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Ernst Rabel
American Law Institute

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THE REVISION OF THE TREATIES OF MONTEVIDEO ON THE LAW OF CONFLICTS

Ernst Rabel*

In its issue of July 1940, the Revista Juridica Argentina of Buenos Aires has published the new "Tratados de Derecho Internacional Privado" of Montevideo concluded in 1939 and 1940. We are grateful to this review for apprising us of a significant event in the field of international codification.

As is well known to every one interested in the law of conflict of laws, a conference held in the capital of Uruguay from August 25, 1888, to February 18, 1889, succeeded in drafting a series of international conventions which were finally adopted as law in Argentina, Bolivia, Paraguay, Peru and Uruguay. On the occasion of the fiftieth anniversary of this conference, the governments of Argentina and Uruguay invited the states which had been represented in 1889, including Brazil and Chile, to a work of revision. This work was accomplished in two periods running respectively from July 18 to August 4, 1939, and from February 5 to March 19, 1940; Argentina, Bolivia, Chile, Paraguay, Peru and Uruguay participated the whole time, Brazil and Colombia during the second period. The purpose was defined as a re-examination of the treaties "in order to adapt them if necessary to the ways offered today by the private international law," "in order to embrace the new situations that have occurred and to reaffirm the doctrine established in America," and "to modify and specify the provisions." In fact, the old treaties had been built on the problems and solutions of their time, with special consideration of the suggestions advocated by the Institute of International Law, some congresses and the European writers. Since then, a multitude of conventions, con-

*Dr. jur., Dr. hon. c., Athens. Collaborator of the American Law Institute; former Professor of Law at the University of Berlin and Director of the Kaiser Wilhelm Institute of Foreign and International Private Law; one-time member of the Permanent Court of International Justice at The Hague.—Ed.
gresses, codifications and literary discussions have accumulated; the Treaty of Habana (Código Bustamante) and the drafts of the American Institute of International Law were evidently taken into particular account by the learned draftsmen.¹

The result is a new text relative to the following topics.

*Treaties signed on August 14, 1939*

1. Asylum and political refuge—a development of articles that had been contained in the treaty on penal international law.

2. “Intellectual property”—a recasting of the treaty on literary and artistic copyright to which a number of European states have adhered.


*Treaties signed on March 19, 1940*

4. International procedural law.

5. International navigation law, elaborated on the basis of parts of the old treaty on commercial law.

6. International “civil” law, so named in contrast to the commercial treaty. (The whole series of treaties is called International Private Law, in a rather mistaken terminology still used by a few writers.)


8. International terrestrial commercial law.

Of course, the new texts have not yet been ratified by any country. The old treaties are still in force.

In this large domain fundamental doctrines have not been reversed, but the changes are numerous and some of them completely alter the practical aspects. They merit and are sure to arouse a keen interest in this country. And not the modifications alone! The fifty year old treaties have not been accorded the attention they deserved. Not even a criticism of such comprehensive kind as must have been developed by the draftsmen of the recent versions has ever been made in the literature so far as I know. In Europe the rules of Montevideo were noticed but underestimated in the too often repeated belief that the common background of language and civilization and the near relationship of the legislations between the Latin-American countries made

¹The Revista Jurídica gives only the names of the Argentine members: Juan Alvarez, Dimas González Gowland, Carlos M. Vico, Ricardo Marcó del Pont, Carlos Alberto Altorta, Juan Augustín Moyano.
unification of conflict rules easy; it was thought comparable to some interprovincial or interlocal regulations issued in a state with several private law systems. This is an exaggeration and a dismal excuse for not imitating such broad unifications in Europe. In South and Central America international agreements are sincerely desired; they are favored by a high degree of idealism; and the sacrifice of local particularities which they involve is nothing exorbitant.

As the preparatory discussions and exhaustive comments by the authors of the treaties are indispensable for their adequate study, we hope these discussions will be published soon. In the meantime a few casual remarks at first view may be noted with all reservations for possible inaccuracy. Outside Latin America, the main practical interest is naturally directed to the matters concerning private law, though from a political and sociological point of view asylum, extradition and mutual rights to exercise liberal professions are extremely important features.

In the treaty on international civil law, the law relative to persons remains based on the principle of domicile; it is the same principle, with some restrictions, that governs in Great Britain and, within numerous and sharp limits, in the United States. It means especially that capacity to contract and family relations (not, however, according to this treaty, succession to movables) depend more or less on the law in force at the place where the person concerned is domiciled. This is the older principle, in comparison with the principle of nationality applied in most other countries. But as modern developments are leading back to the domiciliary law, it certainly could not be given up. On the contrary, the tendency to enlarge its domain has been followed to a certain degree in the draft.

Article 1 emphasizes in a fuller text than it did a part of the broad scope of the test of domicile, stating that "the existence, the status and the capacity of a physical person is determined by the law of his domicile" and adding expressly a significant clause: "No incapacity of a penal character nor for reasons of religion, race, nationality or opinion will be recognized."

The section on domicile defines the particulars of the term as elements of a unified concept of domicile, such as is found in this country,
while on the European continent the conflict rule determines only which state’s law shall govern the details of domicil. New provisions are given for determining the place of domicil of a person. Some reluctance is still shown in permitting a separate domicil for a married woman. Article 9 maintains the rule—corresponding to the American Restatement of the Law of Conflict of Laws, section 29—that “the wife judicially separated or divorced retains the domicil of the husband so long as she does not establish another.” No new domicil of her own is recognized if the wife has gone to another state to live apart before being judicially separated, whereas in section 28 of the Restatement the wife is deemed to be capable of a separate domicil, at least if she is not guilty of desertion. This latter result, however, is reached in the inverse case: by an additional provision in the new draft “the wife deserted by her husband retains the marital domicil, unless it is proved that she has established separately her own domicil in another country.” This means that the deserted wife is not considered domiciled at the new domicil of the deserting husband.

Divorce is a difficult matter in Argentina, where a marriage concluded within the state is considered indissoluble by divorce. Under the existing article 13, the law of the marital domicil determines the dissolubility of the marriage, i.e., it may allow divorce only if “the law of the place where the marriage has been celebrated recognizes the cause of dissolution.” Yet the courts of Uruguay are divorcing spouses who have married in Argentina on the basis of public policy reserved by article 4 of the “Additional Protocol” of Montevideo, and authoritative writers in Argentina think this a legitimate practice. Argentine courts are not inclined to recognize such divorces, but the criminal chamber of Buenos Aires does not consider that a spouse who has been divorced in Uruguay commits bigamy by remarrying in Uruguay. Thus the actual law has not been changed as much as it would appear by the new article 15, which makes the law of domicil unconditionally govern the divorce, with the one exception that the state where the marriage was celebrated is not obliged to recognize that divorce; an additional paragraph states that “in no case does a subsequent marriage concluded in another state cause the delict of bigamy.”

The principle of domicil has made progress in other directions. It excepts from the territorial law parental power (articles 18, 19 new,
cf. r4, r5 old) and the rights of guardians over the property of their wards (article 28 new, cf. 22 old). Also marriage settlements, which until now have followed the declared or presumed intention of the parties, are subject to the law of the first conjugal domicil (article 16 new, cf. 40 old); this is a more questionable change.

On the other hand, the delegation of Uruguay complains that articles 9 and 58* "when applied to many factual situations, would mean the abandonment of the general principle of domicil which has been considered as the fundamental basis of this treaty for determining the legislative and judicial jurisdiction of the contracting states."

The delegation of Peru has signed the treaty but with a long list of reservations, some of which are of far-reaching significance. Thus Peru wants to apply Peruvian law "en favor de nacionales peruanos" despite the domiciliary principle. It is not quite clear what "favor" means.* To apply the national law to nearly all inhabitants under the title of domicil and at the same time to all nationals abroad, as would correspond to the principle of nationality, is in contradiction with the very idea of conflicts law. It is inconsistent especially with the international spirit of the Latin American Conventions. Those few countries unfavorably known for such excess of nationalism should reconsider their positions. It may be hoped that Peru does not join them. Another point is that Peru rejects "articles 15 and 22," feeling bound to the rules of the Codigo Bustamante on the law applicable to matrimonial matters and filiation. As a matter of fact, it would seem that for Peru and Bolivia to carry out their simultaneous obligations under the Conventions of Montevideo and Habania must give rise to many problems. Divorce and filiation are only a few examples of them. E.g., in the same section on marriage, article 13 (old 11) declares the law of the country where a marriage has been celebrated applicable to govern all requirements of a valid marriage, including capacity to marry, consent, etc. It is the same principle as that obtaining in the United States.* The Codigo Bustamante (article 36) on the contrary applies the personal law, as all European countries do. Probably the way out of this dilemma is to advise the parties that they must comply with the absolute requirements of the law of the place of celebration and

* Article 58 grants jurisdiction of suits to require that a guardian render accounts to the court of the place at which he was appointed. Article 9, mentioned supra, does not seem to be relevant to the protest; is there a typographical error?

* The writer hopes to find an answer in the Civil Code of Peru of 1936, not available at the moment.

* Conflict of Laws Restatement, § 121 (1934).
with all requirements of the laws at the domicil of either nupturient. Article 16 presents similar questions of an even more difficult nature, if article 187 of the *Código Bustamante* has to be obeyed at the same time. Under the rule of Montevideo the law of the first conjugal domicil, under the rule of Habaña the personal law common to both spouses, governs the effects of a marriage on their property. Which then is the law applicable where two Brazilians have married and established their domicil in Peru, in respect to movables owned by the wife in Argentina—from the point of view of these three countries? There are various possible answers. Still more interesting is the problem of "renvoi," not touched upon in either convention. I know that renvoi is often rejected by Latin American writers, and I think, in regard to citizens of the United States domiciled in Latin America, that problems are simplified by the absence of any claim of American law to regulate their personal legal relations. Yet there are questions.

The treaty on international commercial law, known for its well-shaped rules, underwent several modifications. The principles have been maintained, however. Thus business corporations and partnerships are governed by the law of their "commercial domicil" (article 5 old, improved by article 8 new), which is not that of their first registration or incorporation, but means, in accordance with the prevailing continental doctrine, the law at the place where the main center of management is located (article 3, par. 1 new). A new article (9) makes sure that a foreign company—for instance a partnership with limited liability—is able to act according to its law of origin in a country where its type is not known. This is the right solution in contrast to an inexact formed argument that a foreign organization could not have more rights than a domestic one.

New sections are devoted to terrestrial and mixed transportation, to pledges and to negotiable instruments made out to bearer. The provisions on bills of exchange are extended to other negotiable instruments to order. An article (24) is literally adopted from the Geneva Convention of 1930 on international conflict rules for bills of exchange (article 3), and article 30, par. 1-3, out of the Geneva Uniform Law (article 41). The main rules in this section (articles 26-33 old), which strongly influenced the *Código Bustamante* articles 263-271, have maintained their independent character.

The provisions on bankruptcy are developed.

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7 This was presumed, on the lines of Anglo-American law, by Bewes, "The Treaties of Montevideo," 6 *Transactions of Grotius Society* 59 at 73 (1921).
In the treaty on maritime law we find besides topics contained in the present commercial law treaty (ship collisions, average, affreightment, bottomry bonds, seamen) provisions on vessels in general, assistance and salvage, maritime insurance and state vessels. Again, further harmony of rules is established by the strengthening of the personal law which in the case of vessels is the law of the flag. It is called "la ley de la bandera" ("del pabellón") or "la ley de nacionalidad del buque" and in several functions replaces the law of registration, which may or may not be identical with the law of the flag (article 6 new, cf. 12 old; 15 new, cf. 21 old; 16, par. 1, cf. 22 old). Contracts of employment are no longer subject to the law of the place of contracting (article 19 old), but to the law of the flag (article 20 new). However the contract of affreightment, until now governed by the law of the place of the maritime agency by which it is concluded (articles 14, 15 old) will not be submitted to the law of the flag as in Great Britain,\(^8\) but to the law of the port of discharge, as in Argentina,\(^9\) Brazil,\(^10\) Chile,\(^11\) and Germany.\(^12\) This seems to imply, as in Germany,\(^13\) that for a voyage from New York to Buenos Aires the Harter Act prohibiting the shipowners from excluding their liabilities by contract clauses is no protection for a consignee at Buenos Aires.

For ship collisions between two vessels of different flags on the high seas, a much vexed question, the Treaty of 1889 established a singular rule whereby the plaintiff could choose the more favorable law. Now an old suggestion of the Antwerp Congress of 1885 and the Institute of International Law of 1888, which was adopted by the Portuguese commercial code, article 674(3), has found favor (article 7); the requirements of liability contained in both laws are to be accumulated in favor of the defendant. This shifts from one extreme to the other.

Embarassing for a foreign onlooker is the complete silence of all these treaties respecting the problem of the intention of the parties. Could it be that the parties have no choice of law of their own? This is hardly admissible. To take the example just mentioned of a contract of affreightment, how would it be feasible to adopt the rule that the

\(^8\) Lloyd v. Guibert, L. R. 1 Q. B. 115 (1865).
\(^9\) Argentine Commercial Code, art. 1091 (1940).
\(^10\) Brazil Commercial Code, art. 628 (1920).
\(^11\) Chile Commercial Code, art. 975, par. 2 (1892).
\(^12\) Reichsgericht, 34 R. G. Z. 78 (1894).
law of the port of discharge governs, without allowing the numerous exceptions necessarily conceded by judicial practice to satisfy the presumed intentions, not to speak of the expressly formulated commercial forms and clauses? Again we need authentic information.

The remainder of the renewed conventions are more than mere agreements on conflict rules; they form veritable unions, creating uniform law.

The treaty on international procedural law is a definite agreement of mutual judicial assistance, completed by a series of new clauses. By one of these clauses, judgments of international or arbitral tribunals sitting within a member state are subject to a special procedure (article 5, par. 2; article 7).

The treaty of international penal law determining jurisdiction and applicable law for punishable acts is particularly significant as an agreement between entirely independent states upon the limits of their power to prosecute. Since 1889, the International Commission of Lawyers at Rio de Janeiro in 1927 and the Codigo Bustamante have followed similar aims and brought new ideas into the discussion. An introduction into the general background of the Montevideo draft is given in the Revista Juridica by Dr. Elías Kraiselburd. The principle of "indivisibility" preventing a double punishment is upheld, and its practicability is improved by certain technicalities as well as by new rules such as relate to offences committed on aircraft (article 15) and to the binding force of a sentence pronouncing on recidivism and criminal habits or disposition (article 17). The conditions under which jurisdiction is attributed have been remodeled. In respect to extradition the treaty continues to enumerate the cases where extradition is denied rather than those where it is granted. Such grounds for nonextradition as political and military offences are more explicitly defined; the court of the requested state decides on the prevailing character of a crime having mixed political and common nature and may dismiss a request on the ground that it appears to be made for political reasons, even though the alleged offense is an ordinary one (article 24).

On asylum, the provisions accepted in 1889 had been a part of a draft by the American Institute of International Law, and there is now an entire treaty which may be compared to the Project No. 10 of the Commission of Lawyers of Rio de Janeiro.

In regard to the Montevideo Treaty on copyright, great international efforts have been made in the years before the present war, e.g., by the Institute for Unification of Private Law in Rome, to amalga-
mate this treaty with the Convention of Berne for the protection of literary and artistic works. In the meantime important provisions have been introduced into this treaty. The old-fashioned definition of the subject matter had to be recast, of course (article 2), and a clause reserving the so-called “droit moral,” the exclusive right of the author to modify his work, was obvious too (article 15). I do not see why the new article 8—“The articles of periodicals may be reproduced with mention of source”—omits the second sentence of article 7 (old): “Excepted are articles on sciences and arts the reproduction of which is expressly prohibited by their authors.” One would think, on the contrary, that scientific and artistic intellectual property should be protected without any express reservation, instead of being left entirely unprotected.

All taken together, the first impression is that the new drafts are worthy of their early predecessors and adequate to their historic importance. Modernization and improvements of style and content enhance the value of the work so much that it ought not to be forgotten and relegated to the backyard of international legal science. There is, however, great need for a reasonable development of the rules contained in these treatises by practice and scientific criticism. We are expecting much in this direction from the Latin American lawyers.