

SYMPOSIUM—CONFLICTS OF LAW IN CONTRACTS BETWEEN DEVELOPED AND DEVELOPING NATIONS

AN INTRODUCTION

Among the issues often raised in the extensive and complex debates on North-South relations, in numerous multilateral fora both inside and outside the United Nations, is the outwardly technical but in reality fundamental philosophical question of the extent to which the participants in the numerous types of economic transactions between North and South have the right to determine the legal rules, structures and institutions for the settlement of disputes. As the number of national systems and the number of types of philosophies regarding private property and freedom of contract have increased, general consensus among legal systems has decreased.

A large number of developing countries, most of which gained their political independence in the last twenty years, have sought to impose their own rules and methods on the economic and commercial life of their respective countries. They have endeavored to limit the legal rights of individuals and enterprises, including, of course, transnational corporations, to escape from their national policies embodied in national law and enforced by national tribunals.

In contrast, there appears to have been a recent tendency among the industrialized countries in Western Europe, as well as in the United States and several other O.E.C.D. members, to reinforce the concept of the freedom of parties to transnational commercial transactions to choose the law of the transaction and the forum for the settlement of disputes arising from their transactions. In reality, however, regulation of specific types of economic and commercial activities in and among the Western countries has resulted in de facto limitations on party autonomy, despite continued allegiance to the general theory. Nevertheless, the pronouncements by Western spokesmen in international fora, often pious in tone, give the impression that only the status quo will permit the continuation of world trade, and that the status quo gives the parties entering into economic transactions unrestrained freedom to choose the governing law and the forum for the settlement of disputes. Thus, parties to commercial transactions can, with some exceptions, frustrate the policies of their national laws

by explicitly excluding the use of the latter by means of a choice of law clause or more indirectly through a choice of forum clause.

The papers in the symposium to which this serves as an introduction focus on the existing situation regarding the extent of party autonomy. Discussion includes certain peculiarities of present-day practice in transactions between developed country parties and those from developing countries. The most substantial portion of the evidence of practice uncovered by the student authors emanates from the Western developed countries, and in particular English speaking countries; this evidence of practice is often to be found in cases before national courts where national law and even general principles are declared by the courts. Evidence of practice in developing countries is less easily obtained.

The principal purpose of the work done by the students at the University of Georgia School of Law, as reflected herein, has been to offer evidence of present practice as well as general trends with respect to party autonomy. It is hoped that this work serves to assist in the clarification of positions among the various countries and groups of countries. Such clarification must precede consensus in the international community regarding the role that parties to transnational economic and commercial transactions should play in determining the law that is to apply to their relationship and in determining the fora for the settlement of transactional disputes.

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