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## Addition to the Foregoing Note

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the commercial world, then different courts must apply the same rules to the settlement of disputes. Section 1-105 would not give us the certainty, uniformity, and predictability that is a necessity in the commercial world.

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#### ADDITION TO THE FOREGOING NOTE

On August 20, 1949, the scholars interested in conflicts law, including leading specialists, who met in Ann Arbor for a discussion of world law problems, expressed their unanimous concern about Section 1-105 of the proposed Commercial Code. They resolved on the motion of Professor Elliott E. Cheatham as follows:

"Resolved, that the undersigned, participants in the 1949 Institute of International and Comparative Law, Ann Arbor, Michigan, are of the opinion that Section 1-105 (in both forms) of the May, 1949, draft of the Uniform Commercial Code, dealing with conflicts of laws, is unwise and should be omitted from the Code; and the Executive Secretary of the Institute of International and Comparative Law is requested to transmit a copy of this resolution to the President of the American Law Institute and the Chairman of the Commissioners on Uniform Laws."

In the minds of those who signed there was not the slightest doubt that the new work was badly disfigured by this crude extension of the code to transactions subject to other legal systems under any existing conflicts theory. If some particularized demonstration is needed, the foregoing students' note furnishes illustration. The editors of this Review have requested my own opinion, which cannot be more than a strictly personal comment on the implications, not discussed at the Ann Arbor meeting, of the resolution printed above.

The meeting voted simply for cancellation at the time being, manifestly because of the considerable efforts necessary for establishing appropriate rules. Now, in my personal view and as far as I can see, two different sets of rules of application should be created.

On one hand, regular rules of conflict must be found, really deserving the epithets, reasonable and not arbitrary. They may

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serve in *foreign* relations as well as in *internal* relations not specially excepted, quite as at present American courts have conflicts rules, in principle equal for internal and external conflicts. While in matters of foreign commerce, of course, Congress has power to legislate, it should not now start to exercise this power contrary to international decency and reciprocal respect, if not even to international law. With respect to internal relations, it must be remembered that the code expressly includes the relations of "non-merchants," which is incompatible with the limitation of federal legislation to interstate *commerce*. The several states, therefore, have exclusive legislative control not only over intrastate commerce but also over non-commercial interstate relations. In all these matters, neither Congress nor any state has the power to issue such rules as Section 1-105 seeks to promulgate.

On the other hand, it is quite right that Congress may and should impose a uniform law on all states of the Union for the purpose of *interstate commerce*. But it would not be helpful to say this in one word as the draft proposes, increasing the uncertainty by including any transaction that "affects interstate commerce." The draft should define the transactions considered "interstate" and considered "commercial." This is a new problem to be solved with careful consideration of the several kinds of transactions regulated by the code, of past experiences in federal legal matters, and of constitutional practice.

In all these respects, solutions can be found if only the conflicts rules be drawn from realistic observation rather than the usual schematic formulas. One rule is not enough for the vast scope of the code; indeed, for some of the topics several rules will be requisite. Having gone through the special sources of obligations in the search for adequate rules of conflicts, I gladly find my personal results confirmed by the most recent draft of the Bank Collection Part of Article 3, of October, 1949, Section 3-636, which smoothly sets aside the entire Section 1-105 and subjects the liability of the bank to the law of the place of the bank, or its branch or separate office. I am also happy to see how this partial draft plainly declares the principle of party autonomy (Section 3-601; Section 3-636, Comment 3), overriding Section 1-105 (2) and Section 1-108.

Practical rules of application can be found indeed. But they need discussion and some agreement. Because in conflicts debates a *communis opinio doctorum* is so frequently frustrated by more opinions than there are doctors, progress may be arduous. Never-

theless, this massive and enormously important work calls for continued efforts in this and other respects. The American Law Institute has announced further revision of Section 1-105 for January, 1950. It may be that by the time these remarks are published they will be obsolete. I hope so.

ERNST RABEL\*

### AGREEMENTS IN ADVANCE CONFERRING EXCLUSIVE JURISDICTION ON FOREIGN COURTS

With almost boring unanimity American courts have refused to enforce contractual provisions conferring exclusive jurisdiction in advance on a court or courts of a particular sister state or foreign country. Leading writers in the fields of conflict of laws,<sup>1</sup> admiralty,<sup>2</sup> and contracts<sup>3</sup> take it to be well settled that contractual exclusion of the jurisdiction of the courts of a certain state or country will not be honored by the courts so sought to be excluded. The rule is rigidly applied, and hardly ever are the particular facts involved in a case given consideration.

The rule had its origin in the tendency long displayed by judges to guard jealously the jurisdiction of their own courts. This tendency found expression, among others, in the early emasculation by the English courts of arbitration clauses by holding them to be "revocable" at the option of either party.<sup>4</sup> Consequently, it is somewhat surprising to find that English courts from an early date have enforced contractual clauses conferring exclusive jurisdiction on foreign tribunals.

In the earliest case on record<sup>5</sup> the litigants were foreigners. A ship and cargo were confiscated in an English port on its voyage back to The Netherlands. Dutch seamen sued their Dutch captain for wages due under a contract entered into in Rotterdam. The seamen's contract provided that all disputes should be set-

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1. Stumberg, *Conflict of Laws* (1937) 244.

2. Benedict, *Admiralty* (Kanuth's 6 ed. 1940) 38.

3. Williston, *Contracts* (1936) § 1725.

4. *Vynior's Case*, 8 Co. Rep. 80a (1609); *Kell v. Hillister*, K.B. 1 Wilson 129 (1746); *Wellington v. Macintosh*, 2 Atk. 569 (Ch. 1743). However, the position taken was legislatively overruled by the enactment of the Arbitration Act of 1889, 52 and 53 Vict. c. 49.

5. *Glenar v. Meyer*, 2 H.Bl. 603 (1796). A second case, *Johnson v. Machielsne*, 3 Camp. 44 (1811), was decided in accord with the *Meyer* case on facts similar thereto.