

Spring 1949

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Recommended Citation

Rabel, Ernst (1949) "Comparative Conflicts Law," *Indiana Law Journal*: Vol. 24 : Iss. 3 , Article 2.
Available at: <http://www.repository.law.indiana.edu/ilj/vol24/iss3/2>

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COMPARATIVE CONFLICTS LAW*

ERNST RABEL†

It is a custom in writing about "conflict of laws," to start with censuring the ineptitude of this title and the mendacity of that other name, "private international law." The American Restatement, evidently moved by similar scruples, chose the title of "The Law of the Conflict of Laws." I have admired the amplitude of this expression but have found out that for my purpose *more* words are needed, namely: The Conflict of the Laws of the Conflict of Laws. This still does not bring out that there is more conflict than law in the subject-matter.

Complaints against the present conditions of conflicts law the world over are very serious, indeed. Disgusted observers—significantly not hard-boiled specialists in the field—have spoken of a labyrinth and a bankrupt branch of science. Not one satisfactory codification of it exists. The Conflicts Restatement with untold labor behind it is recognized as the weakest part in the brilliant series of the American Law Institute. The Código Bustamante, adopted in fifteen countries, it not often applied. The hope for other treaties has been more often disappointed than fulfilled.

Since the international community of Story and Savigny, Foelix and Fiore broke down, this department of the law has been treated as just a sideline of the nationalized private laws. Its international purpose has been forgotten. In the narrow confines of state law and ubiquitous public policy, no frenzied search could discover the magical fluid to revitalize the venerable formulas inherited from the statisticians and so piously preserved, particularly by the French and American courts. International life has encountered an awkward, opinionated attitude, and in some instances an attitude of virtuous selfishness, not seldom an arrogant disregard to contracts and foreign laws. Uncertainty of the law has driven international commerce into an autonomous net of standard forms and lawless arbitration, far afield

* This paper was delivered at a Round Table Meeting of the Association of American Law Schools, December 29, 1948.

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from any national law and court. The hardships of the present upheaval of the world are aggravated by the absence of legal order. Let us get back to the purposes of legal rules determining the applicable law not for the temporary convenience of the court or the citizens of the forum—or its treasury—but for the sake of their participation in reciprocal nation-wide and world-wide relations.

What is the specific state of things in the United States? We have an enormous wealth of judicial authority, abundant in factual situations and legal problems, referring to interstate relations but using the technique of any conflict of laws. Thereby these decisions are the richest source of information in the world for comparative research. And because they deal with sister states, they are also a model of consideration for foreign law, a system of mutual tolerance unattained in any other country. That extraordinarily learned scholar and fascinating teacher, Joseph Beale, sifted these overwhelming materials for the first time. Again, his Restatement has provoked a wholesome, thoughtful reaction by numerous eminent writers. To the two comprehensive textbooks, by Goodrich and Stumberg, we are deeply indebted. There exists, in addition, the imposing literature on the constitutional side of the problem.

The expositions of conflict of laws in the encyclopedias are not among the assets. They have been incapable of penetrating through the curtain of ritualistic formulas behind which the courts have learned for a century to hide their true thoughts, and in some instances their thoughtlessness. These industrious and unhappy surveys make us conscious of the wilderness from which we must escape.

Comparative research—in this country spearheaded by Ernest Lorenzen—has to prove once more its clarifying and inspiring force. This is only natural in a field essentially requiring an international level of observation. While the law of nations has never had its internationalism challenged—only its existence—the people who travel and migrate, the families dispersed and displaced, and businessmen working in foreign jurisdictions or dealing with foreign parties, the members of nation-wide or international organizations—individuals and corporations and partnerships with all their activities crossing state borders, have been abandoned to the chaotic interplay of national laws. They have become

victims of the national seclusion of the legal systems, the positivism of legal science, the legal aspects of economic barriers, and the infinite variety of legal refinements. With at least sixty countries in the field, plus, for minor divergencies, some fifty jurisdictions of the United States and ten Canadian provinces, we enjoy one hundred and twenty-odd "laws of the conflict of laws." The watchword has been: This is a part of the law of the state—right; therefore it is entirely impregnated by the legal system of the forum—wrong. Hence we find: characterization according to the law of the forum, no *renvoi*, no party agreement on the applicable law—almost any policy of the forum being a possible obstacle to applying a different foreign law. In France and Italy they have draped all this outrage with the flag of sovereignty, and not a few have, in the meantime, substituted the naked national interest, as a court understands it. In the United States, Cardozo spoke his famous words: "We are not so provincial. . .," and he has been admirably followed. Nevertheless, Beale appropriated Dicey's thesis that a status unknown to the forum is not recognized. He and other eminent authors have rejected for speculative reasons *renvoi* and party autonomy. Most statutes and constitutions declare that a foreign corporation cannot have more powers than a domestic one of analogous nature. Thus, a foreign adoption, legitimation, deed, a foreign joint stock corporation cannot operate because of some alien features. American courts have prevalingly used wise restraint, but Latin-American governments have requested singular things when asked to license the business of an American corporation.

This reminds me of a true story of my own family. A three-year old girl had a toy, a white cat mounted on wheels, which she pulled by a string. One day on the street a cat came along and her nurse exclaimed, "Look, that sweet little cat!" But the little girl protested, "Oh no, that is no cat, it has no wheels." So we do not recognize a Massachusetts cat, unless we fix it up with wheels. We have here the entire philosophy of characterization according to the law of the forum.

If comparative research teaches us anything, it is to look to the essentials. It ascertains throughout the world the facts common to all, the common life problems, the common functions of the legal institutions. This is the neces-

sary basis for rules intended to distribute the phenomena of life to the various jurisdictions.

We need then the right criterion for adequate territorial connections. In this respect we may discover that provincialism is not the only defect of our doctrine. Another defect is the lack of a sense for reality, most conspicuous in the Continental literature until the First World War. And how else can we explain that in the United States *lex loci contractus* survives from the naïve scholars, 400 to 600 years back, who believed that a contract made in the territory of a feudal lord or a free city was born into the sovereign power of the local seigneur, acquiring a status like a child? How else to understand the mysterious imperative power, until recently, of the law of the place of contracting in the constitutional practice, in the conflicts decisions of the state courts, and in the Restatement of Conflicts? Surviving in a century when contracts are made by mail and wire and telephone, and nobody even can ascertain objectively the *place* of contracting! An action for unjust enrichment is said to be governed by the law of the place where the enriching act is done, but if a New York firm is paid too much at a bank in Paris, it is enriched in New York, not in Paris, because it may dispose of its account; and what clue should either contact give us? Law of the place of performance—but a modern international contract may have ten different places where the parties have to discharge duties. All these factors, taken for themselves, are inconclusive.

What is conclusive, generally is decisive everywhere. A Quebec attorney was once appointed (1864) by the British Government for services before the Fishery Commission between Canada and the United States. The appointment was made in Ottawa, Ontario—place of contracting. The meetings were held in Halifax, Nova Scotia—place of performance. But the Canadian courts and the Privy Council very reasonably allowed an action quantum meruit for the attorney's fees according to the law of Quebec.¹ This is right because an attorney is rooted at his domicile by his function in the administration of justice, the organization of his profession and the living conditions influential on his fees.

We have touched a third trouble, the painful uncertainty of conflicts law. The courts have usurped the faculty, not

1. Regina v. Doutre, 9 App. Cas. 745 (1884).

to choose the applicable law under a conflicts rule, but to choose the conflicts rule in every individual case. This is done openly; thus the American courts are said to have the option among four or five rules at pleasure for localizing a contract. Choice is made in a disguised manner: The place of contracting, in selecting the law applicable to the capacity of a married woman or to an insurance contract, will be localized in that state whose law appears to furnish the solution agreeable to the court.

But in 1943 something sensational happened. The Supreme Court of the United States formally buried that formidable rule, the *lex loci contractus*, where it had its capital, in the division of power over the law of contracts between the states.² Mr. Justice Black said that "in determining the power of a state to apply its own regulating laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance." So then, the old rules are dead—if only they knew it themselves!

For American legal science the important point is, as Professor Harper has stated,³ that the fetters of the traditional rules have fallen and the way is free. The question is: What now? A group of American authors enjoys the vacuum and greets the liberty of the courts to place a case under the law allowing the issue to be decided in accordance with the judge's ideal of justice.

I hope that these scholars nevertheless will be satisfied with firm rules gained from continued studies, if they prove definitely superior to the discarded ones. Law consists of rules; rules have to bind not only the parties but also the judges. This is not a contrast between common law and civil law. Does not common law educate us to arrive through trial and error to more and more certainty? I submit, conflicts law needs, more than any other field, solid rules, susceptible of being managed harmoniously in the various countries. I am afraid that without them there will be much trial and nothing but error.⁴

2. *Hoopston Canning Co. v. Cullen*, 318 U. S. 313 (1943).

3. Harper, *Policy Bases of the Conflict of Laws*, 56 *YALE L. J.* 1155, 1177 (1947): the fetters of territoriality, the jurisdictional approach and the conflict of laws mechanism based thereon are broken.

4. The problem has been discussed recently in Europe with the same result: *De Nova*, in *STUDIA GHISLERIANA* (Ser. 1 No. 5, Pavia

The following are a few illustrations of the possibility to reach universal conflicts rules by comparative studies and international co-operation. They are taken from the law of contracts and do not exhaust the many kinds of suggestions provided by the study of foreign laws and the habits of international business.

1. Comparing, for instance, the conflicts rules on voluntary assignment, we may be amazed to discern, among obscure approaches, three definite systems—each of which is right and wrong at the same time. Each one is focused on one or at most on two sides of what is a triangle. The American rule emphasizes the place of the assignment, excepting only the question of assignability which is referred to the law governing the debt. The German and Swiss doctrine places every question which does not concern a promise to assign under the latter law. The French courts look only to the law of the debtor's domicil. In reality three complexes of problems exist, needing three separate rules. We have to combine and correct all three systems.

2. Suppose an English merchant and the agent of a New York firm meet in Paris and agree on a sale of goods to be sent from Ceylon to Antwerp, f.o.b. Bombay. What law is called for? There is a place of contracting and at least three places of performance. French, English, American, Ceylonese, Indian, or Belgian law? In every court another law? In overseas sales of goods, the uncertainty of solution is so disagreeable to commerce that the International Law Association worked out a draft of a convention on conflicts law which subsequently was discussed in the Sixth Hague Conference in 1928, and, there frustrated by doctrinal disputes, was revised by a committee of outstanding experts. The main principle to be taken from there should be that a sale of goods is governed by the law of the domicil of the seller. This is a convincing solution. More doubtful: in what cases should the law of the buyer govern? The committees stumbled on this point. But here long and thorough comparative research in the municipal sales laws has shown the overwhelming importance of the place up to which the seller bears the burden of custody and risk. In sales per-

1947); Dölle, *Gegenwartsfragen des Internationalen Privatrechts*, DEUTSCHE RECHTSZEITSCHRIFT (Beiheft #5, Germany 1948); Zweigert, *Die Dritte Schule im Internationalen Privatrecht*, in *Festschrift für Leo Raape* 51 (Germany 1948).

formed by shipping it is most frequently the delivery to the carrier that is the center of the transaction. After I suggested that this contact should be material, I have been thankful for Professor Stumberg's collection, in his book of 1937, of American decisions concerning the questions what place should determine the standards of quality and the construction of implied warranties.⁵ Equal branded potatoes were sold, and the court applied the standard of the place of contracting. Ground sheep manure was sold, and its standard was determined by the law of the place of performance. But the f.o.b. place, to which the seller carries the goods, in the former case was in his state, while in the latter it was in that of the buyer. And the same distinction was consistently but reticently observed in other decisions. This is quite a remarkable hint for achieving an internationally useful rule. Commercial thinking is correctly felt and satisfied.

3. Maritime carriage of goods: Goods are transported on an Italian vessel from New York to Rio de Janeiro. What law governs the contract of affreightment (as distinguished from the effects of a negotiable bill of lading)? The new Italian Code of Navigation applies the law of the flag, Italian. Any American court is sure to apply the American law of "contracting." The Brazilian Code is equally stern in applying Brazilian law as that of the domestic port of destination. This is our present anarchy. Uniformity would be so easily acquired if the motives were brought into the open and the rule were clarified that in reality is in the mind of the American and also the English and French, Dutch, and other courts. The port in which the goods are loaded and the bill of lading is issued is the most significant point of the transaction, by administrative supervision and by commercial conception.

4. Similarly, services of attorneys, of physicians, of brokers, and of all independent contractors are determined by the courts everywhere under the law of their domicile; the employment contract of a servant should reasonably be governed by the law of the principal's place of business where the employee is integrated in the service; authority of an agent by the law of the place where he uses his authorization.

5. Insurance is a particularly intriguing subject. Ameri-

5. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 372-375 (1937).

can courts choosing the law applicable to any insurance contract usually state a "well settled" rule that validity of a contract is governed by the law of the place where the contract is made, and that this depends on the last act completing the contract; delivery of the policy is the last act, and if the policy is sent directly to the client by mail, it is at the home office; when the policy is sent to the agent of the company who delivers it to the insured, the contract is made at the latter's place—with more ensuing casuistry. Superficially regarded, the practice is based on stable rules. But these are ritualistic gestures. What really happens looks different.

On the question what law governs a life insurance contract, Professor Carnahan has revealed in seven-hundred pages not one but very many answers, describing them in highly cautious formulations.⁶ More simply, it has been estimated that in seventy-five per cent of the cases the law of the domicil of the insured has been applied, in the remaining cases the law of the home office of the insurance carrier. Whether one or the other law was selected, the result in the overwhelming majority benefited the party suing against the company.⁷

This practice, however, should not be considered without observing the state statutes. They are difficult to summarize, beset with obscurities, and using a variety of techniques. Yet although few states say it definitely, the all-pervading tendency is to extend supervision of the insurance business to the widest scope. Where a statute is satisfied with a list of selected impositions and prohibitions, the list grows fast and large. Where the forms of policy must be submitted to a superintendent or commissioner, I understand that in practice the result of amiable negotiation is that practically nothing material happens without state authorization.

In a third field of dynamics, the Constitution, the long line of decisions dealing with insurance has come to the present stage where in the opinion of the Supreme Court justices, state power to regulate insurance business is un-

6. CARNAHAN, CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS (1942).

7. See CARNAHAN, *ibid.*, and BATIFFOL, LES CONFLICTS DE LOIS EN MATIERE DE CONTRACTS 294 *et seq.* (1938).

limited, except for discriminating and unreasonable provisions, and for mutual benefit associations.

In all three aspects the development points to the same direction, towards the supremacy of the state supervising the insurance business to which the contract is deemed to belong. The private law most naturally applicable to an insurance contract is that of the state exercising the administrative control of the insurer, at his headquarters or at his foreign place of business, respectively. The European doctrine has definitely reached this clear conclusion, with strong emphasis on the technical basis of insurance and the inevitable division of international insurance business into national departments. A draft of a uniform statute by a Committee of the American Bar Association under the chairmanship of Professor Edwin W. Patterson has proposed a strikingly similar treatment.⁸

Collecting all these valuable suggestions, it should not be difficult after renewed studies of the particulars to agree on rules that, roughly speaking, would recognize the law of the insurer's central office when the parties rely on it, not because the policy is mailed there. Further, the rules should recognize much more frequently in life and health insurance the law of the residence of the insured, because the state of this place regulates the business of which the contract is a part—we may say because the agent of the insurer is acting there rather than because the policy is handed to the insured. And finally, we should adopt the law of the situation of objects insured against fire or crop damage, because the risk is situated there.

This example is characteristic of numerous situations where the American doctrines come near to the solution we may desire after examination of a problem and its treatment throughout the world, but need adjustment. Only a little step is needed also for the rules on formalities of legal acts, the place of tort, the extent of an agent's power—and the rule, if consistently applied to the given phenomenon of life, would be sound.

In this entire work of creating a body of rules adequate for interstate as well as international reciprocal use, every

8. "An Act Concerning the Conflict of Laws in Relation to Insurance Contracts" in American Bar Association, Section of Insurance Law, Program (for the) Annual Meeting in San Francisco 50 (1939).

student of conflicts law is able to participate and is highly welcome to take his share, even though he may not be familiar with foreign laws. My suggestion would be that the impressive interest in conflicts law manifested in the law reviews should not prevailingly be devoted to the questionable arguments so often advanced in judicial decisions, but to the discovery of the desirable solution, to the guidance that the courts deserve in their difficult task. More than usual, special problems of restricted size should be totally investigated, with all their social and legal aspects including international justice. And the query should be: What is positively the rule to be written in a new Restatement? If academic and other scholars do this work, they not only promote American law but achieve an exceedingly useful and eminently desirable contribution to international research and agreement.

Whoever is in a position to explore foreign sources is at an advantage. But I should like to emphasize how very valuable English translations would be at the present time, and to reiterate the necessity of an international review of comparative law.

It is a great cause which we have to serve: the higher unity in which to join legal history and legal system, legal theory and practice, and common law and civil law. Conflict of laws is a vital bridge between all of them—a bridge needing repair today.