the co-surety's duty to indemnify the surety who paid the creditor according to the law which governs the suretyship obligation of the person from whom the indemnity is sought; but the law governing the suretyship obligation of the person seeking the recourse would be applied to the extent, that the co-surety seeking the recourse must not be placed into a better position than to which he is entitled under the law of his suretyship obligation.[188]

It should be noted that the desirable result need not necessarily be obtained in these complicated cases even by the application of the law of the principal obligation to the relations between the co-sureties, if the suretyship obligations of the co-sureties are governed by a different law. It might happen, that the law of the principal obligation would not recognize the right of recourse, while the laws governing the suretyship obligations would do so. The complications would be removed only if both the principal obligation and all the suretyship obligations of the co-sureties were governed by the same law; however, as already indicated, this is hardly possible in all cases.

A co-surety, who has satisfied the creditor, is also subrogated to the creditor's secondary rights which may have been established for the purpose of securing the suretyship obligation of a co-surety. The same principles apply to such subrogation, as apply to subrogation to secondary rights attached to the principal obligation, as mentioned above in the discussion concerning the relations between the surety and persons who otherwise secure the implementation of the obligation.

[188] Kegel, op. cit., p. 574, favours, in case of doubt, the law of the place of performance of the party against whom the claim is raised.

THE IMPORTANCE OF MEASURES AND RESTRICTIONS CONCERNING THE DEBTOR'S DUTY TO MEET HIS OBLIGATION

CHAPTER VII

It is customary today, for states, in order to protect their foreign exchange economy, to intervene through statutory and administrative measures also in the sphere of civil-law obligations, especially as regards the performance of such obligations abroad. Consequently, the problems related with such interventions also have an impact on surety. It is therefore necessary to study the effect on the surety's obligation of measures taken by the state — especially in the country of the debtor, where, as a rule, the place of performance is located — which restrict the debtor's ability to pay, or which otherwise affect his duty.

For example, there is the question of whether — in a case, where the debtor is denied the prescribed license to pay his obligation abroad — the surety must pay for the debtor, or whether the surety must do so, if the debtor postpones payment due to a moratorium, etc.

These cases involve a number of interesting situations from the viewpoint of conflict of laws. The simplest is the situation, where surety is governed by the same law as the principal obligation and, e.g., the restriction preventing the debtor from paying his obligation is also imposed under such law. The effect of such measure on the surety's position will unquestionably depend on this uniform law.

The Austrian Supreme Court decided in a similar case in favour of an Austrian surety and against a Belgian creditor, when the debtor's ability to pay was limited under the German foreign exchange law; the court argued that surety was governed by German law just as the principal obligation.[189] This solution seems proper, although different decisions and arguments have also appeared. Proceeding from the principle of viewing negatively all foreign measures of economic protection, the Swiss Federal Court affirmed the surety's obligation to pay, although this obligation was governed by German law, under which the debtor — whose obligation was also governed by German law — was prevented from paying. This decision was criticized.[190]

In cases where surety is governed by the law of the principal ob-

189 Rabel, op. cit., p. 359.
190 Ibid., p. 360.

ligation, the foreign exchange provisions of the law of the principal obligation will, under most jurisdictions, probably also affect surety, and this influence will in most instances be recognized, unless it is found contrary to public order.[191]

In another possible situation, surety is governed by a different law than the law of the principal obligation, under which the debtor was restricted in his ability to pay. It will be proper to proceed in these cases from the influence of the debtor's restriction on the surety's obligation, recognized by the law governing surety. It will depend on this law, whether the respective restricting measure also involves the extinction of surety. Although the existence of the principal obligation and — as a result of accessoriness — indirectly also the existence of surety depend on the law of the principal obligation, the question of the extinction of surety and the question of when the surety is released from his obligation, are governed by the law of surety.[192] Some authors state that in cases, where surety is governed by its own law, the measures adopted under the foreign exchange regulations of the law of the principal obligation, or a moratorium, need not be of any importance for the surety, in that he could refer to it in his favour.[193]

If the measure affecting the debtor's duty to meet his obligation is adopted under another law than that of the principal obligation, in this case, too, the effect of such a measure on the surety's obligation will be determined under the law of surety. If the principal obligation and surety are governed by the same law, the decision will naturally be made under this law. If the principal obligation is governed by a different law than the surety's obligation, preference should be given to the law of surety because it is this law, which must determine — as already mentioned — under what circumstances the surety is or is not released from his obligation. Similarly, if the respective measure were directed against the surety himself, and affected his possibility to meet his suretyship obligation, the question of the effect of such measure on the surety's duty to meet his obligation would be governed by the law of surety.[194]

191 See Schnitzer, op. cit., p. 656.

192 See Batiffol, op. cit., p. 425.

193 See Bystrický, *Základy,* p. 336; Svoboda, op. cit., p. 83; Schnitzer, op. cit., p. 656. However, Schnitzer at the same time points to a provision of Swiss law (Article 501, par. 4, OR), under which, if the duty to perform of a principal debtor domiciled abroad is abolished or limited by foreign legislation, such as clearing regulations or prohibition of transfers, this fact may also be pleaded by a surety residing in Switzerland, unless he waived the plea.

194 The decisive role of the law governing surety is also recognized by Rabel, op. cit., p. 359, and Frankenstein, op. cit., p. 242 (the latter as regards the question of whether a foreign moratorium is recognized as having effect on the surety's obligation).

This problem of conflict of laws is also linked with another interesting but difficult problem, namely the effect of foreign measures of this nature on the surety's obligation under Czechoslovak law. The Czechoslovak provisions concerning surety do not contain any express rule on this point, such as, e.g., is found in the above-quoted provision of the Swiss Code of the Law of Obligations.

The question of whether Czechoslovak authorities should respect a plea of impossibility of performance, raised by a foreign debtor referring to the fact that foreign exchange restrictions prevent his performance, was discussed in detail in Czechoslovak literature by Svoboda; he argues that the solution depends on the concrete character of the case and that the plea of impossibility of performance due to foreign exchange regulations must not be overlooked and flatly rejected without properly weighing all the essential facts.[195] Since the publication of Svoboda's work, the Code of International Trade was enacted in Czechoslovakia and its provisions must be taken into account when dealing with this question.

If the respective measure involves for the debtor a true impossibility to perform, which must be absolute in terms of time (see Section 245, par. 2(b) of the Code of International Trade), the debtor's obligation is extinguished under Section 245, par. 1. Due to its accessorial character, surety, too, is thereby extinguished. However, the debtor, whose obligation has been extinguished due to his impossibility to perform, must compensate the losses caused thereby to the person entitled, unless the failure to perform was due to circumstances excluding his liability (Section 251 of the Code). These circumstances do not include impediments which the person liable was bound to overcome or remove, such as the absence or lack of an official licence essential for the performance of the obligation (Section 252, par. 2, of the Code). If, under these provisions, the debtor is bound to provide compensation for damages, we must ask, whether surety relates to such compensation. Under Section 198 of the Code of International Trade, surety does not cover damages for losses suffered as a result of a breach of the debtor's obligation, if the surety performs his obligation towards the creditor in time. The decisive factor in this case will therefore be, whether the surety's duty to meet his obligation towards the creditor was established prior to the extinction of the principal obligation and thereby also of surety, or not. If such duty was established and the surety failed to meet his obligation in time, he is liable for the damages the debtor is obliged to pay.

If the respective measure makes the obligation impossible to perform for a certain time only (Section 245, par. 2(b) of the Code), the principal

[195] Svoboda, op. cit., p. 79.

obligation is not extinguished,[196] nor is the suretyship obligation, and the surety must meet it after the principal obligation has become due. No written notification is required for the establishment of this obligation, because there is no doubt that the debtor will not perform his obligation within a reasonable term at least.

In the case of a foreign moratorium, it is necessary to proceed, under Czechoslovak law, from the fact that the debtor did not perform his obligation, so that the surety will be liable for this failure.[197]

If the debtor frees himself of his obligation on the basis of a foreign regulation or measure by depositing the due amount with a certain official agency (e.g. in the case of extraordinary events), the continuation of the surety's obligation will depend on whether such deposit extinguishes the obligation under Czechoslovak law; it probably does not extinguish it because the Code of International Trade does not recognize such deposit either as a means of performance under Sections 211 ff., or as another means of extinguishing an obligation under Sections 258 ff. Thus the suretyship obligation would continue.

If the respective measure or restriction affects the surety directly, the effect of such measure or restriction on the continued existence of the suretyship obligation, or on the surety's obligation to compensate any losses caused by the impossibility to perform, is the same as stated above with respect to the principal obligation.

196 See the introductory report on the Code of International Trade (regarding Sections 245 to 250).

197 See Bystrický and Svoboda in footnote No. 193.

When dealing with the question of renvoi in the case of suretyship, we must proceed from the fact that all Czechoslovak law of conflict of laws is governed by the principle of a reasonable settlement of the legal relation involved.[198] This principle applies even more strongly to the sphere of the law of obligations, where the points of contact specified in Sections 10 and 11 of the Act No. 97/1963 — the latter Section also concerning surety — are merely recommendations for the application of a particular law, which, however, cannot be applied, if the intent of the parties or the requirement of a reasonable settlement, or the nature of the matter, indicate otherwise. In such cases it is necessary to use a different approach to renvoi than, e.g., in cases involving rights in rem or probate law. This is also indicated by the wording of Section 35 of the Act No. 97/1963 ("If under the provisions of the present Act a law is to be applied, whose provisions refer back . . ."), which affects primarily those cases, where the provision of the law of conflict of laws unequivocally specifies a point of contact, in contrast to Sections 10 and 11, where the specification of the points of contact is reduced to a mere recommendation by the expressions "as a rule" or "unless the nature of the matter indicates otherwise".

When, in the case of suretyship, we seek a point of contact which is in keeping with a reasonable settlement of the legal relation involved, we must also ask, whether the laws, which might be considered as applicable to the respective legal relation, do not refer back to Czechoslovak law or, indeed, to the law of another state. Taking into account all the circumstances of the considered case, including the possibility of renvoi provided for by laws which could be chosen as decisive, we shall determine, which law is in keeping with a reasonable settlement of the relation involved and which will therefore be applied. After such a decision has been made, renvoi no longer enters the picture. This question thus comes fully within the scope of the proper interpretation of the respective provision of the law of conflict of laws in its application to a concrete case.[199]

198 Bystrický, *Základy*, p. 90.
199 Ibid., p. 90; also see the concluding part of Section 35 of the Act No. 97/1963.

In some cases the application of the reservation of public order may limit the effects of a decisive foreign law also with respect to suretyship. This is true, e.g., of the question of the capacity to assume surety, when it may be sometimes necessary to prevent the effects of a foreign legal provision restricting a woman in her capacity to assume surety due to her unequal status, which is incompatible with the fundamental principles of Czechoslovak law.

In the Codigo Bustamante, the only provisions devoted to suretyship deal precisely with the question of public order.[200] They proceed from the concept of so-called international public order, under which a certain category of rules — e.g. in the Codigo Bustamante the provision prohibiting the surety to bind himself more than the principal debtor, or the provisions concerning legal and judicial surety — must be respected under all circumstances and the application of foreign regulations must be excluded, even though a provision of the law of conflict of laws refers to them; this means that it does not matter, whether the effects of the application of a foreign regulation would or would not be contrary to the fundamental principles of the law which thus conceives the question of public order.[201] On the other hand, under the Czechoslovak concept, the use of the reservation of public order is an exceptional occurrence,[202] as also indicated by the wording of Section 36 of the Act No. 97/1963.

200 Articles 212 and 213; for their text see footnote No. 114.
201 Bystrický, *Základy,* p. 105; also Raape, op. cit., pp. 88—89.
202 Bystrický, op. cit., p. 112.

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[300] Articles 212 and 213; for their text see footnote No. 114.
[301] Bystrický, Zahraničí, p. 105; also Raape, o.p. cit., pp. 88—89.
[302] Bystrický, op. cit., p. 112.

THE EFFECT OF ARBITRATION AGREEMENT BETWEEN THE PARTIES TO THE PRINCIPAL OBLIGATION ON THE POSITION OF THE SURETY

CHAPTER X

If a surety guarantees an obligation the parties to which concluded an arbitration agreement with respect to disputes that might arise from their contract (i.e. an arbitration clause), we must ask, whether such arbitration agreement also affects disputes which might arise with respect to the surety. If different laws do not take the same view on this point, in particular on the basis of the respective judicial decisions, it is necessary to determine, what law should be applied to this question.

The arbitration agreement may be governed by its own law; this is permissible to a certain extent under the Czechoslovak Act No. 98/1963, relating to arbitration in international trade and to enforcement of awards (Section 29). However, this agreement also has a procedural character and therefore some questions are considered under the lex fori.[203] The law of the arbitration agreement may govern the relations between the parties to such agreement, but it is inadmissible, that it should also govern — from the viewpoint of conflict of laws — the effects of the arbitration agreement on the position of a third person who did not take part in its conclusion. The author believes that this question will be considered by the arbitrators according to their own law, i.e. the lex fori. This law must be given precedence over the law of surety, because the question involved is whether the arbitrators may decide a dispute in which the surety would be a party. If, e.g., this question arose in proceedings before a Czechoslovak court of arbitration, the court would base its decision on Czechoslovak law rather than on the foreign law applicable to the surety's obligation.

As regards the substantive decision in this matter, most authors hold that the arbitration agreement does not apply to persons who did not directly take part in the conclusion of the principal contract containing the arbitration clause, and that it does not bind third persons, even though their rights may depend on the legal relation it concerns.[204]

[203] Ibid., pp. 482—483.

[204] See Schottelius, *Die kaufmännische Schiedsgerichtsbarkeit,* Bremen, 1953, pp. 72—73, and the literature and decisions listed therein.

However, there are also contrary views, namely that as a result of the arbitration agreement, claims under substantive law have a special character, that they cannot be applied in court, that the necessity of their being arbitrated constitutes a character or quality of these rights, and that the person who assumes surety for another person's debt assumes it with all that appertains thereto (mit allem Drum und Dran).[205]

Czechoslovak law holds that an arbitration agreement does not bind the surety. This is indicated by the provision of Section 2 of the Act No. 98/1963, under which the parties may agree that certain disputes between them, specified therein, should be settled by one or several arbitrators. This provision thus restricts the effects of an arbitration agreement only to the parties thereto. Another indication is the requirement of a written form of the arbitration agreement (Section 4 of the aforesaid Act). It would be contrary to the purpose of this provision, to interpret it as meaning that the requirement of written form was met on the surety's part by his written declaration assuming the suretyship obligation, which does not even mention the arbitration agreement. Of course, it is another matter, what importance we assign to the fact that the surety attached his declaration to a written contract concerning the principal obligation, which also contained an arbitration clause.[206] However, this is a matter of interpretation of the expression of the surety's will, which must be settled with a view to all the circumstances of the concrete case, but has no effect on the basic answer to this question, namely that under Czechoslovak law, the arbitration agreement does not bind the surety.

However, the surety will be bound by an arbitration agreement concluded with respect to the secured obligation between the creditor and the debtor; he will be bound as regards the legal relation arising from this obligation, if he is subrogated to the creditor's rights. Under an express legal provision, an arbitration agreement also binds the legal successors of the parties to the agreement, which means both universal and singular succession.[207]

[205] Ibid., p. 73.

[206] Ibid., p. 72; Schottelius states that in such a case the surety is bound by the arbitration clause.

[207] See Section 3, par. 3, of the Act No. 98/1963, and the introductory report thereon (Section 3).

RESUMÉ

Práce se úvodem zabývá otázkou samostatnosti statutu ručení, která je u kolizní problematiky ručení hlavní otázkou. Podává přehled názorů ohledně této otázky. Pro otázku samostatnosti statutu ručení má především význam akcesorita ručení. Dospívá k názoru, že akcesorita má sice význam pro kolizní řešení, není však důvodem pro to, aby pro ručení platil vždy stejný právní řád jako pro hlavní závazek. Právní vztah z ručení je zvláštní právní poměr, i když sleduje osudy právního vztahu ze zajištěného závazku.

Práce poukazuje na zajímavé, teoreticky velmi sporné případy, kdy v mezinárodně právních poměrech je ručení založeno smlouvou mezi dvěma subjekty mezinárodního práva, zatímco stranami zajištěného závazku jsou na jedné straně mezinárodní organizace, na druhé straně však subjekt, který nemá mezinárodně právní subjektivitu. V jiných případech zase, jako je tomu při různých státních půjčkách, se setkáváme s právními poměry mezi státem-dlužníkem a věřitelem, kterým je soukromá osoba fyzická nebo právnická, a právním poměrem mezi tímto věřitelem a státem-ručitelem. Vedle toho vznikají poměry mezi státem-dlužníkem a státem-ručitelem, popřípadě i mezi státy-spoluručiteli. Práce dochází k závěru, o němž se domnívá, že doznává souhlasu alespoň autorů ze socialistických zemí, že vztahy, kde jednou stranou je subjekt bez mezinárodně právní subjektivity, musí se spravovat nějakým národním právem, zatímco vztahy, kde oba subjekty mají mezinárodně právní subjektivitu, se musí řídit mezinárodním právem.

V dalších kapitolách jsou probírána jednotlivá kolizní kritéria, která pro ručení přicházejí v úvahu, přičemž se omezuje jen na to, co má význam pro ručení. U volby práva se v důsledku nynější úpravy ručení v zákoníku mezinárodního obchodu, podle něhož lze ručení převzít jednostranným prohlášením ručitele, zabývá otázkou, zda lze určit takto právo i při vzniku závazku jednostranným úkonem. Na tuto otázku odpovídá kladně. Z jednotlivých navázání pokládá za nejvhodnější místo bydliště nebo sídla ručitele.

V dalším se práce věnuje koliznímu řešení v československém právu. Rozbírá ustanovení § 11 československého zákona č. 97/1963 Sb., o mezinárodním právu soukromém a procesním. Pro kolizní řešení statutu ručení v československém právu odůvodňuje význam rozumného uspořádání právního poměru, kterým se také zabývá. Vyslovuje přitom názor, že rozumné uspořádání samo není hraničním určovatelem, nýbrž cílem, k němuž se má navázáním podle určitého hraničního určovatele dospět, a návodem naznačujícím, že tento hraniční určovatel má být volen tak, aby se tohoto cíle dosáhlo. Práce vychází z toho, že k tomuto cíli se dospěje, naváže-li se právní poměr s cizím prvkem na právní řád, s nímž je spojen nejdůležitějším, nejvýznamnějším vztahem. Za takový nejvýznamnější vztah pak ve většině případů pokládá u ručení vztah k právu určenému bydlištěm nebo sídlem ručitele. Jsou možné případy, kdy rozumnému uspořádání odpovídá navázání i na jiný právní řád, zejména i na právo hlavního závazku, pro které se § 11 zákona č. 97/1963 Sb. především vyslovuje, pokud z úmyslu účastníků nebo z povahy věci nevyplývá něco jiného. V některých případech rozumnému uspo-

řádání bude odpovídat navázání na právo, kterým se řídí poměr ze zprostředkování a obchodního zastoupení, jestliže ručení přejímá zástupce vůči zastoupenému pro jednotlivé zprostředkované obchody.

Práce se dále zabývá rozsahem statutu ručení. Uvádí, že otázky způsobilosti převzít závazek z ručení a formy se kolizně posuzují samostatně. Dospívá k názoru, že požadávek zachování písemné formy vyžadované lege causae podle § 4 zákona č. 97/1963 Sb. platí i v případě ručení vzniklého jednostranným prohlášením.

Práce se zabývá kolizními otázkami specifickými pro ručení.

Pro námitku pořadí má platit statut ručení, který určuje, jaké námitky přísluší ručiteli proti věřiteli.

Pro subrogaci má zásadně platit statut ručení, přičemž je třeba, aby právo hlavního závazku alespoň zásadně připouštělo možnost přechodu pohledávky ze zákona. Bude však nutné respektovat ustanovení práva hlavního závazku o nutnosti uvědomění dlužníka o zaplacení závazku ručitelem.

Vnitřní poměr mezi ručitelem a dlužníkem se řídí svým statutem. Ten se uplatní i v tom smyslu, že na základě pohledávky, jež subrogací přešla na věřitele a spravuje se i nadále svým statutem, nemůže ručitel získat více, než na kolik má právo ze svého vnitřního poměru vůči dlužníkovi.

Pokud některá práva poskytují ručiteli právo požadovat od dlužníka, aby jej ještě před uspokojením věřitele v určitých případech zprostil ručitelského závazku, nebo mu poskytl jistotu, jde o vztahy, které překračují meze poměru z ručení, který je poměrem mezi ručitelem a věřitelem. Z toho důvodu bude správné, aby se toto právo ručitele spravovalo právem, kterým se řídí zvláštní vnitřní poměr mezi ručitelem a dlužníkem, jestliže mezi nimi tento poměr je, jinak právem hlavního závazku.

Ve vzájemných vztazích mezi ručitelem a osobami zajišťujícími jiným způsobem závazek a mezi spoluručiteli se práce vyslovuje pro právo, kterým se spravuje závazek toho, proti němuž se uplatňuje postihový nárok, přičemž ten, kdo nárok uplatňuje, se nemá tím dostat do lepšího postavení, než jaké má podle práva, jímž se řídí poměr ze zajištění jím poskytnutého.

Dále se práce zabývá významem opatření a omezení týkajících se dlužníkovy povinnosti splnit závazek, otázkou zpětného a dalšího odkazu. Domnívá se, že v rámci vyhledávání rozhodného práva podle zásady rozumného uspořádání právního poměru berou se v úvahu všechny okolnosti, jež mohou mít význam, tj. včetně zpětného a dalšího odkazu, takže po stanovení rozhodného práva není již pro otázku zpětného a dalšího odkazu místa.

Závěrem se zmiňuje práce o výhradě veřejného pořádku a o vlivu rozhodčí smlouvy mezi stranami hlavního závazku na postavení ručitelovo. Právo rozhodčího místa má odpovědět na otázku, zda se tato rozhodčí smlouva může vztahovat i na spory ve vztazích s ručitelem. Pro československé právo se vyslovuje názor, že rozhodčí smlouva mezi stranami hlavního závazku ručitele nezavazuje.

ZUSAMMENFASSUNG

Die Studie befasst sich am Anfang mit der Frage der Selbständigkeit des Bürgschaftsstatuts, die für die Kollisionsproblematik der Bürgschaft als Hauptfrage erscheint. Sie gibt eine Übersicht der Ansichten hinsichtlich dieser Frage. Für die Frage der Selbständigkeit des Bürgschaftsstatuts hat vor allem die Akzessorität der Bürgschaft Bedeutung. Die Studie kommt zur Ansicht, dass die Akzessorität für die Kollisionslösung zwar von Bedeutung ist, jedoch nicht Grund dafür ist, dass für die Bürgschaft immer dieselbe Rechtsordnung wie für die Hauptschuld gelte. Das Rechtsverhältnis aus der Bürgschaft ist ein besonderes Rechtsverhältnis, auch wenn es dem Schicksal des Rechtsverhältnisses aus der Hauptschuld folgt.

Die Studie befasst sich auch mit den interessanten und theoretisch strittigen Fällen, in welchen in den völkerrechtlichen Verhältnissen die Bürgschaft durch einen Vertrag zwischen zwei Subjekten des Völkerrechts begründet ist, während Parteien der verbürgten Schuld von einer Seite eine internationale Organisation, von anderer Seite aber ein Subjekt ohne völkerrechtliche Subjektivität, sind. In anderen Fällen, wie z. B. bei verschiedenen Staatsanleihen, bestehen Rechtsverhältnisse zwischen dem Schuldnerstaat und dem Gläubiger, der eine natürliche oder juristische Privatperson ist, und Rechtsverhältnisse zwischen diesem Gläubiger und dem garantierenden Staat. Ausserdem bestehen Verhältnisse zwischen dem Schuldnerstaat und dem garantierenden Staat, bzw. auch unter mehreren garantierenden Staaten. Die Studie kommt zum Standpunkt, der ihrer Ansicht nach wenigstens bei den Verfassern aus den sozialistischen Ländern Zustimmung findet, dass Verhältnisse, in welchen an einer Seite Subjekt ohne völkerrechtliche Rechtspersönlichkeit steht, einem nationalen Recht unterliegen müssen, während Verhältnisse, in welchen beide Parteien Subjekte des Völkerrechts sind, von dem Völkerrecht geregelt werden.

In weiteren Kapiteln werden die einzelnen Anknüpfungspünkte, die für die Bürgschaft in Betracht kommen, und zwar nur in dem Umfange, der für die Bürgschaft Bedeutung hat, behandelt. Bei der Rechtswahl wird infolge der jetzigen Regelung der Bürgschaft im tschechoslowakischen Gesetzbuch des internationalen Handels, nach welchem die Bürgschaft auch durch einseitige Erklärung des Bürgen übernommen werden kann, die Frage berührt, ob man das massgebende Recht auch bei Entstehung der Verbindlichkeit durch einseitige Erklärung des Schuldners wählen kann. Diese Frage wird bejaht. Von den einzelnen Anknüpfungspünkten wird der Wohnsitz oder Sitz des Bürgen als der geeignetste betrachtet.

Im weiteren wird die Aufmerksamkeit der Kollisionslösung der Bürgschaft im tschechoslowakischen Recht gewidmet. Die Studie befasst sich mit der Bestimmung des § 11 des tschechoslowakischen Gesetzes Nr. 97/1963 Slg., über das internationale Privat- und Zivilprozessrecht. Für die Kollisionslösung des Bürgschaftsstatuts im tschechoslowakischen Recht wird die Bedeutung der vernünftigen Gestaltung des Rechtsverhältnisses begründet. Es wird die Ansicht zum Ausdruck gebracht, dass die vernünftige Gestaltung des Rechtsverhältnisses selbst kein Anknüpfungspunkt, sondern Ziel, das man mittels Anknüpfung nach bestimmtem Anknüpfungspunkt erreichen soll, und zugleich An-

deutung ist, dass der Anknüpfungspunkt so gewählt werden soll, damit dieses Ziel erreicht werde. Dieses Ziel erreicht man so, dass man das Rechtsverhältnis mit Auslandsberührung an das Recht anknüpft, mit dem es durch wichtigste, bedeutendste Beziehung verbunden ist. Eine solche wichtigste Beziehung ist in Mehrzahl der Fälle der Bürgschaft Beziehung zum Recht des Wohnsitzes oder Sitzes des Bürgen. Es sind auch Fälle möglich, in welchen der vernünftigen Gestaltung des Rechtsverhältnisses die Anknüpfung an eine andere Rechtsordnung entspricht, besonders an das Recht der Hauptschuld, für das sich § 11 des Gesetzes Nr. 97/1963 Slg. vor allem ausspricht, falls aus der Absicht der Parteien oder aus der Natur der Sache nicht etwas anderes hervorgeht. In anderen Fällen wird der vernünftigen Gestaltung des Rechtsverhältnisses die Anknüpfung an das Recht des Vermittlungs- oder Handelsvertretungsvertrages entsprechen, falls die Bürgschaft der Vertreter dem Vertretenen gegenüber für einzelne vermittelte Geschäfte übernimmt.

Die Studie befasst sich dann mit dem Geltungsbereich des Bürgschaftsstatuts. Die Fragen der Fähigkeit die Bürgschaft zu übernehmen und der Form werden kollisionsrechtlich selbständig beurteilt. Für das tschechoslowakische Recht wird der Standpunkt vertreten, dass das Erfordernis der Einbehaltung der schriftlichen Form, die von der lex causae vorgeschrieben ist, laut § 4 des Gesetzes Nr. 97/1963 Slg. auch für den Fall der durch einseitige Erklärung übernommenen Bürgschaft Anwendung findet.

Die Studie befasst sich weiter mit den für die Bürgschaft spezifischen Kollisionsfragen.

Für die Einrede der Vorausklage ist das Bürgschaftsstatut massgebend, das bestimmt, welche Einwendungen dem Bürgen gegenüber dem Gläubiger zustehen.

Für die Subrogation soll grundsätzlich das Bürgschaftsstatut massgebend sein, wobei das Recht der Hauptschuld die Möglichkeit des Forderungsüberganges aus dem Gesetze wenigstens prinzipiell zulassen muss. Es ist dabei notwendig, die Bestimmungen des Rechts der Hauptschuld über die Verständigung des Schuldners von der Bezahlung der Schuld durch den Bürgen einzuhalten.

Das innere Verhältnis zwischen dem Bürgen und dem Schuldner untersteht seinem eigenen Recht. Das kommt auch in dem Sinne zur Anwendung, dass auf Grund der Forderung, die infolge der Subrogation auf den Gläubiger überging und sich auch weiter nach ihrem eigenen Statut regelt, der Bürge nicht mehr gewinnen kann, als ihm aus seinem inneren Verhältnis gegenüber dem Schuldner gewährt wird.

Falls einzelne Rechtsordnungen dem Bürgen das Recht gewähren, vom Schuldner zu fordern, in gewissen Fällen den Bürgen noch vor Befriedigung des Gläubigers von seiner Bürgenverbindlichkeit freizumachen oder ihm eine Sicherheit zu geben, handelt es sich um Beziehungen, die die Grenzen des Verhältnisses aus der Bürgschaft, das ein Verhältnis zwischen dem Bürgen und dem Gläubiger ist, überschreiten. Aus diesem Grunde erscheint es als richtig, dass dieser Anspruch des Bürgen dem Rechte untersteht, das auch das besondere innere Verhältnis zwischen dem Bürgen und dem Schuldner regelt, falls zwischen ihnen ein solches Verhältnis besteht, andernfalls dem Rechte der Hauptschuld.

Für die gegenseitigen Verhältnisse zwischen dem Bürgen und den Personen, die auf eine andere Weise die Hauptschuld garantieren, und zwischen den Mitbürgen wird in der Studie die Ansicht vertreten, dass das Recht anzuwenden ist, das die Verbindlichkeit desjenigen regelt, dem gegenüber der Regressanspruch erhoben wird, wobei derjenige, der den Anspruch erhebt, dadurch nicht eine bessere Stellung gewinnen soll, als ihm das Recht, dem das Verhältnis aus der von ihm gestellten Sicherung untersteht, gewährt.

Die Studie befasst sich ferner mit der Bedeutung der Massnahmen und Beschränkungen, die die Pflicht des Schuldners die Schuld zu erfüllen betreffen, und mit der

Frage der Rück- und Weiterverweisung. Sie vertritt die Ansicht, dass im Rahmen der Aussuchung des anwendbaren Rechts nach dem Grundsatz der vernünftigen Gestaltung des Rechtsverhältnisses alle Umstände, die von Bedeutung sein können, in Betracht genommen werden, d. h. einschliesslich der Rück- und Weiterverweisung, so dass nach Feststellung des massgebenden Rechts für die Frage der Rück- und Weiterverweisung kein Platz mehr ist.

Zum Schluss behandelt die Studie die Vorbehaltsklausel und den Einfluss des Schiedsvertrages zwischen den Parteien der Hauptschuld auf die Stellung des Bürgen. Das Recht des Schiedsgerichts soll die Frage beantworten, ob sich der Schiedsvertrag auch auf die Streitfälle im Verhältnis zum Bürgen beziehen kann. Für das tschechoslowakische Recht wird die Ansicht vertreten, dass der Schiedsvertrag zwischen den Parteien der Hauptschuld den Bürgen nicht verbindet.

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