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UNIFORMITY BETWEEN LATIN AMERICA AND THE UNITED STATES IN THE RULES OF PRIVATE INTERNATIONAL LAW RELATING TO COMMERCIAL CONTRACTS*

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The rapid development in modern times of international trade has brought in its course a deeper appreciation of dissimilarities in the law. Because these differences give rise to disputes and misunderstandings, serious efforts, both individual and collective, have been made to secure greater uniformity not only in the rules of private international law but in the various branches of commercial law itself. The League of Nations has given this movement for unification its strong support and as a result many countries of the world have today a uniform law for the enforcement of arbitration agreements and foreign arbitral awards, a uniform law of bills and notes, a uniform law of checks, and a uniform law of conflicts relating to bills, notes and checks. In the movement for the unification of the rules of private international law Latin America has taken a preëminent place. The Convention of Montevideo of 1889 on Civil and Commercial Law, which was ratified by Argentina, Bolivia, Paraguay, Peru and Uruguay, constituted the first successful attempt in this direction. The work so auspiciously begun was resumed in more recent times by the Pan-American conferences and was carried to a most notable conclusion at the Pan-American Conference at Havana in

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1928 by the adoption of the Bustamante Code, which is now in force in most of the Latin-American countries.

The question thus arises whether the Pan-American movement, which has done so much for Latin America in the unification of private international law, will be able to take another step forward, so as to bring about greater uniformity in the conflict of laws between Latin America and the United States. This discussion is limited to a consideration of the law of contracts, with emphasis on commercial contracts, because it is in this field that uniformity ought to be more readily attainable than in any other branch of private international law. This paper deals only with commercial contracts in general, without extending the observations to the various types of special contracts, such as bills and notes and checks, contracts of carriage, and maritime contracts. The subject of contracts in general will present sufficient difficulties for discussion within a limited space. For purposes of comparison it will be best to take the Bustamante Code as representative of the Latin-American law and the Restatement of the Conflict of Laws by the American Law Institute as representative of the law of the United States. Let us note, however, that whereas the Bustamante Code is an official code and actual law in a large number of the Latin-American countries, the Restatement of the Conflict of Laws by the American Law Institute is unofficial. Its authority rests solely upon its intrinsic merits.

A glance at the provisions of the Bustamante Code and those of the Restatement reveals striking dissimilarities. The Restatement contains sixty-six sections referring to contracts in general.¹ They deal with the formation, transfer, performance and discharge of contracts without performance. All matters relating to the making of contracts are said to be governed by the law of the place of contracting² and matters relating to performance, by the law of the place of performance.³ Elsewhere in the Restatement it appears that matters pertaining to the remedy are determined by the law of the forum.⁴ As regards validity, a unitary principle is set up, no distinction being made between capacity, formalities, and the intrinsic validity of contracts. How different the Bustamante Code, which contains, in Book I, twelve articles

¹Restatement of Conflict of Laws (1934) §§ 311-376.

²Restatement of Conflict of Laws (1934) § 332 *et seq.*

³Restatement of Conflict of Laws (1934) § 355 *et seq.*

⁴Restatement of Conflict of Laws (1934) § 534 *et seq.*

relating to contracts in general⁵ and in Book II, three additional articles dealing with commercial contracts!⁶ It lays down no unitary rule for the validity of contracts but applies one rule to capacity, another to formalities, and still another to the intrinsic validity of contracts. How can we account for this difference? How can greater uniformity between the two systems be brought about?

In making the tripartite division between capacity, formalities and intrinsic validity, the Bustamante Code has remained faithful to a long established continental tradition. That capacity should be governed by the personal law was established from the very beginning in private international law, even by the early Italian writers on the subject. That the formalities of legal transactions should be sufficient if they satisfy the law of the place where the act was executed was recognized somewhat later on mere grounds of convenience. The question of the intrinsic validity of contracts has engrossed the attention of courts and writers in more recent times, by whom much light has been shed upon the subject.

Although Anglo-American courts in early times relied a good deal upon continental writers on the conflict of laws, especially upon the Dutch writer Huber, traces of such influence being still observable, they soon went their own way and developed rules which seemed to meet the special need of their respective countries. In the matter of capacity, the English courts followed the continental view which regarded capacity as a part of status, governed by the personal law, the law of domicile. In the course of the nineteenth century this rule was abandoned as regards commercial contracts in favor of the law of the place of contracting.⁷ The maxim *locus regit actum* governing formalities was never adopted by the English courts and was introduced in England only by statute with respect to testaments. So far as any formalities were required for commercial contracts, they must be found in the Statute of Frauds which has been interpreted by the English courts as laying down a procedural rule, subject to the law of the forum.⁸

⁵Arts. 175-186, Latin-American Code of Private International Law. An English translation of the Bustamante Code is found in 4 *International Legislation* (ed. Hudson 1931) 2279-2354.

⁶Arts. 244-246, Latin-American Code of Private International Law.

⁷*Male v. Roberts*, 3 Esp. 163, 170 Eng. Rep. 574 (1800).

⁸*Leroux v. Brown*, 12 C. B. 801, 138 Eng. Rep. 1119 (1852).

A similar development took place in the United States. Questions of the conflict of laws arose in this country chiefly between the different states of the Union, and because of the shifting character of our population and the consequent uncertainties regarding domicile, the determination of capacity in commercial contracts with reference to the *lex domicilii* was found to be unsatisfactory. From the beginning, therefore, the capacity to contract was held to be controlled on principle by the law governing the validity of contracts in other respects.⁹ As regards formalities, some of our courts followed the English view that the Statute of Frauds was procedural, but a different conclusion was generally reached with respect to the sale of goods. In recent times the tendency has been to regard the Statute of Frauds as laying down a substantive rule, so that the requirements of a written form for commercial contracts is governed by the law applicable to the validity of contracts in general.¹⁰

Let us consider for a moment the subject of capacity with the view of ascertaining what can be done to bring the Latin-American and the North American systems closer together. Under the conditions under which we live in the United States, it is not feasible to operate with the personal law in determining the capacity to enter into commercial contracts. The *lex patriae* is impossible as long as our law is not unified and the vast majority of questions of private international law arise between citizens of the United States. Nor is the *lex domicilii* practicable as between the different states of our country because of the difficulty and inconvenience in determining domicile. Commercial transactions are generally entered into without time for deliberation and do not admit of long investigations into domicile, which in the end may prove to be abortive.

In Latin America the personal law has been retained in determining capacity, but no agreement has been reached regarding the question whether the personal law should be the *lex patriae* or the *lex domicilii*. The Bustamante Code leaves the states free to choose either.¹¹ This is an unsatisfactory state of affairs and the question is whether it would not be possible to solve the difficulty

⁹Nichols & Shepard Co. v. Marshall, 108 Iowa 518, 79 N. W. 282 (1899); Greenlee v. Hardin, 157 Miss. 229, 127 So. 777 (1930).

¹⁰See Lams v. F. H. Smith Co., 6 W. W. Harr. 477, 178 Atl. 651, 105 A. L. R. 646 (Del. 1935).

¹¹Art. 7, Latin-American Code of Private International Law.

in the matter of commercial contracts by adopting the North American position that the law governing the validity of contracts in general should determine also the capacity of the parties. In view of the fact that capacity has been regarded so long as a part of status, which is governed everywhere by the personal law, such a suggestion may seem shocking to Latin-American juristic thought, as involving a sacrifice of all principle. But is such a sacrifice actually demanded? The conception that capacity is a part of status rests upon the premise that disabilities are imposed for the protection of the individual and that the personal law knows best what protection is needed. Such protection, it is argued, should be afforded to the party under disability everywhere, which can be done only by means of his personal law. Granting that there is much force in this reasoning, does it follow that it should be applied also to commercial contracts? In this class of cases the security of legal transactions plays an especially prominent rôle. The desire to protect persons under disability comes, therefore, into conflict with the requirements of commerce, which demand that business transactions should be upheld if they are in conformity with the local law. Anglo-American law has resolved the question in favor of the security of commercial transactions. The writer realizes that the step taken by the United States may seem to the Latin-American jurists too radical a departure from fundamental theory, and that the only concession Latin-American law is prepared to make in the interest of security of commercial transactions is perhaps that persons under disability according to their personal law be not allowed to set up such disability if they possess full capacity under the law of the place of contracting. This is a compromise position which has been taken by some continental countries as well as by the Geneva Convention of June 7, 1930, for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes.¹² The acceptance of the above qualification would constitute an advance over the exclusive application of the personal law and would bring the Latin-American law not only into closer touch with that of the United States but also with the law of the other leading commercial countries.

Complete uniformity in the matter of capacity would be attained if the law of the United States could be modified so that

¹²Art. 2 (2).

a contract, invalid for lack of capacity under the law of the place of contracting, would be sustained if it satisfies the law of the domicile of the parties. This could be done only if a distinction could be made between interstate and international transactions. In contracts between the states of our Union resort to domicile is impracticable, as we have seen, because of the uncertainties connected with domicile. It may appear, however, that the domicile of persons engaged in international trade is more stable than the domicile in the average case where interstate transactions are involved, and if that assumption is justified domicile may furnish a convenient standard for international transactions. In fact, it might be possible to regard the place in which the business is carried on, that is, business residence, as a substitute for domicile in determining capacity in this class of cases. A modification of our law in the direction just indicated, according to which capacity to contract would be determined in interstate transactions by the law governing the validity of contracts in general and in international transactions by the law of domicile or business residence, would have to be brought about, however, by legislation in the individual states or by treaty, for our courts have been disposed to lay down identical rules of the conflict of laws in both classes of cases. Such a result might be brought about by legislation in some of our states vitally interested in foreign commerce.

The validity of contracts as regards formalities should not be difficult to resolve, and yet we find considerable divergence in the law of the different countries. The position of the English courts that the Statute of Frauds is procedural seems indefensible, there being no justification for regarding a contract that is valid in every respect, as unenforceable simply because it does not comply with the statute of the forum. The American courts, as we have seen, were inclined to follow the English view except in contracts for the sale of goods, but they have now seen the error of their ways and regard the Statute of Frauds today as affecting the substance of the contract and thus controlled by the law governing the validity of contracts in other respects. Foreign writers frequently assert that our law subscribes to the continental maxim *locus regit actum* in matters of formalities, but such assertion is incorrect. The maxim denotes that any legal transaction, although governed as to validity in general by some other law, shall be valid

as regards formalities if it satisfies the law of the place of the contracting. The rule was introduced as a rule of convenience and was not intended to set aside the law governing the transaction in general. With due respect to the origin of the rule, it is frequently held on the continent, therefore, that *locus regit actum* represents an optional rule. There is some difference of view as to what the other alternative is or should be. In France *locus regit actum* seems to be regarded as a qualification of the law of nationality, hence a legal transaction is valid with respect to form if it satisfies the law of the place where the transaction was entered into or the national law of the parties.¹³ In Germany, on the other hand, the option is between the *lex loci* and the law governing the validity of the transaction in general, which in the case of contracts means the law of the place of performance.¹⁴ A very eminent French writer, Professor Lainé, after a most profound study of the subject, reached the conclusion that a legal transaction should be valid if it complied with the requirements of form either of the *lex loci*, the *lex patriae*, the *lex domicilii*, or the *lex fori*, and where it related to property, the *lex rei sitae*.¹⁵ Two cases decided by the Supreme Court of the United States would seem to suggest at first glance that our highest court has adopted an alternative rule in the matter of formalities. In *Scudder v. Union National Bank*,¹⁶ the Supreme Court states that: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made." Some years later, in the case of *Hall v. Cordell*,¹⁷ the same court held that the law of the place of performance should govern the formal requirements of contracts. It does not follow from these cases, however, that the Supreme Court took the German point of view and deemed the contract valid as regards formalities if it satisfied either the law of the place of making or the law governing the contract in other respects, that is, the law of the place of performance. There is no indication in any of our cases that our courts have adopted an alternative rule in this matter. In the two cases referred to, the Supreme Court actually laid down two

¹³Barbey, *Le Conflit des Lois en Matière de Contrats dans le Droit des Etats-Unis d'Amérique et le Droit Anglais comparés au Droit Français* (1938) 302.

¹⁴Introductory Law, Art. 11, German Civil Code.

¹⁵Lainé, *Esquisse d'une théorie de la forme des actes instrumentaires en droit international privé* (1908) 321, 674 *et seq.*

¹⁶91 U. S. 406, 412-413, 23 L. Ed. 245 (1875).

¹⁷142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956 (1891).

divergent rules in the conflict of laws governing contracts in general, holding that the particular rule adopted applied also to formalities—the *lex loci* in the first place and the *lex solutionis* in the second. Neither the Supreme Court of the United States nor any of our state courts has been inclined to follow the continental tradition by applying a special rule to formalities. They are more apt to allow the parties to contract in general with reference to either the law of the place of contracting or the law of the place of performance—they have done so more or less consistently in the usury cases¹⁸—which renders any special rule governing formalities unnecessary.

The situation is quite different from the standpoint of the Bustamante Code. Instead of allowing a choice between two laws, it requires compulsory compliance with the law of two states, the law of the place of contracting and the law of the place of performance,¹⁹ thus multiplying the chances for invalidity. A more liberal rule is clearly in order, and as there is a good deal of precedent for such a conclusion in the legislation of other civil-law countries, it should not be difficult to bring the Latin-American law into line. Professor Lainé's suggestion may as yet seem too far advanced, but both Anglo-American and Latin-American law could well adopt the rule that a commercial contract is valid as regards formalities if the requirements of the place of contracting or those of the law governing the intrinsic validity of the contract are satisfied.

If we turn our attention now to the law governing the intrinsic validity of contracts, the problem is simplified by the fact that we can consider the problem by itself. Capacity and formalities affect not only contracts but many other legal transactions, and the desire for uniform rules and symmetry in the law might cause one to hesitate to adopt a special rule with respect to contracts, even if it seemed to meet the requirements of international commerce. The intrinsic validity of contracts presents questions which are not seriously interrelated with other problems in the conflict of laws. They can be more readily isolated, but this does not render their solution easy. The Institute of International Law has wrestled with this problem on various occasions without being

¹⁸*Seeman v. Philadelphia Warehouse Co.*, 274 U. S. 403, 47 Sup. Ct. 626, 71 L. Ed. 1123 (1927).

¹⁹Art. 180, Latin-American Code of Private International Law.

able to come to any satisfactory conclusion. Most courts and writers seem to agree that the intention of the parties should control in this matter, subject to the rules of public order. The continental courts especially are consistent advocates of this rule. According to some, the parties should be limited in their choice of law to the countries that have some vital connection with the contract in question. Others give greater freedom to the parties. In the great majority of cases the parties did not express their intention and did not even think of the matter. In these cases some courts purport to find the "implied" intention of the parties from the circumstances, that is, the intention which they feel the parties would have entertained, had their attention been called to the question. But it is obviously impossible to ascertain a subjective intention that did not exist. The best that can be done in that situation is either to apply an objective criterion and subject the contract to the law of the state or country with which it has the most intimate relation or to indulge in a legal presumption, such as the application of the law of the place of contracting, or the law of the place of performance, or the law of the common domicile of the parties.

What has been the attitude of our courts in this matter and what are the rules laid down in the Bustamante Code? If we were to accept the Restatement of the Conflict of Laws by the American Law Institute as truly expressive of our laws, the answer would be that the law of the place of contracting controls absolutely and without reference to the intention of the parties. Section 332 of the Restatement expresses the general rule, in accordance with which the law of the place of contracting determines the validity and effect of a promise with respect to capacity, the necessary form, the mutual assent and consideration, any other requirements for making a promise binding, fraud, illegality, or any other circumstances which make the promise void or voidable. Here we have an extreme expression of the view that the law of the state where a contract is made necessarily determines whether a binding agreement has been reached. It represents the theory long entertained and expounded by Professor Beale, the Reporter of the American Law Institute for the Conflict of Laws, according to which the state in which a contract is concluded, even though it be localized there only by way of fiction, as in the case of contracts by correspondence, has the exclusive power to attach legal

consequences to the facts.²⁰ Our courts as a whole have not supported this view and have followed Story's view²¹ that where a contract is to be performed in some other place than the place of contracting, in accordance with the presumed intention of the parties, the law of the place of performance should control.²² Some courts consider all the facts of the case and apply the law of the state with which the contract has the closest connection. In usury contracts our courts allow the parties to contract in good faith with reference to the laws with which the contract has some substantial connection, particularly with reference to the law of the place of contracting and the law of the place of performance.²³ Our law reflects, therefore, to a considerable degree, the views entertained by the courts and writers of other countries. In the writer's opinion the parties should be allowed to contract with reference to any law with which the contract has a reasonable connection, subject, of course, in exceptional cases, to rules of public policy. A presumption might even be indulged that the parties contracted with reference to the law having a substantial connection with the contract that would support its validity. A recent English decision would allow them to contract even with reference to some law having no direct relation to the contract.²⁴ It seems unwise to extend the autonomy doctrine to this extent in matters affecting the validity of contracts, except, perhaps, under special circumstances. There is general agreement that if all the facts connect the contract with a particular state under the law of which it is void, the parties should not be allowed to subject the contract to some other law. It seems equally clear that where the contracting parties are not on an equal footing the law may have to lay down a compulsory rule regarding the law governing the validity of the contract, or of a particular stipulation, without reference to the expressed intention.

Our law needs clarification in various respects. It should make clear under what circumstances the parties can or cannot choose their law in matters affecting the validity of contracts. That they have such power in matters not affecting validity is conceded.

²⁰Beale, *What Law Governs the Validity of the Contract?* 23 *Harv. L. Rev.* 260, 267 *et seq.* (1910).

²¹Story, *Conflict of Laws* (3d ed. 1846) 367, 432, §§ 242, 280.

²²See *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104 (1882).

²³See *supra* note 18.

²⁴*Vita Food Products v. Unus Shipping Co.*, [1939] A. C. 277.

Turning now to the Bustamante Code, we find that it lays down mandatory rules not only with respect to capacity and formalities, but also with regard to the intrinsic requirements of contracts. The effect of fraud, mistake, and duress is said to be subject to the "territorial" law.²⁵ Illegality is a matter of "international public order."²⁶ In contracts by correspondence, the law of each contracting party must be satisfied.²⁷ No room is left for a choice of law in matters affecting the validity of contracts, no room for the autonomy of the will. In taking this rigid attitude Latin-American law, as embodied in the Bustamante Code, is at variance not only with the law of continental countries which has made autonomy the underlying basis of the conflict of laws regarding contracts, but also with the law of England and the United States. In requiring that the law of both contracting parties must be satisfied in contracts by correspondence, the Bustamante Code takes a severer stand than that taken by any of the leading commercial countries of the world. It makes for invalidity, whereas it would seem that the great desideratum in commercial transactions is that contracts be sustained as far as possible. Instead of upholding a contract satisfying the law of the place of contracting or the law of the place of performance, it goes to the opposite extreme by requiring that it must satisfy both laws. The autonomy doctrine has been attacked by many writers, but properly understood and limited, it furnishes a proper juridical basis for the determination of contractual rights in private international law. Moreover, its universal character is calculated to promote unity in the law among the nations, thus furthering the development of harmonious international relations. We have in the autonomy doctrine, therefore, the clue to the problem how greater uniformity between the American Republics—Latin-American and North American—can be attained in the matter of the intrinsic validity of commercial contracts. In the accomplishment of this aim, both systems of law will have to abandon some of their preconceived ideas. Our law will have to rid itself of the notion that law is territorial and that contracts are, therefore, necessarily governed by the law of the state where they are entered into, in contracts by correspondence as well as in contracts *inter praesentes*. The dogma of the territoriality of law had been overthrown in

²⁵Art. 177, Latin-American Code of Private International Law.

²⁶Art. 179, Latin-American Code of Private International Law.

²⁷Art. 245, Latin-American Code of Private International Law.

this country in large measure with respect to contracts prior to the publication of the Restatement of the Conflict of Laws. The Restatement unfortunately adopts it as the exclusive basis for the determination of the validity of contracts and by so doing tends to retard its complete elimination from our law. It is to be hoped, and the writer ventures to predict, that when the Conflict of Laws is restated by the American Law Institute the second time, the autonomy principle will displace the present theory. The Latin-American law, so far as it is contained in the Bustamante Code, will have to give up some of the ideas contained therein, however sound they may be from a logical and theoretical standpoint, in favor of a more elastic principle which will sustain contracts. The adoption of the autonomy theory will serve to point the way. This may seem like giving up principle for mere opportunism, but this is not actually the case. The autonomy doctrine, as interpreted and developed by some of the latest writers who have given profound consideration to the subject with full knowledge of the decisions of the courts of many countries, constitutes no longer an "emergency solution," devoid of all principle, but rests upon veritable scientific foundations.²⁸

The subject of commercial contracts presents, therefore, a field in which it is possible for jurists of Latin and North America to cooperate with the view of bringing about greater uniformity in the law and thereby help to promote understanding and goodwill between the peoples of the American Republics.

²⁸See Battifol, *Les Conflits des Lois en Matière de Contrats* (1938).