Chapter 64

Conclusions to Part Twelve

Why the Geneva conflicts rules have failed to produce uniformity with the Anglo-American countries, providing such a poor example of unification, has often been explained but never justified. It was previously known that the differences in the national laws are numerous and of many kinds. These have proved too numerous and difficult, because the governments were not prepared to abandon particular rules and even mere banking habits.[1] Despite assertions to the contrary, the conflicts rules of the British Act have not been commended in authoritative opinions and those developed by the courts in the United States are considered confused.[2] The divergencies cherished throughout the world are largely superficial.

A considerable improvement in the present situation might be reached by following a suggestion of Hessel E. Yntema, which he allows me to mention. After investigations of many years, he proposes an international collaboration of the relatively few leading banks in each country which are most active in the field of foreign bills and notes. Each bank may issue forms complying with its own law and rely on the validity of the instruments approved by a partner to the agreement. This experiment should be tried.

In the long run, of course, uniform legal rules cannot be avoided. When the problems are scanned, certain observations impose themselves.

No reference should be made to the national law; its mingling with form and capacity in the Geneva rules is

[1] Argaña 215 blames unjustified negative tradition and exaggerated nationalism.

[2] Loronzen 5; Gutteridge 16 ser. 3. J. Comp. L. 54.

deplorable.[3] The law of the domicil is adequate only for emergency purposes.

Nor can any effort serve to discover a single local contact to provide a single law for all obligations arising on a bill of exchange. Whenever a bill is submitted for discount or acceptance, it is a primordial postulate that no foreign law should have to be consulted to determine the main effects of the intended transaction.[4] The same is true for checks, despite their closer connection with the place where payment is due. Since they are handled in millions through bank collections, the now frequent proposals to determine all check obligations by the law of the place of payment [5] are unrealistic. This is an irremovable block on the road to simplicity.

On the other hand, form, capacity, and other initial requirements of "cambial" obligations and their construction and effects must be subject to unitary legal treatment, for which the *lex loci actus* has an inveterate claim, although its definition needs elaboration and unification.

To delineate the scope of such acts, various in nature, the "extracambial" contracts and obligations must be excluded and assigned to their own connections;[6] if this is done, the "cambial" acts proper group themselves easily in three categories.

1. The law of *issue,* that is, of the place of negotiation through signature and delivery by the drawer or maker to the payee, creates the basic instrument, including its nature as negotiable [7] and the class of commodity papers to which

[3] *Supra* Ch. 59 III 2; 60 I 1 (b).
[4] *Supra* Ch. 61.
[5] E.g., HJALMAR EGNALL, Le chèque et la loi du lieu du payment (Paris, 1935) 103 ff.
[6] *Supra* 142 ff.
[7] *Supra* Ch. 61, III.

it belongs, construction,[8] and general rules.[9]

2. Under the principle of independence, opposed to the law of issue, each law of the successive places of contracting controls the respective obligations of drawer, maker, indorser, giver of aval, accommodating party, and acceptor for honor, with the exception of obligations determined by the law of the place of payment.[10] The law of the place of contracting especially governs validity and effects of warranty,[11] including liability after maturity [12] and damages in recourse.[13] Whether it ought to determine also the necessity and time for notification of default is doubtful.[14] Worldwide unification of these questions at least and of the time for suing should be earnestly sought at the Hague.

3. The law of the place of payment of the principal obligation governs conditions and effects of acceptance, time of maturity, modalities of payment, such as currency, time and locality, permissibility of part payment and conditional acceptance, amortization, discharge and excuses of any acceptor, and the necessity, time, and form of protest.[15]

In the case of checks, the scope of the law of payment is enlarged, as the Geneva rules have recognized.[16] It should also be observed that the American courts show unequivocal preference for the law of the place of payment in locating the liability of the maker of a promissory note.[17] Promissory notes in the United States, quite as *billets à ordre, eigene Wechsel* abroad, are prevailingly used in bank loans and therefore usually are payable at the lending bank. With

[8] *Supra* 148 ff.
[9] *Supra* 149 ff., 196.
[10] *Supra* Ch. 61.
[11] *Supra* 188 ff.
[12] *Supra* 198-199.
[13] *Supra* 200-201.
[14] *Supra* 215.
[15] *Supra* Ch. 62, I.
[16] *Supra* 225.
[17] *Supra* 206.

such facts in mind, a middle road might be found for conflicts rules between the civil law separating bills and checks and the common law merging them; promissory notes and checks may well be subjected to the larger domain of the law of the place of payment which, if it can be ascertained, is preferable to the domicil of the payee as such.[18]

A holder in due course for value or in good faith acquires the protection granted him by the law governing the indorsement made to him, when it affords larger rights than the law under which a precedent indorser obligated himself.[19]

As we have seen, the courts seek practical solutions, sometimes without any intention to do so but with the apparent effect of moderating fundamental contrasts, such as the opposition of signature and delivery [20] or the diverse treatment of bills carrying forged signatures.[21]

[18] *Supra.*
[19] *Supra.*
[20] *Supra.*
[21] *Supra.*