Buffalo Law Review

Volume 3 | Number 1 Article 27

12-1-1953

Conflict Of Laws—Contracts

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long as the prohibitions of a statute indicate that public policy of the domicile is against the marriage in question, such marriage must fall.[36] He further indicated that all the subdivisions of § 5 should be given equal construction. Therefore, since the first two subsections, which invalidate marriages between ancestor and descendant or brother and sister, are given extraterritorial effect, the third should be likewise construed.[37]

Thus, it appears the Court of Appeals has clearly indicated by reason of its strict interpretation of the second exception that, even as to domiciliaries, no extraterritorial effect will be given to Domestic Relations Law § 5 (3). If the first two subsections are to be given extraterritorial effect, it is not because the cases within their scope are "prohibited by positive law," but because such marriages are generally regarded with abhorrence by all Christian countries.

Contracts

The problem of the recognition of exchange controls in conflict of laws has become increasingly important in the past few years by virtue of their almost universal usage. Early cases often ignored or refused to apply the foreign exchange restrictions, primarily on the ground of repugnance to the public policy of the forum. Whereas two decades ago we would have looked askance at such regulations, today we can count the countries which do not have currency restrictions on the fingers of one hand. Although the United States has no such controls, it recognizes and gives some effect to those of other countries.[38] Despite this fact, the law is not fully settled as to whether the courts will uphold defenses based on such restrictions in all cases.

The Court of Appeals was faced with a reasonably uncomplicated version of this problem in *Perutz v. Bohemian Discount Bank in Liq.*[39] Under an agreement with defendant's predecessor bank,

36. But see RESTATEMENT, *op. cit. supra* note 2, § 134, comment *b*, "The mere fact that the foreign marriage would have been contrary to the statute of the forum had it occurred within the state, does not make it so offensive to local policy as to be refused enforcement."

37. See 2 BFLO. L. REV. 325 (1953) (instant case noted in Appellate Division stage).

38. The Bretton Woods Agreements Act, § 11, 59 STAT. 516 (1945), 22 U. S. C. § 286 h (1946), gives full force and effect in the United States to certain sections of the Articles of Agreement of the International Monetary Fund, among which is the first sentence of Art. VIII, § 2(b): "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement, shall be unenforceable in the territories of any member." *See Kraus v. Zivnostenska Banka*, 187 Misc. 681, 685, 64 N. Y. S. 2d 208, 211 (Sup. Ct. 1946).

39. 304 N. Y. 533, 110 N. E. 2d 6 (1953).

plaintiff's decedent, a former bank employee in Prague, was entitled to a pension from the employer-bank commencing in 1940 and payable in Czechoslovakian crowns at Prague. The agreement was validly executed in Prague when both parties were nationals of Czechoslovakia. In 1940 the decedent came to America where he became a citizen and resided until his death in 1949. In 1948 he attached local funds of defendant and sued for the amount accrued under the contract. Defendant conceded the sums to be due under the agreement and actually credited these amounts to a blocked account in the decedent's name at the bank in Prague. The bank set up as a defense the fact that under Czechoslovakian exchange regulations, in force since 1924, it was prohibited from making any transfers of domestic or foreign currency to a non-resident without a license from the exchange control authorities. Admittedly, neither plaintiff nor her husband had obtained such license. On appeal from a judgment of the trial court dismissing the complaint, the Appellate Division[40] reversed and granted judgment for the plaintiff, together with a refusal to grant a stay of execution to the defendant.

The Court of Appeals, unanimously reversing the Appellate Division, held that the law of Czechoslovakia governed the contract, and that under this law the defendant was performing its obligations. Flatly rejecting the view of the lower court that enforcement of the foreign restrictions would give unwarranted extraterritorial effect to the foreign law, Chief Judge Loughran apparently assumed that the exchange controls were a part of the substantive law of Czechoslovakia.[41] Since the contract was made in a foreign country by citizens thereof, and intended by them to be there performed, the agreement was governed by the substantive law of that country.[42] Although reaffirming the basic principle that our courts may refuse to apply the law of a foreign country where it is contrary to the public policy of the forum,[43] the court reasoned that any repugnancy on policy grounds was negated by the fact that both the United States and Czechoslovakia were members of the International Monetary Fund. Since the defendant bank was performing its pension obligations in accordance with the law governing the contract, the court concluded it would not interfere by applying a different law.

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40. 279 App. Div. 386, 110 N. Y. S. 2d 446 (1st Dep't 1952).

41. See *Kraus v. Zivnostenska Banka, supra* note 38.

42. *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N. Y. 474, 478-479, 14 N. E. 2d 798, 800 (1938). The fact that almost all the essential elements in determining choice of law in a contract case fell within one country, makes the present case relatively uncomplicated.

43. *See Dougherty v. Equitable Life Assurance Soc.*, 266 N. Y. 71, 90, 193 N. E. 897, 903 (1934); *Straus & Co. v. Canadian Pacific Ry. Co., supra* note 20 at 414, 173 N. E. at 567.

It is important to note that the court approached the present problem by the use of traditional choice of law rules. By holding the foreign substantive law to govern the contract, the action failed because there was no breach of obligation under the foreign law. We should not place too much weight on the reference to the International Monetary Fund, since it is well recognized that courts generally refrain from invoking the public policy exception unless the case has relatively important "contacts" with the forum.[44] Although the reference to the Fund appears justified in order to show no repugnancy to our public policy, the mere mention of the Fund for this purpose does not warrant its use as a stepping stone for the argument that the Fund Agreement should be the sole basis of decision.[45] Such a rationale would lead to results consistent with those reached through the use of the traditional approach where, as in the present case, the foreign substantive law was indicated as the law of the contract. However, as the "contacts" of a case lean substantially more toward the forum,[46] the Fund approach would still render the contract unenforceable; whereas the use of ordinary conflict rules would apply the law of the forum, which would enforce it.[47] Until there is a clear indication that currency restrictions of fellow Fund members are to be enforced in all cases, we should not be forced to forsake our ordinary choice of law rules.

V. CONTRACTS

Arbitration

Today a greater percentage of commercial contracts are providing for the settlement of disputed terms through arbitration.

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44. "Only an actual, strong and adverse interest of the forum will prompt the court to refuse the application of the foreign law that would govern under general conflict of laws rules." Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L. J. 1027, 1031 (1940). "[I]t cannot be against the public policy of this State to hold nationals to the contracts which they have made in their own country to be performed there according to the laws of that country." *Dougherty v. Equitable Life Assurance Soc., supra* note 43 at 90, 193 N. E. at 903.

45. It has been suggested that even more consistency of result would occur if the court had not used traditional choice of law rules of the forum, but rather had used the International Monetary Fund Agreement as a "superimposed" rule of decision. See note 38, *supra;* Meyer, *Recognition of Exchange Controls After the International Monetary Fund Agreement*, 62 YALE L. J. 867 (1953); 2 AM. J. COMP. L. 389 (1953). This would call for an interpretation of several terms in Art. VIII, §2 (b), especially "exchange contracts", before the section could be used as the basis of decision. However, there has been material written to indicate that the instant case could have been decided under this section. See Meyer, *supra.* But see Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L. J. 421 (1950).

46. Especially where the place of performance is also the forum.

47. See *Central Hanover Bank & T. Co. v. Siemens & Halske G.*, 15 F. Supp. 927, 929 (S. D. N. Y. 1936), *aff'd mem.*, 84 F. 2d 993 (2d Cir. 1936), *cert. denied*, 299 U. S. 585 (1936); *Glynn v. United Steel Works Corporation*, 160 Misc. 405, 289 N. Y. Supp. 1037 (Sup. Ct. 1935).