PUBLIC POLICY AND THE AUTONOMY OF THE PARTIES: INTERRELATIONS BETWEEN IMPERATIVE LEGISLATION AND THE DOCTRINE OF PARTY AUTONOMY

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INTERNATIONAL contracts are governed, according to the law prevailing in the greatest number of existing legal systems, by a remarkable rule: the parties to such contracts are allowed to choose the law which will govern their transactions. This rule of "party autonomy" is considered as highly satisfactory by all those who deem that liberty of individuals finally is the real end of the law. In addition, this rule has been admitted, at least in results, in the majority of the larger countries. Such a unity is rare, if we compare the differences in the solutions with which we are faced in the fields of conflicts law relating to family relations, property, or succession on death. This is a very interesting fact, since it has been reached without any agreement between the courts of the different countries which have stated the rule.

But a striking fact is also that party autonomy has been strongly attacked by authors, especially in continental Europe. It has been repeated in numerous books that party autonomy is opposed to the authority of the law, and to logic. The authority of the law is in danger if anyone can escape the imperative legal provisions in choosing a foreign law with different provisions to govern a contract. On the other hand, logic forbids that individuals decide whether the law applies to their case or not; it is a part of the legal operation to state which contracts as well as which properties or which persons the law will govern.

But, strangely enough, the courts in all countries have not been influenced by those objections, and I will not insist on the dispute. First, one hour is too short time to discuss once more all the arguments which have been proposed on the topic; on the other hand, there is no more any positive problem on the main question. Those who attack party autonomy affirm that the essentials of the contract are determined without choice of the parties. For

some, like Beale, the law of the place of contracting as a matter of principle governs essentials. For others, like Niboyet, the proper law may be another one but it is determined by statutes or judicial decisions, and the parties enjoy liberty of choice only in the matters on which the proper law of the contract has optional, not compulsory, provisions. Those views have not been accepted by the judges, for reasons which are well known and seem to be sound.

I would not remind you of this old dispute, if I had not to state that Professor Cheshire, in his recent and so useful little book on international contracts[1] maintains that the law chosen by the parties ought to apply only to the substance of the obligation, and not to its creation. The distinction seems to be subtle; it shows that the discussion is not yet finished in the field of party autonomy; it may however be asked whether such distinction will succeed better than former suggestions to prevent the judges from applying to contracts only one law.

In my opinion, there are today two problems which are not yet solved, the study of which will enable us to consider the general problem of "interrelations between imperative legislation and the doctrine of party autonomy." Imperative legislation is not in danger of being evaded by the sole fact that party autonomy applies to international contracts; the authority of municipal law on internal contracts is safe. But one important question remains which is not yet solved: is it possible for the parties to choose a law without any relation to the contract that they enter into? For instance, a Frenchman sells in France to an Englishman a property situated in Switzerland; can they decide that their contract will be governed by German law? Undoubtedly, such a provision offers a possibility to escape the imperative legislation of the different countries with which the contract has real connections. I think it is the field in which a useful discussion may be tried, since the courts have not yet taken a definite position on the question. It is interesting to attempt to foresee what position will be reached in the future.

On the other hand, we are faced in the field of contracts, as well as in family relations, property, or torts, with the famous question of public policy. Undoubtedly this is the second barrier that can be opposed to party autonomy in order to protect imperative legislation. We shall examine successively the two problems which have been outlined.

It has often been said in judicial decisions of many countries that the law chosen by the parties to govern their contract ought to have a "real con-

[1] International Contracts (1948).

nection" with the contract; that this law must not be "fictitious"; that it ought to be chosen "in good faith," bona fide. It was said long ago by the United States Supreme Court in *Andrews* v. *Pond*,[2] that the choice of the law ought to be made in "good faith." Much more recently, the same has been said in England by the Privy Council in *Vita Food Products* v. *Unus Shipping Company*.[3] In Germany the *Reichsgericht*[4] nullified, according to the law of Saxony, a contract which the parties had submitted to Prussian law. In Italy the *Corte di Cassazione* has decided that it is not permissible to go abroad in order to escape the provisions of the Italian law if the contract has no relations whatever with the foreign country.[5] On the position of the French *Cour de Cassation*, we shall come back later.

But it has often been remarked that in the majority of cases, at least in England and the United States, the judges have considered that the law chosen by the parties had a real connection with the facts of the case. In these conditions, it may be that these requirements will appear in the future as having been mere dicta.

However, the doctrine of the "real connection," if we may say so, is strongly supported by the majority of authors, among whom I will name Professor Cheshire in his recent book on international contracts. For those who approve the doctrine, it is obvious that the choice of the law must be a serious one. Is it reasonable to admit that a Brazilian selling coffee to a Japanese may stipulate that the contract will be governed by Danish law? Such a provision seems to be the sign of an attempt to evade the clauses of one of the laws which would normally apply. If the doctrine of party autonomy has been so strongly attacked on the ground of evasion, we must answer to those attacks and protect a rule which is useful. But there is no danger of fraud if the chosen law has a real connection with the facts of the case; the danger appears only where no such connection exists. The doctrine of the real connection is therefore a sound one.

Nevertheless, complete liberty of the parties to choose any law they wish has been firmly advocated in recent times. The most prominent supporter of this view has been Professor Rabel in the second volume of his admirable *Conflict of Laws: A Comparative Study*. I shall name also a Swiss writer, Dr. Moser, in his interesting book, *Vertragsabschluss, Vertragsgültigkeit und Parteiwille im Internationalen Obligationenrecht*.[6] For these jurists, impera-

[2] (1839) 13 Pet. 65, 10 L. Ed. 65.
[3] [1939] A. C. 277.
[4] (Sept. 21, 1899) E.44.300.
[5] (July 26, 1929) Corte Cass. 1929, 1291.
[6] St. Gallen, 1948.

tive legislation in each country must certainly be respected, but as soon as the contract has international connections, the parties enjoy an entire liberty of choosing any law they wish. International transactions need flexible rules; international contracts are so varied that it is necessary to admit the greatest liberty of the parties.

As a matter of fact, and the same authors stress this, experience shows that a great number of international contracts are governed by certain laws without any connection with either the place of contracting, the place of performance, or the domicile of any party. Such are all those important transactions which are submitted to the famous forms of contracts of the London Corn Trade Association. A French Company buying corn in Argentina will use the La Plata grain contract form issued by that Association, which subjects the parties to English law, although no connection whatever may exist with England in the case. Why should we forbid what experience has proved to be useful? Finally, the Privy Council in the decision above cited, after having said that the intention expressed by the parties should be bona fide, added that "connection with English law is not, as a matter of principle, essential." And the Judicial Committee admitted as valid the choice of English law in a case where the carriage, on a Nova Scotian ship, of goods from Newfoundland to New York, between residents in these countries, had been expressly placed under English law. It seems therefore that the courts, or, at least, one of the most important in the world, have finally admitted the entire liberty of the parties as soon as a contract is international.

I am not sure that the best way of protecting the liberty of the parties is to allow them the possibility of choosing any law they wish. Extreme positions are seldom the best, and it may be asked if an unreasonable liberty is really an advantage for the contracting parties. If legislators or judges have thought that there were good reasons to adopt a rule by statute or by judicial decisions, we must assume that such a rule is good, at least in the country in which it has been created. Many people easily believe that every rule of law is an evil, perhaps necessary, but which anyone may try to escape as far as he can: in this view, law and liberty would be in opposition. We must remind ourselves that liberty is not always used for good purposes. There are contracts which arise out of duress or fraud; there are clauses contravening all good faith which exempt the debtor from liability. Other clauses impose on the debtor unreasonable liabilities. The nullity of a contract is not always a mischief. Of course, it is desirable that a contract be performed but only if it is a good contract legally speaking, that is, a valid one.

Naturally, the different laws existing in the world vary to some extent,

because each has in view the economic and moral milieu in which it is enforced. They allow a contract to be performed in accordance with the provisions of a foreign law, if the contract has some connection with the foreign country, because relations with foreigners are necessary and such relations imply the validity of foreign law abroad. But if a contract is submitted to the law of a country with which the facts of the case have no relation, is there any reason to enforce it? Certainly, the law of the country with which such a contract is really connected has no interest in protecting its validity. And why would the law chosen by the parties claim to protect the contract? If international relations imply respect for foreign laws, it seems that this should be only when the foreign law is entitled to govern the contract.

Surely, we must not forget that international transactions call for a greater liberty than purely national ones. And it is desirable to permit the parties to choose the law which seems to be the most proper to regulate their contracts. But practically, the difficulty has arisen mostly in the case of forms like the contracts of the London Corn Trade Association. It is well admitted today that such forms may be entered into by parties whose transactions have no relation with England. The *Cour de Cassation* in France quashed two judgments of the Courts of Appeal in Douai and Rennes because those courts had refused to enforce such contracts,[7] and the Privy Council in the *Vita Food Products* decision has also referred to this question in order to support the view of the entire liberty of the parties.

Professor Cheshire, who opposes complete liberty of the parties, thinks also that it is difficult to forbid the adoption of those forms in transactions lacking any connection with England. But he agrees with the view I expressed in my book, *Les Conflits de lois en matière de contrats*. Such types of contracts provide that English law will govern and that any dispute arising out of the transaction will be subject to English arbitration. Now, it is generally admitted that where a contract provides for arbitration in a certain state, such a provision expresses the intention of the parties to subject their contract to the law of that state. The same could be said of clauses providing that litigation shall be submitted to the courts of a certain state. Of course, the case is more complicated here because the state in question seems to have no factual relation with the transaction. Nevertheless, we must observe that the contract was formulated by jurists of the country where arbitration will take place. It may be said therefore that there is a connection between the contract and that country. This connection is not merely ideal, because if litigation arises the plaintiff will have to sue in that country. We may therefore speak of a factual connection, and the danger of

[7] (Feb. 19, 1930 and Jan. 27, 1931) S. 1933.1.41.

evasion is minimized because the parties have agreed that litigation take place abroad. Finally, the difference between such a contract and a purely internal transaction, is factual and not merely supposititious.

What shall we say, lastly, of contracts which select a law only because the parties are familiar with its provisions, or some of them, without including any clause relating to arbitration or jurisdiction in the country where the chosen law is in force? It may be that the parties had in view some definite provisions which seemed to them particularly adapted to their contract. Nothing prevents admitting such provisions to apply if the law having the most real connection with the contract has only optional requirements on the point; hence, it will be desirable to subject the contract to one of the laws having some real connection with the case, the requirements of which are only directory, not imperative, on the matter, in order to give effect to the provisions contemplated by the parties. But if all the laws which could possibly apply have precisely compulsory provisions on the point at stake, how can we escape the conclusion that the choice of another law lacking any connection with the situation is the sign of an attempt to evade imperative legislation? If the parties really wanted their contract to be subject completely to the law they have chosen, they ought to provide also arbitration of jurisdiction in the same country.

Practically, the question will not arise very frequently, but it must be observed that the Privy Council, after stating that "connection with English law is not as a matter of principle essential," sought a connection between the situation and English law, and their Lordships expressed the view that "In the present case the Hurry On, though on a Canadian register, is subject to the imperial statute, the Merchant Shipping Act, 1894, under which the vessel is registered and the underwriters are likely to be English. In any case parties may reasonably desire that the familiar principles of English Commercial Law should apply."

It cannot be said therefore, in spite of the dictum referred to, that the Privy Council has really approved the choice of a law without any connection with the contract. We state what the courts say, but we also look at what they do. And we must remind ourselves that there are very interesting cases in which the highest courts in the world have rejected the law chosen by the parties although it had a real connection with the contract, because it did not seem that that connection was the most proper one. I cite the Supreme Court of the United States in *Alaska Packers Association* v. *Industrial Accident Commission of California*,[8] where a contract of employment had been subjected by the parties to Alaskan law, Alaska being the

[8] (1935) 294 U. S. 532.

place where the contract, executed in California, was to be principally performed. The Supreme Court held that the compensation law of California was applicable, among other reasons, on account of the interest of California in the situation and the fact that the contract had been executed in that state where the wages were to be paid. In France, the *Cour de Cassation* has approved the application of French law to the negligence clause in a charter party executed in New York because the ship was bound for a French harbor, whereas the parties had expressly stipulated that New York law should apply.[9] In England the Court of Appeal in *The Torni* has discarded a clause stipulating that the contract should be construed according to English law, and has decided that Palestine law was the proper law of the contract.[10] It is true that the Privy Council in 1939 sharply criticized this result. But the tendency, nonetheless, exists. We find it again in Germany with the above-cited decision of the *Reichsgericht*.[11] We have also already cited the Italian *Corte di Cassazione*,[12] nullifying a contract which had been executed abroad to evade Italian law.

It is not so surprising that judicial decisions in the field of conflicts law admit some limits to the liberty of the parties in the choice of law. As a matter of fact, there is a strong tendency in the municipal laws of most countries today to interfere in private contracts. I will not say that the tendency is good without any qualification, but the fact is that it exists. And it is easy to understand that the immense difficulties created by the economic development of the world with successive depressions, and, above all, the world wars, have so much complicated social relations that it is no more possible to have such a simple contracts law as our fathers used to have in the last century. When social relations become more and more intricate private contracts have more direct consequences on social welfare—or the common good as said the scholastics—and the law interferes to prevent private transactions from having evil effects as regards the good of the community. In addition to that, public opinion in the twentieth century is more and more convinced that the respect for individual dignity and the trend towards preventing excessive inequalities must necessarily be regarded by the law; this is another cause of legislative interference. Of course we must not forget that private law requires liberty as far as possible. Liberty is a real good, and a community without liberty could not even exist; it is not a

[9] Cass. civ. (Dec. 5, 1910) S. 1911.1.132, Quebec Steamship Company v. Seugès de la Quintinie et Cie.

[10] [1932] P. 27, aff'd at 78.

[11] (Sept. 21, 1899) E. 44.300.

[12] *Supra* note 5.

discovery to affirm that the great difficulty in lawmaking consists in reconciling a reasonable liberty with wise provisions to prevent abuses of liberty which would be harmful to the individuals as well as to the community. But in the present state of affairs internal legislation is generally directed towards greater interference in private contracts.

The old philosophers said *"natura non facit saltus."* It would be surprising that conflicts law should be the field of the greatest liberty of the parties at the very moment when the internal law more and more restricts that liberty. Of course we know that a difference exists between the facts which are ruled by internal law and those which are subject to private international law; it is reasonable that a greater liberty be admitted for international relations, but it may be asked if it is sound to exaggerate the contrast. I have the feeling that such a tendency is not in the nature of things and that such an exaggeration will lead to strange results. One may fear that the more municipal laws restrict liberty in private contracts at a time when private international law is regarded as extending it without limits, the more will it be tempting for the parties to try to escape the provisions of municipal law. Jurists ought to have in mind that legal rules are good not only because they seem sound in themselves, but because they are appropriate to the milieu and the psychology of the individuals for which they are created.

Now, I must add that the admission of a necessary connection, however flexible, between the law chosen by the parties and the facts of the case, has the advantage of confirming a general view on party autonomy to which I have devoted a few lines elsewhere. I have told you that the dispute concerning party autonomy is rather theoretical. I will not insist on the theoretical part of the problem, but it is hard to miss the opportunity I have today to show that the conception I have defended is confirmed by a desirable practical result.

I will be as short as possible. If the parties are really free to choose any law they wish, realism leads to the conclusion that no real choice of the parties exists when the contract contains no provisions whatever on the law which will apply. And the authors who recommend entire liberty in the choice of law admit that there is no resort to such a liberty when the contract does not refer thereto. In such cases, it is obvious to everybody that the judge himself determines which law will apply, and it is more and more admitted that the old explanation is wrong which refers to the presumed intention of the parties; no such intention exists. So we reach a double rule: if the parties have expressed an intention, this intention will prevail; but if the parties have expressed no intention, the judge will determine by himself the proper law of the contract according to all the circumstances of the case.

"The court," said Lord Wright, in *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ltd.*[13] "has to impute an intention or to determine for the parties what is the proper law, which as just and reasonable persons they *ought* or *would have intended* if they had thought about the question when they made the contract." In the second case, it is obvious that the parties have not thought about the question, and that the intention they ought to have is invented by the judge.

Now there are cases in which we find a middle way between an expressed intention and the lack of any intention. We find such cases in contracts providing that litigation, if any, will be subject to arbitration in a certain state or to courts of a certain state. Is it not natural to consider that such a clause involves the intention to submit the contract to the law of that state? Consequently, authors who admit complete liberty of choice by the parties where their intention is expressed, and the determination by the judge of the governing law, where no such intention exists, add that the intention may be implied. So they distinguish between an implied intention which is binding and a presumed intention which leaves the judge free to find for himself the proper law. This is the position, for instance, of Dr. Moser. It seems that this distinction is too subtle, and that we need a view of the problem which safeguards its unity.

I think that in all cases, the judge seeks the law with which the contract has the most real connection. But in this research he has to look at the structure of the contract to ascertain where its main elements are situated. In such research, it is not possible to avoid considering the intention of the parties. Let us, for example, take a contract between a French seller in Paris and a Spanish purchaser in Madrid. The contract has been concluded by correspondence; delivery has to take place in Madrid, payment in Paris. One may think that it is difficult to say whether such a contract is Spanish or French. But if the parties have agreed that any dispute shall be subject to arbitrators in Spain, this is a sign of their intention to conclude a Spanish rather than a French contract. In short, a contract being made by the parties for their common utility, the question of its situation as regards the law which will apply depends on their will in executing their agreement. The judge seeks where the contract is situated according to its structure, *which is the creation of the parties*, and he concludes that the law of the country where the contract is situated will apply.

If the parties have expressly stipulated that the law of a certain state will apply, I think that the same explanation is still good. Such a clause means that in their intention, the contract is an English contract or a German one.

[13] [1938] A. C. 224 at 240.

Even here it is possible to consider that the parties "locate" their contract and the judge deduces what law will apply. We can test the soundness, in my opinion, of this view if we recall the important cases above cited where the law chosen by the parties has been rejected by the courts because the judges thought that the real situation of the contract was different. As was neatly said by the Supreme Court of North Carolina, "calling it a Virginia contract does not make it one."[14]

I have stated elsewhere the advantages of such a view which explains why an international contract may be void according to the law expressly chosen by the parties. Nullity is strange in a system, which pretends surely to give effect to the will of the parties. But if the parties have only intended to conclude, say, a Michigan contract, application by the judge of Michigan law which nullifies the transaction is consistent with their will.

It has been said that this view which was expressed nearly in the same way by English authors long ago, is artificial, and conceals the fact that the parties directly choose the law. Professor Rabel stands against it. And Dr. Moser points out that if the parties locate their contract it is only for the sake of the governing law.

I know that there is something artificial in any effort to explain such a complicated situation. And if the view I prefer certainly is, to a certain extent, inadequate, I have shown that the other views are open to the same criticism. But I will tell you a few words about a recent French case which is a good answer, I think, to the objection that a contract is not located by its structure as the parties framed it. This case shows, I think, that it is possible to find an intention of the parties to locate their contract, without any intention on the choice of law. The *Compagnie Française de l'Afrique Occidentale* (*C. F. A. O.*), being a French Company with its *siège social* in Paris, bought a property in French West Africa from the *Société du Haut Ogooué* (*S. H. O.*), another French company having its *siège social* in Marseille. The contract was concluded by exchange of letters between Paris and Marseille in November, 1945. The price was 5,500,000 francs, to be paid in January, 1946, at the *Banque de l'Afrique Occidentale* in Port-Gentil, French Africa, for the account of *S. H. O.* But on the 26th of December, 1945, the colonial franc was introduced, the value of which was fixed at 1.70 as regards the metropolitan franc. The purchaser in January, 1946, sent 5,500,000 metropolitan francs to the bank in Port-Gentil, but the seller refused, contending that it was entitled to receive the same number of colonial francs (*franc C. F. A.*) which amounted to 9,350,000 metropolitan

[14] Rowland v. Old Dominion Building and Loan Association (1894) 115 N. C. 825, 18 S. E. 965.

francs. The Court of Appeal in Aix-en-Provence[15] stated that, to determine whether the contract was governed by the metropolitan law relating to money or by the colonial law, the principle of party autonomy required that the intentions of the parties should be ascertained. And, as the contract related to an immovable situated in West Africa where the price was to be paid, and where the seller intended to reinvest the price in buying another property, the intention of the parties had been to execute a colonial contract. Hence, the money regulations in force in French Africa applied, and the purchaser was condemned to pay 5,500,000 colonial francs to the seller.

The commentators have objected that it is a strange idea to look for the intention of the parties as regards the currency in which payment was to be made at a time when the colonial franc did not exist. However, the Court of Appeal, after having stated that the intention of the parties was to be determined, examined all the circumstances of the case to conclude plainly that the structure of the transaction gave it the character of an African contract. This shows in my opinion that in certain cases the judge may have to determine where a contract is located according to its structure, as framed by the parties, although the parties had no idea that a conflict of laws may arise.

I think therefore that, generally speaking, the judge always has to examine the connections of a contract with the different states the laws of which may possibly apply; an express clause of the contract choosing the law is only an indication to the judge of the most real connection as the parties see it; as a matter of principle this indication will be followed. But if such an indication is inconsistent with the obvious structure of the transaction, there is no reason to respect it, and this will be the case of course if the law which has been chosen by the parties has no connection whatever with the facts.

The second problem we have to examine is the interference of public policy to prevent the application of the proper law of the contract. In all countries, judges decide that a foreign law can be rejected if its provisions are contrary to fundamental conceptions or to an imperative policy of the forum. Everybody knows that this system is very troublesome, since it is scarcely possible to foresee what are those fundamental conceptions or imperative policies which will be opposed by the courts to the foreign law. As a matter of fact, the use of this means to apply the law of the forum has varied in different countries of the world. I must say that French courts are known frequently to oppose *ordre public* to the application of foreign law.

[15] Cour d'appel d'Aix (July 13, 1948) Revue critique de droit international privé (1949) 332.

On the contrary, American courts very seldom do so, since they are mostly faced with interstate conflicts; in their fundamental conceptions, the forty-eight states of the Union do not much differ from each other. This contrast shows that the interference of public policy is a cause of great uncertainty and prevents the parties from anticipating with sufficient security the decisions of the courts. In addition to that, it leads to different results if the suit is brought in one state or in another. However, it may be said that public policy has been used much more in family relations, successions on death, and even in the field of property, than in that of contracts.

Nevertheless, the possibility of such interference is disturbing. And we must acknowledge our debt of gratitude to Professor Rabel for his suggestion in the second volume of his *Conflict of Laws* of a new formula to limit the interference of *ordre public.*

Professor Rabel distinguishes between public law and private law. If the proper law of the contract is contrary to some provision of the law of the forum pertaining to public law, it is natural that the public law of the forum should prevail. Examples are taken by Professor Rabel from the field of labor law, the field of legislation on working hours, woman and child labor, social insurance, and in the field of criminal law prohibitions such as on the purchase of intoxicating liquor, and also from administrative and fiscal law. Professor Rabel wishes that the legislators confine such statutes to contracts, the proper law of which is that of the forum.

As regards private law, Professor Rabel advocates complete exclusion of the interference of public policy. If there are conflicts of laws, it is because the substantive rules of the various civilized jurisdictions are supposed to be exchangeable. To be consistent with this starting point we must apply the foreign private law without any exception. Professor Rabel would only admit interference "from the depth of basic moral conceptions which in our times naturally include those of fundamental social justice." He takes for examples contracts relating to serfdom, prostitution, or imposing obligations without effectual relief to children or incompetent persons.

The distinction between public and private law as regards public policy is very important. Undoubtedly, progress will be easier in the field of private law than in public law, and when Professor Rabel tries to limit the interference of the *ordre public* he is very wise in admitting a wider possibility of this notion in public law. Now, shall we see in a near future Professor Rabel's view accepted? The statutes pertaining to public law are applied to the matters for which the legislators framed them. And legislators certainly could decide that such statutes having some effects on private contracts would apply only to contracts subject to the private law of the state. But

nowadays rules of public law generally apply to all facts happening in the territory of the state, although some of them do happen in the performance or in the execution of contracts governed by foreign private law. For instance, rules relating to labor law apply to anybody working in the state, even if his contract of employment is governed by a foreign law. Public opinion does not seem to be ready to accept that legislation on working hours should not apply to all persons working in the territory of the state. We have in France a statute prohibiting payment of wages in public houses; this statute is applied to all payments made in France, whatever may be the law which governs the contract. Of course, such a general rule as Professor Rabel proposes cannot be accepted quickly because there is a long tradition against it. Professor Rabel himself suggests that legislators themselves should limit the field of their public law statutes. There can be progress; we shall perhaps see in the future rules of public law limited in their effects to private contracts which are governed by the law of the state. But I do not think that this progress will happen very soon and be general. The old position is too strong to be defeated completely and quickly.

As regards private law, we have already said that interferences of public policy are much less frequent in contracts than in the other fields of private international law. It is therefore possible to try to suppress it almost completely. But the adverb "almost" shows the difficulty of the problem, and Professor Rabel himself does not think differently, since he tolerates the notion of *ordre public* in the few cases I have enumerated. This enumeration certainly is short and, in the author's mind, exhaustive, but its explanation lies in the formula of "basic moral conceptions which in our times naturally include those of fundamental social justice." Such a formula is as wide as those generally suggested for the definition of *ordre public*. The difference lies in the strict limitation of the applications. I completely agree with such a tendency, but I think that it is only a tendency and that it is difficult to limit very strictly the applications of that notion. We must strive to convince the judges that they ought to use as seldom as possible the barrier of the *ordre public*. But it is very difficult to fix a definite limit to such use. Nobody knows what strange and unexpected regulations a foreign law may contain. When conflict rules admit the application in the forum of foreign law they cannot blindly accept anything that any legislator in the world may imagine. Of course as Savigny said long ago, conflicts law supposes that private laws are exchangeable, but precisely, as Bartin showed in 1899, conflict rules cannot work any more when such exchangeability disappears. It is the function of public policy to set aside conflicts law when foreign conceptions are so far from our own that exchangeability is not possible. Of

course, contract laws in the western world seem to be in every point morally and socially exchangeable (at least as regards conflicts law, though in certain respects the social milieux are different); and as a matter of fact, courts have seldom rejected foreign law on the ground of public policy. But even if the comparative law of contracts for the western world is sufficiently known, we do not know so well the legislations of other parts of the world, and we do not know what new provisions western nations may some day enforce. Who could have foreseen in 1930 that German law could contain a few years after some provisions contrary to fundamental social justice?

We must not conclude that all progress is impossible. I think that progress is nearer and more certain, when we see clearly the difficulties and the possibilities.