Chapter 5 Deliberate Connections (Indirect Choice of Law)

474. A further instrument available for the private ordering of transnational activities and the resulting legal relations consists in the deliberate creation of links relevant under private international law that connect transnational fact situations with specific legal systems which the persons in question prefer to other legal systems for substantive reasons. The links brought about by such deliberate activities have traditionally been considered as artificial, alleged or pretended connections with a given jurisdiction. Conflict lawyers have dealt with them under the heading of “fraus legis”, “fraude à la loi”, “evasion of laws”, “wetsontduiking” or “Gesetzesumgehung”. The negative connotation of these terms results from the assumption of a quasi-natural, deeply rooted and stable connection of individuals, companies, corporeal things and acts with a given jurisdiction, the notion of a pre-established “seat” of the legal relation. Where such assumption prevails, the calculated creation of a relevant link with a different jurisdiction may appear as illegitimate. The question that has to be asked in our times is whether such quasi-natural and deeply rooted connections to specific jurisdictions can still be claimed to exist in all areas of the law. While they still endure in some legal disciplines such as the law of immovable property, others are undergoing a transformation. To employ the term coined by Savigny, the “seat” of some legal relationships seems to be increasingly indicated by connecting factors permitting flexibility and mobility at lower costs for the persons involved. Put in other words: private actors are progressively capable of changing the connections of those legal relations and of establishing, by appropriate moves, connections with legal systems that may suit their interests and intentions better than the connecting factors accepted in former times. The process may indeed be characterized as a turn towards an “indirect choice”.

475. This transformation of the discipline will be further investigated with regard to some traditional connecting factors employed in the conflict of laws, see infra section 1. The tendency towards objective connecting factors allowing for greater mobility goes hand in hand with the progressive advancement

and liberalization of the recognition of foreign decisions and other crystallizations of foreign law. This development is targeted at the implementation of the so-called principle of recognition which has received particular attention as the principle of mutual recognition within the European Union, see below section 2. The nexus between recognition and private ordering of the type outlined supra can be explained by the following consideration: as the preconditions of recognition are becoming more lenient and recognition is handled more generously, the individual liberty to choose among several jurisdictions by deliberately establishing appropriate connections is enlarged as a matter of fact since the persons involved need not effectively give up the connections with the legal system whose law had previously governed their relationship. The possibility of maintaining the substantive factual connections with country A while at the same time deliberately creating connections with country B in order to benefit from its legal order raises the question of fraus legis. In a system of mutual recognition, it appears in a new light as will be further explained in section 3.

Section 1: Connecting Factors favouring Private Choice

1. Formal Requirements and the Lex Loci Celebrationis

a) The recognition of the lex loci celebrationis

In modern society and culture, a profound distinction between form and substance can be observed. Form is not valued in the same way as substance. This is reflected by the treatment of formal requirements in many areas of the law. They are considered as ancillary to substance and are afforded secondary significance in most contexts. Accordingly, a rather lenient approach has evolved in private international law, relating to all kinds of juridical acts, in particular contracts, marriages and wills. Courts and legislators do not insist on the observance of the formal requirements established by the law governing the contract or unilateral declaration in question; instead, they accept the formalities laid down in the law of the place where the contract or declaration is made.⁹⁹⁰ According to Savigny, this rule has been accepted ever since the sixteenth century.⁹⁹¹ The designation of this rule by the Latin

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⁹⁹¹ Savigny, p. 350 (§381).