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Conflict of Laws--Choice of Law--(Adhesion) Contract of Affreightment With Stipulation of Applicable Law

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CASE COMMENTS

CONFLICT OF LAWS—CHOICE OF LAW—(ADHESION) CONTRACT OF AFFREIGHTMENT WITH STIPULATION OF APPLICABLE LAW.—*P* and his wife contracted with *D*, a British corporation, in New York, to provide sea transportation for *P* and his wife. During the voyage, *P*'s wife was injured by the alleged negligence of *D*. The contract, printed on the reverse of the ticket, provided that all claims for injury must be brought within one year from the occurrence, and that all questions on the contract shall be decided according to English law. Shortly before the end of one year from the date of the injury, *D*'s New York agent purported to waive the period of limitation orally. The contractual period for commencing the action having expired, *D* withdrew its offer of settlement and denied liability. This action followed. The lower court dismissed the action, from which *P* appeals. *Held,* applying the federal choice of law rule, one judge dissenting, that by referring to "English law" in their contract, the parties intended to invoke only English intramural (municipal) law, rather than English law of conflict of laws, and there was no waiver or estoppel of the valid contractual period of limitations by the actions of *D*'s claim agent under English law. *Siegelman v. Cunard White Star,* 221 F.2d 189 (2d Cir. 1955). (Note: the issue presented under English municipal law will not be a part of this comment.)

Since the action had been commenced in the Federal District Court for the Southern District of New York, the first problem confronting the court was whether the New York or the federal conflict of laws rule was to be applied. As a general rule, where federal jurisdiction is merely based on diversity of citizenship, the federal court must apply precisely the same law which the state court would apply. *Erie R.R. v. Tompkins,* 304 U.S. 64 (1937). But the rule is otherwise in admiralty cases. *Garrett v. Moore-McCormack Co.,* 317 U.S. 239 (1942); and see *Jansson v. Swedish American Line,* 185 F.2d 212, 216 (1st Cir. 1950). The courts have consistently held that there is a general maritime law which is to be uniformly applied. Therefore, the court's preliminary conclusion that general federal maritime law, including its conflict of laws rule, rather than New York law, is to be applied in the principal case, seems sound.

The second problem concerned the validity of a choice of law stipulation in a contract cutting across international boundaries, to govern (a) its ("formal" and "essential") validity or (b) interpreta-

tion, *i.e.*, governing disputes arising under the contract. For the distinction between "formal" and "essential" validity, and the difference between validity and interpretation, see DICEY, CONFLICT OF LAWS, Rules 143-149 (Moore ed. 1896). Since the instant court refrained from committing itself on the nature of this issue, an insistence on the distinctions would not aid the clarity of this comment.

There are five generally recognized theories for the determination of the law governing contracts of the instant nature. These theories refer to: (1) the law of the place of making the contract (*lex loci contractus*), (2) the law of the place of performance of the contract (*lex loci solutionis*), (3) the law of the place of greatest contact, (4) the law of the place intended by the parties, and (5) the law of the place which supports the validity of the contract, which is of greater theoretical than practical importance, as to all of which see 2 RABEL, CONFLICT OF LAWS 440-484 (1947) (hereinafter cited as RABEL). The first of these would seem to be the soundest in view of the ease of its application and foreseeability of result. But the rule is arbitrary and, absent agreements to the contrary, the *lex loci contractus* has, therefore, generally been used merely to determine the "formal" validity of contracts. 2 BEALE, CONFLICT OF LAWS 1090 (1935) (hereinafter cited as BEALE). The second is subject to the practical objection that in many cases where the place of making and the place of performance of a contract will differ, there will be a number of places of performance. For this reason the third rule has been advocated, 2 RABEL 441, but the difficulty of ascertainment is thereby merely shifted rather than alleviated. In the principal case, the court, by giving effect to the parties' expressed intention, adhered to the fourth theory. This theory first found its way into the common law in the eighteenth century, in the English case of *Robinson v. Bland*, 2 Burr. 1077 (1760). Mr. Beale has concluded that in this case the rule is mere dictum, and is poor authority for the decisions which followed it. 2 BEALE 1171. However, this rule now is followed not only in England, *e.g., Jacobs v. Credit Lyonnais*, 12 Q.B. 589 (1884); *Trinidad Se. & T. Co. v. G. R. Alston & Co.*, [1920] A.C. 888, but also in several American jurisdictions. 2 BEALE 1118-1174. It has been designated as the "English rule". RESTATEMENT, CONFLICT OF LAWS, W. VA. ANNOT. § 332 (1937).

The West Virginia cases reflect some of the general confusion on the subject, there being decisions upholding two of the five theories. Several cases have held that the law of the place of

performance is to govern the validity of the contract. *Pugh v. Cameron's Adm'r,* 11 W. Va. 523 (1877), citing STORY, CONFLICT OF LAWS §§ 241, 280 (1872); *Wick v. Dawson,* 42 W. Va. 43, 24 S.E. 633 (1896); and see *Campen Bros. v. Stewart,* 106 W. Va. 247, 249, 145 S.E. 381, 382 (1928); and *Boyd v. Pancake Realty Co.,* 131 W. Va. 150, 156, 46 S.E.2d 633, 636 (1948). These cases can, perhaps, be said to be within the exception of RESTATEMENT, CONFLICT OF LAWS § 358 (1934). No case has held that a contract is governed by the law intended by the parties. Mr. Dickinson, in RESTATEMENT, CONFLICT OF LAWS, W. VA. ANNOT. § 332, cites *Payne v. Bowlin,* 6 W. Va. 273 (1873), as standing for this proposition; however the case would seem to uphold the rule that the contract is to be governed by the *lex loci contractus.* The vast majority of West Virginia cases, consistent with RESTATEMENT, CONFLICT OF LAWS § 332, held that the law of the place of making *(lex loci contractus)* will govern the nature, construction and validity of the contract. *Boyd v. Pancake Realty Co., supra; In re Fox,* 131 W. Va. 429, 48 S.E.2d 1 (1948); see *Miller v. Prudential Banking & Trust Co.,* 63 W. Va. 107, 118, 59 S.E. 977, 981 (1907); and see cases collected in RESTATEMENT, CONFLICT OF LAWS, W. VA. ANNOT. § 332. But there is no reason to assume that the court would refuse to give effect to an agreement of the parties to the contrary, provided public policy *(ordre public)* is not violated by the particular nature of the agreement.

The federal cases in point are not easily reconcilable along the lines suggested by RESTATEMENT, CONFLICT OF LAWS §§ 332, 358. Both the theory of the *lex loci contractus* and that of the *lex loci solutionis* have been favored at times. But it has always been recognized that the parties have the power to specify the law by which they intend their contract to be governed. See *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.,* 129 U.S. 397 (1889). It follows that if the parties expressly specify that the validity of the contract shall be governed by a different body of law, such specification ought to be given effect.

But there are certain limitations on the parties' privilege to stipulate the applicable law, as the court pointed out in the instant case. The stipulation must be bona fide, citing *Vita Food Products v. Unus Shipping Co.,* [1939] A.C. 277. The place stipulated must have some relationship to the contract. See *Brierley v. Commercial Credit Co.,* 43 F.2d 724, 730 (3d Cir. 1930). The stipulation must be one which will neither allow the parties to do some act or fail to do some act which would violate nor allow the parties to do some act or fail to do some act which would evade or avoid any statute of the

place of contracting. *Seeman v. Philadelphia Warehouse Co.*, 274 U. S. 403 (1928). In summary, no such provision will be given effect where it is regarded as violative of the *ordre public. The Energia*, 56 Fed. 124 (S.D.N.Y. 1893); *Lewisohn v. National S.S. Co.*, 56 Fed. 602 (E.D.N.Y. 1893); *Knott v. Botany Mills*, 179 U.S. 69 (1900). The majority, in the principal case, considering all the facts, found that none of these specific rules for the protection of the *ordre public* had been violated by the parties' stipulation. But the dissent was not content with such a finding. It finds that in fact the stipulation runs afoul of "public policy". The dissent reasons that the contract being a printed form (adhesion contract), since *P* was not a party to the selection of its terms, it is against public policy to invoke the English law to defeat a claim which, under all considerations of justice, is recoverable if United States law were applied.

Having decided that the intention of the parties with regard to the choice of law will be given effect, the court then felt itself confronted with the question of what part of the stipulated English law the parties intended to invoke: the entirety of English law, including the English law of conflict of laws with its choice of law rule, or merely English municipal law. It appears that the court refused to run the risk of encountering a *renvoi* problem. The court did so by stating its belief that the parties intended to apply English municipal law only. As the dissent pointed out, an English court would have interpreted the parties' stipulation as invoking the entire English law. *Vita Food Products v. Unus Shipping Co., supra.* But, both the majority and the minority, in the principal case, overlooked the fact that the chance of encountering a *renvoi* problem was nonexistent, as the English choice of law rule, invoked by reference to the entire body of English law, would refer the case to English municipal law under any of several possible English theories. See *Jones v. Oceanic Steam Navigation Co.*, [1924] 2 K.B. 730, applying English choice of law rules without hesitation. See also DICEY, CONFLICT OF LAWS 587 (Moore ed. 1896). The majority, by avoiding the *renvoi* question on the basis of the parties' assumed intention, has taken a middle ground, the other alternatives being (1) never to refer to the entirety of foreign law, thus making it nearly impossible for *renvoi* situations to arise, and (2) always to refer to the entirety of foreign law, thus inviting *renvoi* problems, then to be solved by fixed rules. But the court has made the assumed intention of the parties hinge on an assumed desired result, and in so holding it acted without full investigation.

The majority purported to aid the desires of the carrier, namely, to achieve uniformity in the interpretation of its contracts. In this case it was mere accident that application of the English municipal law rule led to the same result which would have been reached by the proper application of the English conflict of laws rule. But the assumption of the carrier's desire to obtain uniform interpretations of his contracts, coupled with the blind application of the carrier's domestic law, is dangerous, and, in fact, on occasion may even defeat the carrier's real intention. Under German law, for instance, the German choice of law rule refers to the municipal law of the place of delivery of the passenger or cargo, with the result that German carriers obtain a uniformity of result with respect to all goods and passengers shipped into their own ports, and consistency with respect to all goods and passengers shipped into any foreign country. If an American court were to interpret a German contract for shipment to America, referring to the application of German law, merely so as to refer to German municipal law, then the intention of the German carrier—who relies on the entire German law—would be frustrated. This points to the danger of invoking assumptions as to the intention of the parties without first inquiring what it is reasonable for the parties to intend. To guide the interpreting court, it should inquire what the courts of the contract-writing party would hold with respect to the stipulated law. See RAAPE, INTERNATIONALES PRIVATRECHT 294 (3d ed. 1950). Thus, parties referring to "law" may well plan on *renvoi* and thereby intend to secure uniformity and consistency of result.

The decision leaves unaffected the general propositions, uncertain as they are, governing the applicability of law where the parties are silent. The court reaffirms the rule that where the parties have been circumspicious enough to stipulate the applicable law, such stipulation will be given effect, subject to the *ordre public* of the *lex fori*. Where the parties have failed to give a clear indication as to whether they meant to invoke the entire law (including conflict of laws rules) or merely the municipal law of the stipulated body of laws, the court will endeavor to ascertain the intention of the parties. But in defining the putative intention of the parties as it did, the court may well have erred.

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