FORM AND CAPACITY IN INTERNATIONAL CONTRACTS

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WHILE the majority of the legal systems in the present world admit, as a matter of principle, party autonomy, as regulating international contracts, there are two points on which this agreement vanishes: according to an old tradition formalities are subject in many countries to the law of the place of contracting, whatever may be the proper law of the contract. On the other hand, capacity to contract generally in continental Europe is subject to the personal law, that is, the national law, or the law of the domicil; in other systems the place of contracting or the proper law of the contract applies. We shall examine successively questions of form and capacity.

I. FORM

One of the oldest rules in European conflicts law is *locus regit actum;* literally these words mean that contracts and other legal instruments like wills are ruled by the law of the place where they are made. But after the sixteenth century, the idea of party autonomy developed, and the meaning of the old formula was then restricted to the formalities.

Today the rule has remained without changes in several countries, that contracts *must* be executed in accordance with the forms of the place of contracting. Such conception of a compulsory rule obtains in different states of South America and continental Europe, as we see in the admirable book of Professor Rabel.[1] It is also the case in England, but modern authors contend, and among them Professor Cheshire, that this compulsory character is unreasonable. If we consider two Englishmen entering into a contract while they are for a short time in France, why should French law imperatively determine the form of their contract, if the parties are acquainted with the English formalities for a transaction which will be entirely performed in England?

Other countries in continental Europe have not kept such a rigid con-

[1] Rabel, 2 The Conflict of Laws (1947) 486.

ception of the rule, *locus regit actum;* the best expression of the new system is to be found in the German Civil Code; the introductory law, section 11, admits alternatively the formalities of the proper law of the contract or those of the place of contracting. The same system was adopted by the new Italian Civil Code of 1942 and by the Polish law of conflicts of August 2, 1926.

The situation in France is not so clear. Authors generally say that the rule is also optional, but the question is what option exists. The *Cour de Cassation* has only decided in an important case[2] that an English woman could make a will in France in the forms of English law. This implies, of course, a choice between the place of execution and the national law. But it may be asked whether the option is possible for contracts as well as for wills, and if the national law is the only possible substitute for the law of the place of execution. Authors generally teach that the rule is optional for contracts as for wills, but they disagree on the second point. Many of them think that a choice lies only between the place of contracting and the national law common to both parties, perhaps the national law of either one. I am of the opinion that the decision in *Gesling* v. *Viditz* ought to be understood as allowing the parties to choose either the law of the place of contracting, the national law of one of the parties, or finally the proper law of the contract, as the German Civil Code provides. Older decisions in that direction can be referred to, but undoubtedly the state of the law is still uncertain. There is only a tendency towards an optional rule.

I will be brief on the question in the United States, since you know it much better than I do. I had the impression when I studied the problem in this country fourteen years ago that it was very confused; some decisions applied to formalities the proper law of the contract, others preferred the law of the place of contracting, whereas the proper law was different; others applied the law of the place of contracting, without specifying if that law was the proper law of the contract or not. And it was difficult in my opinion, to determine where was the heavier weight of authority. Professor Rabel recently concluded that on the whole the proper law of the contract prevails. We find other positions which may be stated briefly. The *Código Bustamante* requires compliance with the law of the place of contracting as well as with that of the place of performance (if the word "*ejecución*" is to be understood in that sense). It does not seem desirable to require compliance with two different laws, since the risks of nullity are greater. We may recall also the system of the Chilean Code, followed by other Latin-American enact-

[2] Cass. civ. (July 20, 1909) D. 1911.1.185, Revue de droit international privé 1909, 900, conclusions de M. le procureur général Baudouin, Gesling v. Viditz.

ments, according to which the formalities of the forum are imposed on contracts "destined to have effect in the State." This is also open to criticism because the parties when they contract are not sure of the place where litigation, if any, will arise. (It may also be that the Chilean formula means the place of performance, but we may observe that the law of that place is not necessarily the proper law of the contract.)

It seems therefore that this short comparative survey leads us to the conclusion that two systems only deserve further examination: the optional rule of the German Civil Code and the exclusive application of the proper law of the contract as the case seems to be in the United States.

I think that the optional rule is better, and keeps what has been good in the old rule, *locus regit actum*. There are indeed some reasons which explain why formalities have been subject to a different law than the substance of the contract. Parties are not interested in forms "for their own sake," as Professor Rabel says; while they are interested in the application of the law having real connections with the case, to the substance of their agreement, on the contrary, their exclusive wish in the field of formalities is to make a valid contract. Now, generally speaking, they will more easily obtain information on the law of the place where they contract than on any other. Of course, the same has been said in order to apply the law of the place of contracting to the substance of the contract; this was one of the arguments of Beale for the application of that law to all the elements of the contract. But, strange as it may appear, parties are generally more concerned about formalities than information on substantive rules. As soon as they agree on qualities, quantities, prices, delivery, and payment, they do not imagine discussions about consideration, misrepresentation, or breach of contract; but they inquire, when the contract has some importance, whether it must be in writing or not and which formalities, under seal, or *authentique* as we say in France, and so on, are required.

These differences between form and substance explain why different laws govern the two series of questions. Now, while in most cases it will be true that information is easily obtained on the law of the place of contracting, we have already seen that this may not be so in certain situations. The optional rule seems therefore to be the best.

If this view is admitted, there will be some problems in distinguishing substance and form since they may be subject to different laws. I will only suggest the main ones to stimulate the discussion which will follow this exposé.

1. The question has been raised whether the law governing form determines that a certain form is necessary for the validity of the contract.

For instance, the French Civil Code provides that a gift must be executed before a notary. Is such a provision a rule of form? The opinion has been expressed that it concerns the substance, as the law governing form determines how the formalities should be executed, and the law governing substance fixes which formalities ought to be complied with. The French courts have decided that it is a question of form.[3] Professor Rabel writes that there is practically no doubt that the concept of form includes the problem whether a contract may be concluded orally or not.[4]

2. A more difficult problem arises in the field of evidence. Which law decides whether written or testimonial proof is admissible? Common law states generally apply in this matter the law of the forum, considering that it is a question of procedure. But in many European states it has been held that it is a question of form, since the parties have to get information at the place of contracting on the requirements of the law in force at that place concerning the form, oral or written, of contracts.

I think that a middle way can be found between the two conceptions. As a matter of principle, I understand that modes of proof are a part of the procedural system; procedure indeed determines what modes of proof the judge may consider as convincing. And there are certain modes of proof, like confession or oath, which have nothing to do with the form of the contract. Nevertheless, as a learned French author, Arminjon, puts it, the rule *locus regit actum* loses most of its utility if it does not apply to the modes of proof. For instance, suppose that a Frenchman contracting in Germany has not executed a written agreement because he was informed that German law does not require such formality. If later he sues the debtor in France, it would be unfair for the French judges to refuse testimony respecting the contract on the ground that French law provides that any contract involving more than 5,000 francs shall be executed in writing. The same could be said of the statutes of frauds in the common law states.

I suggest that the application of the law of the forum may be kept as a matter of principle, but, that the plaintiff should also be able to invoke modes of proof admitted by the law of the place of contracting, if some of these are not admitted in the forum. On the contrary, if the law of the forum admits modes of proof unknown in the place of contracting, it should apply and these modes be admissible. This is not a prejudice in favor of the plaintiff or to facilitate proof, but a combination which seems to be necessary between the law of the forum and the law which governs the form of the contract.

[3] Cass. civ. (June 29, 1922) S. 1923.1.249, Leroux v. d'Etchegoyen.

[4] Rabel, 2 *op. cit.* at 496.

3. There is a discussion whether revenue laws are part of the law governing form. There are few judicial decisions on the question; those in Europe seem to admit that the requirements of the foreign laws in matter of stamps on negotiable instruments are compulsory formalities, the absence of which nullifies the instrument everywhere if such is the rule at the place where the instrument is drawn. But the decisions in England are old; they are rare in Italy, Germany, and Austria. Consequently, important authors invoking some old American cases deny that such requirements are compulsory for the foreign judges. As a matter of fact the British Bills of Exchange Act, 1882, departed from the former English standpoint, and the Geneva Convention of 1930 pronounced that rights flowing from bills of exchange, and promissory notes, shall not be subordinated to the observance of stamp provisions.

Professor Rabel supports the view that international co-operation must not be hindered by revenue laws. I had personally thought, as Professor Goodrich does, that international co-operation would be fostered by reciprocal recognition of revenue laws. This may be another point for our discussion.

4. I will only indicate finally that some authors like Lerebours-Pigeonnière, a judge at the French *Cour de Cassation*, and formerly professor at the University of Rennes, suggests that renvoi is to be avoided in questions of form because the meaning of the conflicts rule is that the municipal rule of the place of contracting itself will apply. Professor Rabel, however, does not think that rules of form deserve special treatment.

5. It is a difficult problem to know which law determines the place of contracting, and particularly if this is a question of form. I doubt whether we shall have time enough to discuss this topic.

II. CAPACITY

Capacity to contract is a field where striking differences exist among the legal systems. In the United States it has often been said that capacity is governed by the proper law of the contract, but many decisions hold that the law of the place of contracting applies, and Professor Rabel contends that this is practically the American solution whatever may be the proper law of the contract. In continental Europe capacity is generally considered as an element of status and, as such, is governed by the national law of each party. In England it is very difficult to know what is the law. Some decisions have applied the law of the domicil as being the personal law of the parties, but others have preferred the proper law of the contract, or the law of the place of contracting.

Such differences express the difficulty of the subject. Undoubtedly, the application of the personal law and especially of the national law leads to great difficulties because a party contracting with a foreigner may be completely ignorant of the foreign law relating to capacity. There is a famous French case where a Mexican citizen named Lizardi underwrote promissory notes for jewels bought in Paris, and, when sued for payment, objected that Mexican citizens are incompetent until the age of twenty-five, whereas he was twenty-two at the time of contracting, and French law fixes the majority at twenty-one. The French courts decided that the promissory notes were enforceable, and it has often been said since that such a decision proves the impossibility of applying the personal law in questions of capacity to contract. Even when the personal law is that of the domicil, surprises may happen since contracting parties are not always domiciled in the place where the contract is entered into.

Nevertheless the principle is maintained in continental Europe that personal law applies in matters of capacity. In spite of the exceptions which limit the principle, this is a result which calls for explanation. The explanation seems to be that laws relating to capacity need, like any law relating to status, some continuity in application; if such continuity is lacking, those laws miss their end. Let us take an example: spendthrifts in French law may be declared by judgment incompetent to enter into any contract without the assistance of a person, often a lawyer, called his "*conseil judiciaire.*" Such an incapacity exists in many legal systems, but many others do not know it; its soundness, of course, is open to criticism, but this is not the question in discussion here; we have only to consider the case where a person under such disability enters into contracts abroad, in a country where the law leaves spendthrifts entirely free to contract. It has been felt for centuries in Europe, if I understand well, that a restriction of this nature would be of no use if the incompetent person had only to cross a border to be able to do quite regularly what was impossible otherwise.

This is not a plea in favor of the universal application of personal law, as Mancini recommended. But there are very special reasons to apply the personal law to capacity; it has often been contended that defects in consent, like error, duress, or fraud should be subject to the personal law because, like incapacity, they aim at protection of the individual will. But, as Professor Rabel states, this view has not been accepted by the courts; in Germany, France, and England, the proper law of the contract applies. This is very important, I think, to understand the meaning of the personal law in questions of capacity. One feels that there is a difference between a permanent disability, as in the case of a married woman, or a lunatic, and

a casual defect in consent like duress or misrepresentation. If the law of a certain state provides that married women cannot enter into contracts in favor of their husbands, it is obvious that the efficiency of such provisions will be in serious danger if married women only have to cross a river or to take a train or a car to be able to do what the law forbids. On the contrary, every one feels that nothing of the kind is to be feared in questions of consent; for instance, civil laws originating directly in Roman law do not know the idea of misrepresentation; their notions of error and *dol* are somewhat different. Now is there any difficulty in subjecting a Frenchman contracting in England to the English rules relating to misrepresentation? Obviously no. While, as we have seen, the French law on incapacity, e.g., as to spendthrifts, may be easily evaded if spendthrifts can regularly accomplish across the Channel what is forbidden to them in France, French law on consent only applies to contracts having their most real connection with France, and we do not mind if English contracts are otherwise regulated.

The difference, finally, seems to lie in this: permanent disabilities, to reach the end they aim at, must apply with some continuity, because they are directed to the person itself, whatever may be the contracts entered into, whereas provisions on consent seek fair contracts. Of course, any legal rule finally applies to persons, but it may consider them directly or only so far as they are involved in questions relating to property or to contracts of such or such a kind. Now when the law of a certain state has some definite regulations on consent in contracts, this is on the ground that such regulations are necessary, or at least useful to ensure fair contracts; it does not matter therefore which persons are parties to a contract.

I hope to have helped you to understand this strange looking rule of the application of the personal law to capacity. There is no use to insist here on the difficulties it meets in practice. I have already mentioned the *Lizardi Case*, which sufficiently illustrates them. But we must now briefly indicate that half-way positions have necessarily been found.

As far as English law on this topic may be stated, it seems that there is at least a tendency to apply the personal law to contracts connected with family relations, like marriage or adoption, and to prefer the proper law of the contract in ordinary transactions. Professor Rabel thinks that this system is acceptable. I wonder if many continental jurists would not consider that the place it leaves to the personal law is too small.

Another solution is to be found in the German Civil Code, which, aware of the *Lizardi Case*, provided that a foreigner, able to contract according to German law, cannot avail himself, for contracts executed in Germany,

of a disability originating in his personal law. This provision has been followed in Sweden, Switzerland, in the new Italian Code,[5] and in the Geneva conventions of 1930 and 1931 on bills of exchange and checks. This does not mean discarding the personal law, since the foreigner, capable of contracting according to his personal law, is capable in Germany, even if he is not according to German municipal law.

In France we are still faced with the *Lizardi* decision,[6] in which an incompetent Mexican citizen was held liable for notes signed in France, because, as it was said, the French party, contracting in good faith, was not obliged to know Mexican law. You can easily guess the numerous comments and criticisms this decision has provoked; I have not time to show how it can be explained as a result of the special character of foreign law, but I will point out two facts.

First, the *Lizardi* rule does not destroy the principle of the personal law as applied to capacity, since the French contracting party must have been in good faith. Therefore, as everybody understands it, if the transaction is important enough to allow sufficient time for information, the personal law will apply. More precisely, the Court of Appeal in Chambery ruled that a French banker in a city close to the Swiss border could not ignore Swiss law on capacity, since he was doing business frequently with Swiss citizens; to contract in good faith with Swiss married women, he ought to get information on Swiss law, which was an important question in his business.[7]

On the other hand, one may think that such rulings introduce a dangerous uncertainty in the law. But a striking fact is the very small number of judicial decisions on the question. It appears that where payment is in cash, no difficulty arises, and where payment is not immediate, parties generally have time enough to get information. Of course half-way situations, as the *Lizardi Case* shows, may happen, but, as a matter of fact, they are rare. And so you may understand why there is no serious desire to change the existing law on the point in France. Several suggestions have been made which have met only indifference. It has been said that the French system better safeguards the principle of personal law than the German or the English solutions.

The difference remains very striking between these conceptions and the American view. I suppose that such a difference is the result of a real con-

[5] Germany: E. G. §7, par. 3; Sweden: Law of July 8, 1904; Switzerland: Titre Final, C. C. S., art. 59 (7 b); Italy: C. C. Disp. Prel. (1942) art. 17.

[6] Cass. req. (Jan. 16, 1861) D. 61.1.193, S. 61.1.305.

[7] (Jan. 29, 1934) Revue critique de droit international 1935, 133.

trast in social and economic conditions. American conflicts law, as everybody knows, has been mostly framed for interstate rather than international conflicts. Interstate business in the American union is much more frequent than international transactions anywhere else; application of the personal law to capacity would be very troubling. On the other hand, the fundamental conceptions of law are very close to each other in the forty-eight states of the Union; it seems therefore preferable to apply the law which can be most easily known, be it the proper law of the contract, or the law of the place of contracting—a question which I leave open for the discussion.

But I must observe that the need of some continuity in the law of capacity has also been felt in the United States. The well-known decision of the federal Supreme Court in *Union Trust Co.* v. *Grosman*[8] is a sufficient sign. We must also point out that the application of the law of the contract or of the place of contracting leads to a problem which is parallel to the *Lizardi Case*: if a party is capable to contract according to his personal law, but not according to the law of the place of contracting, is it reasonable to hold that the contract is void? Professor Cheshire answers no, and Professor Rabel seems to agree with him.

The problem of capacity undoubtedly owes its difficulty to the fact that this notion is connected at the same time with status and with the law of contracts. Status calls for a certain continuity in the law; contracts call for simplicity and easiness in execution. The two needs are conflicting, and no clear-cut answer is satisfactory, which forgets one of them. The striking difference between European and American answers originates in the different kind of conflicts which are mostly considered in the two continents. I wonder if the best way to reconcile those two points of view would not be the idea of Professor Lorenzen that the law of the domicil, or in other words the personal law, is suitable for capacity in international conflicts, while the proper law of the contract is preferable in interstate transactions. This interesting suggestion would permit each system to keep something of its own; it would remind us of the fact that conflict rules may perhaps be somewhat different when the foreign system is closely connected with the legal system of the forum, a fact about which much could be said. But we would still have to choose some limitation on the interference of personal law in international conflicts, as the European countries have done, and it might prove useful to give some role to the law of the domicil in interstate conflicts, as the United States Supreme Court once seemed to think was proper.

[8] (1917) 245 U. S. 412.