

PARTY AUTONOMY IN CHOICE OF GOVERNING LAW AND ADHESION CONTRACTS IN AMERICAN CONFLICT OF LAWS

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I — INTRODUCTION.

"The contracts in Private International Law is one of the chapters of this discipline whose reputation of complexity, of confusion and of arbitrariness is very well established"¹.

"Contracts is by common consent the most complex and also the most confused part of Conflict of Laws"².

These two statements by two great scholars, one in Continental European system of law the other in American legal system show the difficulties to be encountered by those who undertake to study any problem in this area. The task of the one who seeks to study "Party autonomy in choice of governing law" in relation with a specific type of contract such as contract of adhesion is more delicate because first he has to go through the problem whether or not "the parties to a legal transaction may choose the law by which it is to be governed"³. Another difficulty, after accepting the autonomy doctrine is whether it is confined only to "expressed intention" of the parties? In other words if is intended law or autonomy be applicable only when expressly stated? or does "presumed intention" of the parties have decisive effect too?

1) Henri Batiffol, *Les Conflits de Lois en matière de contrats*, 1939, 1.

2) Willis L. M. Reese, *Restatement of the Law, Second, Conflict of Laws*, Council Draft no. 9, March 3, 1960, 1.

3) *ibid.*

II — AUTONOMY OF THE PARTIES AS GOVERNING LAW.

As there are three elements of a contract namely: capacity, formalities and essential validity three laws may govern these three elements international contracts, but this is not an absolute rule, two of the elements may be subject to same law while the third element is subject to a second law. By governing law intended by the parties the law governing the essential validity is meant.

1) THE DOCTRINE.

Some writers reject the doctrine of autonomy. Professors Lorenzen⁴, Beale⁵, Goodrich⁶, and Foote⁷, Minor⁸ and Baty⁹ belong to those." Professor Lorenzen forwards the following argument in support of his view:

"The validity or invalidity of a legal transaction should result from fixed rules of law which are binding upon the parties. Allowing the parties to choose their law in this regard involves a delegation of sovereign power to private individuals. Dicey's explanation of the intention theory does not meet this objection. If the parties to a contract which is made in England and is to be performed in France can, by the mere operation of their will, make it a French contract or an English contract, which is subject, as regards intrinsic validity, to French or English law respectively, they are in fact determining the validity of the contract, and to that extent exercising sovereign powers."¹⁰

Professor Beale uses the same reason in the following words: "the intention theory makes a legislative body of any two persons who chooses to get together and contracts." Thus the intention

4) Lorenzen, "Validity and Effects of Contracts in the Conflict of Laws, 30 Yale L. J. 655 (1921).

5) Beale, "What law governs the Validity of a Contract" 23 Harv. L. 260-1, (1909), Conflict of Laws, 2, (1935) paragraphs 332.2.

6) Goodrich, Handbook of the Conflict of Laws, (1947), ed. 326.

7) Foote, Private International Jurisprudence, 4th ed. (1914) 358-359.

9) Baty, Polarized Law, (1914), 43.

10) Lorenzen, op. cit. 658.

"allows the parties by their own will to create an obligation where, by the law of the place under which they act, no legal obligation would be attached to the agreement"¹¹.

Beside American writers some of the European authorities on Conflict of laws too oppose and reject the autonomy. Two eminent French writers Pillet¹² and Niboyet¹³ attack the intention theory because it allows avoidance of laws which are obligatory in their domestic application. This avoidance creates two possible applications of the same law: the imperative domestic application, and facultative international application, which these French writers say is improper. For them only the sovereign state is source of law, it is an exclusive source covering all human activities within its jurisdiction.

Another objection to autonomy is that in many types of transactions the parties are bound by a given law they do not have power or right to choose another law which is best suitable for their own purposes, so to recognize the freedom of choice for the applicable law would be an anomalie¹⁴.

The opponents of the autonomy concede that the parties are free to choose their own terms, within the limits prescribed by law, as they may prefer and find best for their convenience. They may even adopt the rules of a given legal system for shorthand purpose. But such "incorporations" of legal provisions is not legislation. Their binding force derives from the law prescribed by the sovereign state having jurisdiction over the contract.

Again in Academic field the theory of autonomy has many adherents. It has been suggested that the reasoning of those rejecting the party autonomy "is theoretically unsound. This conclusion

11) Beale, *op. cit.* article, p. 263.

12) Pillet, "Essai d'un système général de solution des conflits de lois", *Clunet* (1894) 417, *Principes de Droit international privé*, (1903) 430 ff *id.*, 2. *Traité Pratique de droit international privé* (1924), 261.

13) Niboyet, "La théorie de l'autonomie de la volonté" 16, *Recueil des Cours*, (1927, 1), 5 *Traité de droit International privé français*, 36.

14) Delaume, "Autonomie de la volonté en droit international privé" 39 *Revue Critique de Droit International Privé* (1950), 321.

has been reached and persuasively justified, in rare agreement by both natural law and analytical legal philosophers¹⁵.

In fact one of the leading legal philosopher and believer of natural law in the nineteenth century Prof. William Galbraith Miller wrote the following.

"the whole operation of preparing contracts, agreements settlements, conveyances and such deeds, is purely legislative. The conveyancer who prepares a contract of copartnery or articles of association of a company is framing a code for a greater or smaller group of persons. A marriage settlement or a will is equivalent to a private act of parliament regulating the succession of a particular person or persons... All such deeds **make** the law for the **persons** involved.

But the movement for freedom does not stop here. The exigencies of commerce refuse to be trammelled by the formalities of the civil law. Contracts *in re mercatoria* are privileged in their forms. They are made by merchants in their own words or in any manner they please... in ordinary agreements if a person expresses himself clearly there is no reason why he should use particular words if others are as clear...

This movement which in some respects is called free trade, merely signifies that individual men are allowed to *make the law for themselves*.

Professor Kelsen too in a fine analysis points out that autonomy exists¹⁷.

The writers favor autonomy for different reasons, and on different grounds. The followers of (jurisprudential system) accept that the parties to a legal transaction have power, subject to the general public laws, to choose the law governing the transaction. Accordingly within the sphere of private law, their intention, express tacit or when necessary presumed from the circumstances of the case is controlling as regards the applicable law. Formulated by Laurent commonly accepted a century ago, and most generally espoused by

15) Albert A. Ehrenzweig, "Adhesion Contracts in the Conflict of Laws" 53 Col. L. Rev. 1072.

16) William Galbraith Miller, Lectures on the Philosophy of Law, 1884, 71.

17) Hans Kelsen, General Theory of Law and State, 32, 35.

judicial practice, this view advances that private consent provides the law of the contract except as restricted by imperative statutory requirements.

Professor Batiffol who believes in autonomy has a different ground to sustain his view. He says that in majority of contracts with elements interesting more than one juridical system, the intended law of the parties is not present. The judges pretend to derive from presumed intention of the parties this law. This pretention is abusive and dishonest, because parties have no whatsoever any intention concerning this respect, because they never thought of the problem. The reached result is obviously an arbitrary decision by the judge as witnessed by the large diversity of solutions presented by judicial decisions: law of the place of making, law of the place of performance, national law of the parties or of the debtor, law of domicil of the debtor, law of the situs of the object. There is no other area where it is more difficult to anticipate the decision of the judge. This deplorable practical result comes from an initial error of analysis which is rendering the system rationally non-justifiable. It is not up to parties to make the choice of a law to govern them, a law governs the contract by authority (*s'impose d'autorité*), it is not chosen¹⁸. So autonomy denotes not a power to stipulate the applicable law as such but the freedom of the parties in contracting to localize transactions by their voluntary acts¹⁹. The law of the contract is determined by its "economy", the circumstances that indicate its location on space, which may, but usually do not, include an express stipulation regarding the applicable law. It is conceived that this analysis avoids certain difficulties in the traditional views: the supposed *petitio principii* in allowing the parties to choose the law of the contract; the question whether *renvoi* is admissible, and the problem presented when the "intended law" nullifies the contract. In effect this interpretation of the "proper" law doctrine in terms of autonomy reverses Savigny's analysis to ascertain the law of a contract, instead of utilizing intention to locate

18) Batiffol, *op. cit.*, 1.

19) *Ibid.* "Les parties selon nous ne choisissent pas la loi applicable mais les éléments de faits localisateurs du contrat dont le juge déduit la loi applicable."

contracts in space as contemplated by Savigny, the intention of the parties is inferred from the objective localization of contracts in their material elements²⁰.

Professor Rabel maintains that autonomy signifies specifically the power of the parties to choose the law governing *inter alia* the extent of their freedom to contract²¹. This liberal doctrine has the shortcomings of not representing the admissions (e.g. *loi facultative*) and the restrictions (e.g. public policy) commonly accepted.

The Turkish writers in general accept autonomy of the parties. Professors Muammer Raşit Sevig and Vedat Sevig accept party autonomy with the limitations of public policy and fraudulent evasion (*fraude à la loi*)²². Professor Osman Fazıl Berki accepts autonomy only if the contract is 1) a contract exclusively concerning private interests and not public interests, 2) a contract not dealing with succession and wills 3) not against public policy. Prof. Berki cites the following contracts as the ones concerning public interests: contracts of corporation, labor contracts of crew and other seamen, labor contracts in general, contracts on liability from work accidents²³.

Professor Nihal Erdener accepts autonomy but on one condition that is if the contract is valid *a priori* according to *lex obligationis*. She says that if the contract is not valid than there is no lieu to look for the law chosen by the parties to be applied to contract. Dr. Erdener indicates law of the place of the most characteristic performance of the contract as *lex obligationis*²⁴. Professor Necip Kocayusufoğlu accepts autonomy on condition that it is accepted by *lex obligationis* which is the law of the place of the most characteristic performance of the contract or the law of the domicile of the debtor if he undertook the obligation at the domicile. Professor Kocayusufoğlu says that Turkish judge will examine the refe-

20) Yntema, op. cit., 344.

21) Ernst Rabel, 2, The Conflict of Laws: A Comparative Study, (1947), 357.

22) Muammer Raşit Sevig ve Vedat Raşit Sevig, Devletler Hususi Hukuku, 3. Bası, 1962, 568.

23) Osman Fazıl Berki, Devletler Hususi Hukuku, 3. Bası 1959, 498.

24) Nihal Erdener, Devletler Hususi Hukuku, 1962, 133-134.

rence to a chosen law by the parties in the contract taking into consideration *lex obligationis*. If *lex obligationis* openly rejects autonomy then the judge will interpret the rules of the chosen law which are not included within public of distinctive policy rules, as interpretative provisions of the contract²⁵. Suphi Nuri accepts autonomy with the exception of public policy. According to him Labor contracts, contract of corporations are within the domain of public policy²⁶.

Professor Sami Akıncı writing on contract of affreightment accepts autonomy in charter-parties with limitations of public policy, the prohibitive rules of Brussels Convention and the provisions of Turkish Commercial Code on the responsibility of charterers²⁷.

We do believe that the intention of the parties must be given effect and we do concur in the following remarks of Prof. Rheinstein: "... opposition to the intention of the parties rule has been motivated by the fear that the rule might too easily lead itself to evasion of law. But which law is it that the opponents fear might be evaded? All the prohibitive and restrictive provisions of the law chosen by the parties apply... There are also applicable all those prohibitive and restrictive rules of... the forum... which are regarded... is sufficiently important to merit classification as rules of public policy. If a state thinks that a contract should not be enforced because it was made in contravention of an important prohibition of the place where the agreement was made... it can perfectly well do so by an appropriate exception to the general intention of the parties rule."²⁸.

25) Necip Kocayusufpaşaoğlu, "Devletler Hususî Hukukunda tarafların sükutu halinde akitlere tatbik edilecek kanun" İstanbul Hukuk Fakültesi Mecmuası Cilt 21, Sayı 1-4. s. 393.

26) Suphi Nuri, Yasaların Çatışması, 1934, 211.

27) Sami Akıncı, Deniz Ticaret Hukuku, Navlun Mukaveleleri, 1961, 30.

28) Max Rheinstein, "Book Review: Falconbridge, Essays on the Conflict of Laws, (1947), 15 U. Chi. L. Rev., 478, 485-487.

For other authors supporting autonomy see: Walter Wheeler Cook, The logical and Legal Bases of the Conflict of Laws, 389-432 (1942), "Contracts' and The Conflict of Laws: 'Intention' of the Parties 32, Ill. L. Rev. 899 (1937); "Some Further Remarks about Intention" 34, Ill. L. Rev. 423 (1939), Arthur Nussbaum, "Conflict Theories of Contracts: Cases versus Restatement", 51 Yale L. J. 893, 898-900 (1949).

2 — AMERICAN JUDICIAL PRACTICE.

In Middle Ages the old statuist maxim *Locus Regit Actum* was applied by courts to contracts not only to their forms but to their substance as well. It was after Dumoulin insistence in 1525 that the effects of marriage upon property should be determined primarily by the intention of the parties that autonomy came to the attention of courts. However in England *Locus Regit Actum* ceased to be more than a presumption of intention only in 1760. In *Robinson v. Bland*, (2 Burr 1077) Lord Mansfield affirmed *lex loci contractus* as general rule but also accepted an exception where the parties at time of making the contract had a view to different kingdom.

American Law too at a very early date recognized the intention of the parties as governing law. Chancellor Kent in *Thompson v. Ketchum*, 8 Johns, 189, 193 (N. Y. 1811) excluded the *lex loci* where "the parties had in view a different place, by the terms of the contract". Chief Justice Marshall's dictum in *Wayman v. Southard*, 10 Wheat 1,48 (U.S. 1825) sustained that "a contract is governed by the law with a view to which it was made." The Supreme Court applied this dictum in *Pritchard v. Norton* 106. U.S. 124, 136 (1882) with the following words: "The law we are in search of, which is to decide upon the nature, interpretation and validity of engagement in question is that which the parties have either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice in *Wayman v. Southard*, (10 Wheat, 1, 48) where he defined it as a principle of universal law. There is authority sustaining the chosen law as the law to regulate matters which lie within the contractual powers of the parties *People v. Globe and Rutgers Fire Insurance Co.* 96 Cal. App. 2d. 571 216

Oliver, "Standardization of Choice-of-Law Rules for International Contracts: Should There be a New Beginning?" 53 A.J.I.L. 385, 391 (1959)); James, "Effects of the autonomy of the parties on Conflict of Law Contracts" 36 Chicago-Kent L. Rev. 34, 87 (1959), Dicey and J. H. C. Morris, Conflict of Laws 6th. ed. (1949) 579, Graveson, Conflict of Laws, 103 (1945). The proper law of commercial contracts, International Contracts, Schmitthoff, English Conflict of Laws (1945), Moser, Vertragsabschluss, Vertragsgültigkeit und Partewille im internationalen Obligationenrecht.

P. 2d. 64 (1950); *Boole v. Union Marine Ins. Co.*, 52 Cal. App. 207, 198 P.c. 416 (1921).

Even there is substantial authority sustaining that the parties may choose the law to govern their contract even as to matters which do not lie within their contractual power. The parties' choice has been upheld when the state of the chosen law is the place of contracting and performance is to take place in several states. *Ringling Bros. Barnum and Bailey Combined Shows v. Olivera* 119 F. 2d 584 (9th Civ. 1941), *Mittenthal v. Mascagni*, 183 Mass. 19, 66 N. E. 425 (1903).

For presumed intention "it is generally agreed that the law of the place where the contract is made is prima facie that which the parties intended or ought to be presumed to have adopted"²⁹; in the absence of circumstances indicating a different intention. *Gaston, Willicms and Wigmore v. Warner*, 260 U.S. 201, 43 S. Ct. 18, *Mutual L. Ins Co. v. Cohen*, 179 US. 262, 21 S. Ct. 106; *United States v. North Carolina* 136 U.S. 211, 12 S. Ct. 150.

An exception to this rule may obtain where the law has recognized the operation of other principles, as for instance, in respect of a contract of affreightment, it being a rule as to such, in the absence of express provisions or circumstances from which a different intent can be inferred, that the liability of a shipowner is presumably determined by the law of the country of the ship's registry or flag.

The parties may under this principle, readily adopt any law as that of the contract; and if the adoption is bona fide and devoid of fraud, the entire transaction will be governed by such law in accordance with the intent of the parties, regardless of where the contract is actually made. *Swedish-American National Bank v. First National Bank* 89 Minn. 98, 94 N. W. 218. *Beggs v. Bartels* 73 Conn. 132, 46 Atl. 874, *Coghian v. South Carolina R. Co.* 142 U.S. 101. This rule is however in its application is frequently delimited by the further qualification that some important element of the contract must have a real relation to jurisdiction whose law is stipulated to govern.

It is a rule that if the place of performance is different from

29) II American Jurisprudence, 405-406.

the place where the contract is made, the presumption is that the former is intended to apply. *Hall v. Cordell*, 142 U.S. 116, 12 S. Ct. 154, *Mason v. Dousay*, 35 Ill. 424, *Southern Exp. Co. v. Gibbs* 155 Ala. 303, 46 So. 465. *Dyke v. Erie R. Co.* 45 N. Y. 113, *Old Dominion Copper Mine and Smelting Co. v. Bioelow*, 203 Mass. 159, 89 N. E. 193 affirmed in 225 U. S. 111, 32 S. Ct. 641.

The position has been taken that in order to rebut the strong presumption that the *lex loci solutionis* governs the contrary intention must clearly appear. *Brown v. Gates*, 120 Wis. 349.

Now it is generally established that where there is a stipulation in the contract legal in one state but illegal in the other, the intention of the parties is thus manifested that the law of the state upholding provision should govern. *Garrigue v. Kellar* 164 Ind. 676, 74 N. E. 523.

Intention of the parties which is followed "with astonishing unanimity" by courts of leading European and Latin-American countries³⁰, was "probably the rule most frequently followed by the United States Supreme Court when the federal courts were still free to apply their own notions of conflict of laws in cases coming before them on grounds of diversity of citizenship"³¹.

Pritchard v. Norton is still good law to-day. In two recent decisions of the Supreme Court it is possible to find the recognition of the autonomy by this court. In *Lauritzen v. Larsen* (1953 73 S. Ct. 921, 931) Mr. Justice Jackson's dictum concerning an express agreement on the application of Danish law is the following: "Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which parties intended to apply." In *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (October term 1958) the court ruled: "We are not dealing with the sovereign power of the United States to apply its law to situations involving one or more foreign contacts. But in the absence of a contrary congressional direction we must apply those principles of choice of law that are consonant with the needs

30) **Rheinstein**, Book Review (1937), 37 Col. L. Rev. 327 reviewing "Les Conflits de Lois en matière d'obligations contractuelles, selon la jurisprudence et la doctrine aux Etats-Unis" by **Jeanprêtre**.

31) **Stumberg**, Principles of Conflict of Laws, 234.

of a general federal maritime law and with due recognition of our self regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern or the international community. These principles do not depend upon a mechanical application of a doctrine like that of *lex loci delicti commissi*"³².

3 — RESTATEMENT.

The Restatement had a "logical" preference for the *lex contractus*.

We said "had" eventhough, Restatement, Second, on Conflict of Laws, is still in draft form and Restatement of 1935 still in force. The Restatement, Second accepts autonomy of the parties to choose the law governing the validity of contract. In fact Paragraph 332. of the Council Draft No. 9 is the following:

"Law governing validity of Contract.

(1) The validity of a contract is determined by the local law of the state with which the contract has its most significant relationship; except in the case of usury (see para. 334 d).

(2) The state of most significant relationship is the state chosen by the parties, if a choice is permissible under the rule of § 332a, and otherwise the state selected by application of the rule of § 332b."³³

Paragraph 332 a is entitled "Law Chosen by the parties" and it reads: "The validity of a contract is determined by the local law of the state chosen by the parties for this purpose, unless,

(a) the contract has no substantial relationship with the chosen state and there is no other reasonable basis for the parties choice or

(b) application of the law so chosen would be contrary to a fundamental policy of the state which would be the state of the governing law in the absence of an effective choice by the parties"

³⁴.

It is obvious that Restatement, Second gives a paramount im-

32) 358 U.S. 354, at 382.

33) Reese, op. cit. 8.

34) *Ibid.* 17.

portance to autonomy. Its rationale is the following: "Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives can best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligation"³⁵.

As mentioned above the original Restatement stated without qualification that the validity of a contract is governed by the local law of the place of contracting, which was said to be the place where occurred the last act necessary to make the contract binding upon the parties. The Restatement stated also that the local law of the place of performance governs questions relating not only to the details of performance but also to sufficiency of performance, excuse for non-performance and the nature and measure of recovery in the event of breach. There was some authority behind each rule, however they were not consistently applied in practice.

III — LIMITATIONS ON THE PARTIES' AUTONOMY IN AMERICAN CONFLICT OF LAWS.

Even though as shown above autonomy is generally accepted in judicial practice and has strong following among the writers on the field, its applications is restricted by the following limitations.

- 1 — Questions of procedure are universally governed by the *lex fori*.

So the parties are not free to choose the law on procedure.

- 2 — The results reached by use of the chosen law must not violate the public policy of the forum.

This limitation is formulated in the new Restatement as "when application of chosen law would be contrary to fundamental policy

35) *Ibid.* 20-21.

of state whose local law would otherwise govern". All supporters of autonomy whatever be their grounds of support do agree that this limitation is essential and do exist. The reason is that a contract can be enforced by the courts of a state as long as it is not against state interest and state regulations. However the forum will not refrain from applying the chosen law merely because this would lead to a different result than would be obtained under the local law of the state which would be the state of the governing law if chosen law were to be disregarded. The chosen law can be refused only if its enforcement would be violative of the settled policy of the forum. This policy is called "fundamental" in Restatement, Second in preparation. This policy may be embodied in a statute of the forum enacted to protect its citizens.

Duskin v. Pennsylvania Central Airlines Co. 167 F. 2d. 727 (6th Cir.) cert. denied, 335 U.S. 829 (1948).

Exculpatory clauses reducing a vessel's liability for negligence to passengers are void as against public policy. 49 Stat. 1480 (146 U.S.C. paragraph 183 (1952) even though valid by the law stipulated in the contract. *The Kensington*, 183 U.S. 263 (1902) *Oceanic Steam Navigation Co. v. Corcoran*, 9 F 2d 724 (2d. Cir. 1925) A carrier may limit his liability for damages to baggage only if he provides the passenger with an option to insure the full value of the baggage. *Bachman v. Clyde S.S.Co.* 152 Fed. 4-3 (2d. Cir. 1907) *Cohn v. United States Lines Co.* 84 F. Supp. 503 (N. J. 1949), *Reihman v. Compagnie Générale Transatlantique*, 290 N. Y. 344, 49 N .E. 2d. 474.³⁶

3 — The chosen law must be related to transaction.

It is quite generally held or assumed that while the parties may stipulate that their contract shall be governed by the law of some jurisdiction which has a real connection with one or more of the various elements of the contract, they may not arbitrarily select the law of some jurisdiction which has no real connection with any of the elements of the contract and stipulate that law shall

36) For further cases See. Note. "Determining the Scope of Choice of law provisions in steamship tickets: Adhesion Contracts and Conflict of Laws" Yale L. J. 553 (1955-56); 112 A.L.R. 124, 125.

govern. *Seeman v. Philadelphia Warehouse Co.* 274 U.S. 403 (1927). The Supreme Court's test was normal relation in this case. In *Hal Roach Studios Inc. v. Film Classics Inc.* 156 F. 2d. 596 (2d. Cir. 1946) the court test was reasonable relationship. In *Owens v. Hagenbec - Wallace Shows Co.*, 58 R. I. 162, 192 At. 158 (1P37) Rhode Island Court's test was real relationship.

Whether a stipulation as to the law of some jurisdiction which bears some relation to the contract, but not equal to that possessed by the jurisdiction where the contract is made or is to be performed, as for instance, the domicil, as such, of one of the parties to the contract, will be enforced, has seldom been directly decided by the courts, because usually the several elements of the contract have coincided in the jurisdiction stipulated, and the decision goes not expressly rest on any definite element of the contract."³⁷

The Restatement, Second has adopted as an essential requirement to apply the chosen law the existence of substantive relationship between the chosen law and with the chosen state. A court will not apply the chosen law if the parties had no reasonable basis for selecting it. For example the Court will not apply a foreign law which has been selected by the parties in the spirit of adventure and to provide mental exercise for the judge, or just because it is an exotic law. This may not happen because usually the contracts involve many rights and duties, and the parties choose the law which may be applied in their best interest. The state of chosen law must have some substantial connection with the contract."³⁸

The requirement of relationship is rejected by "certain advocates of the classic liberal view who are apprehensive of stereotyped limitations of this nature and also object that the problem is non-existent in bona fide commerce and, for abnormal situations, is sufficiently anticipated by application of the *lex fori* under the doctrine of *ordre public*"³⁹. The other objection to some connection between the contract and the chosen law comes from those who accept autonomy only for incorporation of facultative laws.

37) American Jurisprudence, Cumulative Supplement to Conflict of Laws (1959-1960), p. 14. col. 2. Addenda to p. 406.

38) Reese, *op. cit.* 24.

39) Yntema, *op. cit.* 250.

4 — The chosen law must be adopted bona fide.

This rule is a consequence of the previous rule. This is important when the circumstances point a fraud on the law. The requirement of bona fide appears to be met when the stipulated law bears a reasonable relationship to the transaction. *Seeman v. Philadelphia Ware House Co.* (cited supra), *Albitron v. General Finance Corporation*, 204 F. 2d. 125 (5th Cir. 1953)., *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N. W. 1042.

The bona fide intervenes when the parties chose a law different from the law of the place which has exclusive jurisdiction. That means that with the exception of the facultative provisions of the internal law, intended law of the parties is accepted in international contracts.

5 — All parts of Contracts are governed by the same chosen law.

By parts we do not mean elements of a contract, only sections as regard to performance, payment etc. While in England "the intention of the parties may provide for the application of different legal systems to different parts of the contract"⁴⁰, in the United States the practice of courts, and the writings of authors indicate that a unique law must be chosen for application. Restatement has the same standing too⁴¹.

6 — The parties can only choose an existing municipal legal system.

This is the view of Restatement, Second and most of American writers point that only an existing municipal legal system can be chosen. The Restatement, Second refers to "the local law of the state chosen by the parties". This view has been adopted in England too, the parties are not at liberty to subject their contract to a legal system which is no longer in force or to draft of a foreign Code or to a system which have been freely invented. They

40) Schmitthoff, op. cit. 115.

41) The passage on choice of two laws in Restatement, Second is the following: "The extent to which the parties can choose to have the local law of two or more states govern the validity of different questions arising under their agreement is uncertain" Reese, op. cit. 28.

cannot even declare that their contract shall be governed by the rules which International Court of Justice apply⁴².

IV — AUTONOMY IN ADHESION CONTRACTS.

1 — Adhesion Contracts in General.

To World legal literature "Adhesion contract" terminology was contributed by Raymond Saleilles who used the term for the first time as far as the research shows, in his book entitled "*De la Déclaration de la volonté*", at page 229 which was published in 1901. "Contrat d'adhésion" was adopted by Patterson in his article on "The Delivery of a Life - Insurance Policy" in 33 *Harvard L. Rev.*, 1919 at pages 198 and 222. Adhesion contract is defined in the Restatement, Second as the "one that is drafted unilaterally by the dominant party and then presented on a "take-it-or-leave-it" basis to the weaker party who has no real opportunity to bargain about its terms."⁴³ In this type of contract the dominant party unilaterally dictates its terms to an undetermined multitude rather than to an individual. Such contracts are usually prepared in advance in printed form and frequently at least some of their provisions are in extremely small print.

2 — Which contracts can be considered as Adhesion Contracts.

Insurance, loan and transportation contracts are generally accepted as Adhesion contracts and "choice of law provisions contained in such contracts are usually respected. Nevertheless the courts do scrutinize such contracts with care and will refuse to apply any choice of law provision they may contain if to do so would result in substantial injustice to the adherent."⁴⁴

It is possible to go through decided cases one by one and find out that Prof. Ehrenzweig is right when he considers that some of these contracts are pseudo-Adhesion contracts while the others are adhesion contracts and that the Courts are really refusing to apply the autonomy when there is an Adhesion Contract, and apply it when there is a pseudo-adhesion contract.

42) Wolff, op. cit. 417.

43) Reese, op. cit. 23.

44) Ibid.

So we will do the same and study some of the cases decided and show where there is a real adhesion contract and where there is none.

By common consent ocean marine insurance in the transportation of goods is left out of adhesion contracts. "Even Soviet maritime law expressly states the right of the parties to modify the normal conflict solutions, although the imperative Soviet rules are excepted, this express permission is in full contrast to the general Soviet legislation."⁴⁵ In American insurance law the need of separate treatment of such insurance was recognized and the Courts and legislatures have left the insured shipowner to his own devices⁴⁶.

If the insurance contract was freely bargained as it was the case in *Boseman v. Connecticut General Life Insurance Co.*, 301 U.S. 196 (1937) where the Supreme Court upheld the chosen law which was Pennsylvania law to the detriment of insured. The Supreme Court pointed out the fact that the group life insurance policy accepted by insured was freely negotiated and bargained by his employer acting as his representative. However the courts are reluctant to extend this rule when the adherent has nothing to do with the drafting of the contract. The courts know the fact that insurance contracts are sold and not bought and "that the applicant must merely 'adhere' to the terms of the contract tendered to him by insurance company."⁴⁷ So the Courts have consistently refused to give effect to choice of law provisions when to do so would be to the disadvantage of the insured. The public policy was an argument of courts. *New York Life Ins. Co. v. Cravens*, 178 U.S. 389 (1900); *Great Southern Life Insurance Co. v. Burwell*, 12 f. 2d. 244 (5th Cir. 1926)⁴⁸.

In many cases the courts applied the choice of law provisions which were to the advantage of the insured. *Union, Central Life Ins. Co. v. Pollard*, 94 Va. 146 (1896), *Cones v. New York Life Insurance Co.* 32 Okl. 339, 122 Pac. 702 (1902).

45) Rabel, 3 op. cit. 240.

46) Ehrenzweig, op. cit. 1078.

47) Charles W. Carnahan, *Conflict of Laws and Life Insurance Contracts* (1942), 250.

48) For further cases see Reese, op. cit. 142.

This shows inconsistency on the application of choice of law to life insurance contracts. Even in some cases they had to declare the chosen law which was unfavourable to the insured to be applicable, they found a way to render this stipulation ineffective. All these "tortured reasoning" and "inequitable decisions" could be avoided say Prof. Ehrenzweig if a rule which "is actually applied by the vast majority of American courts" was adopted a stipulation of applicable law in an adhesion contract is invalid as lacking freedom of choice⁴⁹.

American courts at the beginning upheld the autonomy of the parties in loan contracts, thus notwithstanding their treatment of insurance contracts. This loan contracts permitted interest rates which were usurious under the *lex fori* or *lex contractus*. *Steinman v. Midland Saving Bank and Loan Co.* 78 Kans. 479, 96 Pac. 860 (1908) *Midland Saving and Loan Co. v. Solomon* 71 Kans. 185, 79 Pac. 1077 (1905) *Goode v. Colorado Investment Loan Co.* 16 N. Mex. 461, 177 Pac. 856 (1911).

But with the trend the vast majority of stipulations in commercial loan contracts, have either been invalidated by the courts or rendered harmless. Restatement, Second recognizes the autonomy of the parties (paragraph. 346 k.) with the limitations of usury (paragraph 334d). According to the last paragraph "the validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permitted by the general usury law of any state with which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the state whose local law governs the validity of the contract under the rules of paragraphs 332-332b".

In *Railroad Company v. Lockwood*, 17 Wall, 357, 382 (U. S. 1873) the United States Supreme Court refused to recognize a provision on limitation of liability of the shipper in a carrier's form contract.

Since then with the exception of *Siegelman v. Cunard White Star Ltd.* 221 F. 2d. 189 (1955) the Courts followed this holding.

In *Friche v. Isbrandtsen Co.* 151 F. Supp. 465 (SD. N. Y.

49) Ehrenzweig, op. cit. 1080.

1957) plaintiff brought action for injuries sustained aboard defendant's ship. Plaintiff, a German national knowing no English, purchased steamship tickets in Germany, written in English, containing two-year limitation, and providing that all questions were to be decided according to the laws of the United States. The Court held that motion for summary judgment dismissing claim denied, without prejudice to its being renewed upon a proper showing of German law. In application of grouping of contacts theory choice of law clause is only one of factors to be taken into account. In a case of this kind standard provisions are submitted to passengers on a take-it-or-leave-it basis. Here all incidents surrounding sale of ticket took place in Germany." Plaintiff if she considered any law probably felt that German law controlled. It may be that German law affords protection to parties in this plaintiff's position by not attaching great significance to 'objective expectations' as expressed in steamship tickets, and perhaps such protection might even amount to a strong national policy. It would seem that federal conflict of laws should take cognizance of such an attitude by the foreign sovereign where it is coincident with so many of the significant contacts... Unless a party.. can be said to have understood that another law from the one normally governing the contract is to control, it would be improper to decide a question which poses a choice between legal systems having quite different jurisprudential philosophies an American contracts law principles."

In *Mulvihill v. Furness, Withy and Co*, 136 F. Supp. 201 (S. D.N.Y. 1955) the steamship ticket was issued in New York. The time limitation provision was not observed the defendant moved for summary judgment. The court held granted (1) Since cause of action is founded upon a maritime tort, substantive law to be applied is federal law, including federal choice of law rules. (2) Ticket stipulated: "All questions arising on this ticket shall be decided according to English law with reference to which this contract is made". Under both English and American law limitation clause is valid. Conflict problem arises as to interpretation of contract. (3) Federal law should govern interpretation of this contract, a body of principles is being developed under Rule 56, considerations of internal public policy, reliance of parties upon 46 U.S.C.A. par. 183b" indicates that construction of the limitation

clause be determined by decisions of federal courts construing that statute". Since the contract is made in the United States, plaintiff is American citizen voyage commenced in American port and reference is made to American law for interpretation, center of gravity of contract is within the United States, "Since the document was in fixed printed form, prepared by defendant and tendered to plaintiff the clause referring to English law must be strictly construed against the defendant."

In *Siegelman v. Cunard White Star Ltd.* (cited supra) the court held autonomy clause valid to the detriment of the passenger. Ticket required suit to be brought within one year of injury. Defendant agent orally waived this requirement. Ticket provided: "All questions arising on this ticket shall be decided according to English law with reference to which this contract is made. Ticket was issued in New York. The Court held (1) Federal choice of law applies both because it is the forum and because of the nature of the claim: tort on high seas.— (2) "Since we cannot assume that the parties' choice of law will always foreclose the court from applying another law, our question is whether the contract provision here should have the effect, under federal conflict rules, of making the English law applicable to the particular questions posed by this case. While this question may appear on the surface to be purely one of the conflict of laws, we think it also involves interpretation of the contract. For it is not altogether free from doubt what is meant..., (a) Since major purpose of clause is to assure uniform result, provision must be read as referring to the substantive law of England not whole of English law including conflict rules, (b) validity of contract is embraced as well as its interpretation (c) Waiver of provisions of contract is included (3) Although question is more akin to one of validity than of interpretation, court gives effect to contract provision in this case for various reasons (4) English law neither pleaded nor proved, pleading unnecessary under Rule 8 N.Y. Judicial notice rule applicable under Rule 43 (a) (5) No waiver or estoppel established under English law. Dismissal of complaint *affirmed*. Judge Frank, dissenting reasoned that inter alia steamship tickets are contracts of adhesion therefore should be strictly construed against drafter. Since there was doubt whether the English law provision applied

to waiver and since the federal law of waiver was more favorable to the passenger than that of England he would have applied federal law.

V — CONCLUSION.

To our opinion *Siegelman* case is not an exception to denial of autonomy theory to adhesion contract because the majority opinion did treat the steamship ticket as an ordinary ticket. So, from jurisprudence and from the writers we can deduct the rule that in adhesion contract a choice of law rule is invalid. The courts have in their power now two doctrines to reject the chosen law when it is unfavourable to the weaker party: these are the public policy and the unconscionable bargain doctrine. But we think it is fair for both parties to know before hand which law will govern their contract so instead of favouring the weaker and make of adhesion contract principle a mean by which adherer wins in every case, it is better to enunciate an express rule that in the adhesion contract the freedom to choose the applicable law does not exist.

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