THE PROBLEM OF CONFLICT OF LAWS IN NEGOTIABLE INSTRUMENTS

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The Conflict of laws provisions of the Negotiable Instruments Act, 1881 and the Recommendations of the Indian Law Commission.

The principal provisions concerning conflict of laws in negotiable instruments are embodied in sections 134 to 137 of the Negotiable Instruments Act, 1881, though certain other provisions embodied in sections 4, 11, 12, 46 and 104 may also be relevant as *lex fori* for an Indian Court in the determination of the rights and liabilities of the parties arising out of a negotiable instrument involving a foreign element or elements. These provisions are inadequate to meet many questions of choice-of-law which a negotiable instrument circulating in the course of modern international commercial intercourse may give rise to and which may come up for determination in an Indian Court. The Act only deals with the 'liabilities' of the maker or drawer, indorser and acceptor, and with the questions 'what constitutes dishonour' and 'what notice of dishonour is sufficient'. It does not deal with capacity of the parties, the formation of the contract, the formal and essential validity of the contract and its interpretation, effect and discharge. The Indian Law Commission, which considered the revision of the Negotiable Instruments Act, 1881, has accorded special treatment to these provisions in its eleventh report submitted to the Government and has recommended that these provisions should be largely modified and recast. The Commission has noted that there is lack of uniformity in the principles embodied in the English and the Indian enactments and also " as between such principles and those followed in other countries ".[1] According to the Commission, the existing provisions contained in sections 134-137 of the Indian Act do not deal with all questions which ordinarily arise in this branch of the law. The principal questions which, according to the Commission require to be solved in connection with international dealings in negotiable instruments are—the capacity of the parties, the formal and essential validity of the contract, the liabilities of the parties including the formalities

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1. Para 24 of the Report.

regulating presentment for acceptance, presentment for payment, notice of dishonour for non-acceptance and non payment, noting and protest.[2]

Having formulated the questions arising in this branch of the law, the Commission goes on to examine the principles relevant to each of these questions.

Capacity of the Parties

There is no existing provision in the Act for determining the capacity of the parties to the contract or contracts embodied in a negotiable instrument. The recommendations of the Commission are at para 28 of the report, the relevant portion of it is as follows:

> "We have accordingly proposed a simple rule that *in the absence of any contract to the contrary* (emphasis supplied), the capacity of the parties to an instrument shall be determined by the law of the country where the contract constituted by the negotiable instrument was made." (emphasis added).

The words underlined raise an important question, namely that of autonomy of the parties in the matter of choice of law applicable to capacity to enter into contracts contained in a negotiable instrument. The Commission is clearly of the opinion that the parties can be given free play in this matter. Referring to the question of capacity it says:

> "we would not prevent the parties from having their own choice in the matter of the law which would govern their contract"

The draft section (section 108 of Appendix 1) proposed by the Commission to replace the existing provisions of the Act, incorporates the principle of autonomy. This appears to be a bold departure from the position which is almost universally accepted by other legal systems and runs counter to the principle accepted in the other branches of our own law. Nor does the sociological considerations justify it.

The question whether the parties to a negotiable instrument can have their own choice in the matter of the law which would govern their capacity does not appear to have arisen for the decision of the Indian courts. There are two conflict of law cases in which the courts had to determine the law governing the capacity of the parties to enter into mercantile contracts. The first is *Kashiba* v. *Shripat* [2a] in which the

2. Para 26 of the Report.
2a. (1894) 19 Bom. 697.

Bombay High Court decided in favour of the *lex domicilli*. The other is *T.N.S. Firm* v. *Muhammad Hussain*[2b] in which the Madras High Court held that the capacity to enter into mercantile contracts is governed by the *lex loci contractus*. But neither court had occasion to, nor expressed any opinion on whether the parties are free to choose the law. Probably it is out of question in view of the basic presumptions of the Indian Law of contract.

Section 72 of the English Bill of Exchange Act, 1882, which contains the conflict of law provisions does not deal with the question of capacity. The general principles of conflict of laws applicable to mercantile contracts also lacks authority on the question, which law determine the capacity of a person to bind himself in contract. In *Sottomayor* v. *De Barrows* (*No. 1*),[3] the Court of Appeal, in determining the capacity of persons to bind themselves in marriage has used the language which implies that a person's *lex domicilli* governs his capacity to enter into any contract whatsoever. Some support to this *dicta* has come from Lord Macnaghten in *Cooper* v. *Cooper*.[4] But there are other judicial views which favour the *lex loci contractus* such as that of Lord Greene in *Baindail* v. *Baindail*.[5] Thus, judicial view is either in favour of the *lex domicilli* or in favour of the *lex loci contractus*. It is nowhere suggested, that the choice between these two or of any other law can be made by the parties themselves by stipulating to that effect in the contract, as in the case of the proper law. There is judicial opinion to the effect that the doctrine of the proper law which enables the parties to select the law governing their agreement is not suitable for application to the question of capacity to enter into mercantile contracts. *In Cooper* v. *Cooper*,[6] a case concerning the capacity to make marriage settlement, Lord Macnaghten says :

> "It is difficult to suppose that Mrs. Cooper could confer capacity on herself by contemplating a different Country as the place where the contract was to be fulfilled ".

In the law of the United States, the autonomy of the parties plays a lesser role than in English law. While the English law allows the parties to a contract to select the law governing their contract and only restricts their autonomy in the matter of the choice-of-law

2b. (1933) 65 M.L.J., 458, 146 I.C. 608.
3. (1877) 3 P.D. (C.A.) I, 5.
4. (1888) 13. App. Cas. 88, 108.
5. [1946] p. 122.
6. (1888) 13. App. Cas. 88, 99.

governing their capacity, the American rules of conflict of laws have no room for the intention of the parties in either matters.[7]

On the continent of Europe too, the question of capacity is governed by compulsory rules and it is not open to the parties to select the law applicable to the determination of their capacity.[8] The compulsory rule is that the personal law governs the capacity of the parties to a contract subject to the exception that a contracting party cannot rely on his incapacity by his personal law if he has capacity under the *lex loci actus*.[8]

The position taken by the Law Commission is not sustained by the opinion of jurists and text book writers either. If any support can be claimed for the view that the parties should not be prevented from their own choice in the matter of the law governing their capacity it is probably from the theory canvassed by Dr. Cheshire. Though Dr. Cheshire would have capacity regulated by the proper law of the contract, he emphatically denies any place for the intention of the parties in the determination of the proper law for this purpose. For he says:

> "A person cannot confer capacity upon himself by deliberately submitting himself to a law to which factually the contract is unrelated".[9]

The proper law which according to him should regulate capacity is the law of the country with which the contract is most substantially connected.

According to the authors of the 7th edition of Dicey's Conflict of Laws, the capacity of the parties to a bill of exchange should be governed by the law of the place where the contract is made.[10] The editors (of 7th Dicey) make a distinction between the law applicable to negotiable instruments and that applicable to mercantile contracts in general[11] and even though they argue in favour of relaxing the regid rule of *lex loci contractus* in its application to capacity in mercantile contracts in general, they are opposed to the selection of the applicable law to be made by the parties themselves.[12]

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7. *Restatement of Conflict of Laws*. Ss. 332, 333 and onwards.
8. On this see Dr. Martin Wolff, *Private International Law*, p. 280 et seq.
9. Cheshire, *Private International Law*. 6th Ed. 1961, p. 231.
10. *Dicey's Conflict of Laws*, 7th Ed. by J.H.C. Morris with specialist editors.
11. *Ibid* p. 845: The argument against the rigid application of the *lex loci contractus* is that the place of contracting may be fortuitous. This argument has less force when applied to negotiable instruments.
12. *Ibid* 772-73.

Dr. Martin Wolff referring to the application of the proper law doctrine to the question of capacity says that there are no precedents supporting this view either in England or in the countries of Europe. He is of the opinion that the question of capacity is and aught to be governed by compulsory rules.[13]

Is the view taken by the Law Commission justified by considerations of sociological jurisprudence? Capacity is an incident of status. Status is the basis of capacity. And therefore it stands to reason that the law governing one's status would normally govern his capacity though in certain circumstances and for certain purposes other legal systems may also claim to govern capacity and even claim to govern it exclusively. Status has been described as a person's legal condition in Society.[14] The relation between a person's status and the society in which he lives is so well described by Prof. Graveson, that I am tempted to quote him at length.

> "The predominent purpose behind the idea of status is the maintenance of social institutions. Society is classified into status groups with the object of legally protecting certain social relations and individual conditions, and where a personal condition or relation exists which it is in the interest of the community to control or supervise, the law imposes on the person or the persons concerned a legal status. These legal classifications into status groups.....are based usually on the common institutions and concepts of society, such as marriage, legitimacy, conviction of felony, infancy, lunacy or bankruptcy. The effect of a persons being a member of one of those classes is the automatic attachment to him of a mass of rights, powers, capacities, duties, disabilities and liabilities or such a combination of them as is appropriate to the particular status....." [15]

Thus status is a legal condition imposed by the State and therefore cannot be acquired, varied, or divested at the will of the person or persons concerned. And it is equally true of capacity which is an incident of status. It is a matter of compulsory social law and therefore the person or persons concerned, cannot at will subject themselves to another law.[16] Capacity, like other incidents of status, is vested in

13. Martin Wolff, *Private Int. Law*, 2nd Ed. 1950, p. 285 (s. 265).

14. Graveson; *The Conflict of Laws*, 4th Ed. 1960, p. 114.

15. *Ibid* p. 115.

16. This is not to say that only personal law—*lex domicilli* or *lex patriae* as the case may be—and no other law should govern capacity. Commercial convenience would make it unjust that a person comes to this country and enters into a contract

a person or he is divested of it, because the interests of the society at large so demand. The interest involved may be the protection of its social and economic institutions or social and economic transactions or relationships or of values it cherishes or it may even be the protection of the individuals themselves. But capacity is only one of the legally defined incidents of a legally imposed status. It is merely part of a greater whole. The law applicable to the part need not always be the same as that applicable to the whole, and therefore capacity of a person may sometimes, be determined by a law different from that which defines his status. But still, it is attached to him by law—the law of the society whose interests are predominently involved—and not by act of the party. Social concern is the reason for denying capacity to infants and sometimes to women to bind themselves by contractual obligations. In some municipal laws there exist special rules applicable to capacity to sign negotiable instruments. Thus, apart from infants and women, soldiers, peasants and clergymen have been declared to be incapable of validly signing bills of exchange.[17] The idea is to protect persons unacquainted with commercial intercourse. Therefore, to extend the doctrine of autonomy of the parties to the question of their capacity is open to strong sociological objections.

If the door is closed to the parties to choose the law applicable to their capacity, the effect of the remaining portion of Section 108 proposed by the Law Commission would be to subject capacity to the *lex loci contractus*.

As has been stated above, the Indian courts are divided between the *lex domicile* and *lex loci contractus* on the question of capacity to enter into mercantile contracts. English law has no authority on this question. In the United States[18] the applicable law is the *lex loci actus*. A Canadian Court has held in favour of the *lex loci actus*.[19] The opinion of jurists is divided. The editors of the 7th edition of Dicey's Conflict of Laws who make a distinction between the law applicable to bill of exchange and to other mercantile contracts in this matter, argue in favour of the *lex loci actus*.[20] Graveson appears to favour the *lex loci actus*

here according to whose laws he has capacity and then trys to avoid his obligations by setting up his incapacity by his personal law.

16a. See *Baindail* v. *Baindail* [1946] p. 122.

17. See Dr. Martin Wolff, *Private Int. Law*, 2nd Ed. p. 478 (s. 462).

18. *Restatement of Conflict of Laws*, ss. 333.

19. *Bondholders Seurities Corporation* v. *Manville* (1933) 4 D.L.R. 699. The Sasketchewan court held that the capacity of a married woman domiciled in Sasketchewan to make a promisory note in Florida was governed by the law Florida.

20. *Dicey's Conflict of Laws*, 7th ed., p. 844-45.

subject to the qualification that effect should be given to any more liberal standard of capacity granted by the party's personal law.[21] Dr. Cheshire who does not discuss this question separately in the case of bill of exchange, seems to assimilate the question with that in mercantile contracts generally. In mercantile contracts, capacity, according to him is governed by the law which is substantially connected with the contract.[22]

Dr. Martin Wolff also sees no reason to make a distinction between bill of exchange and other ordinary contracts. According to him the leading principle is that the law of the domicile applies subject to the qualification that a contracting party cannot rely on his incapacity by the *lex domicilli* if he has capacity under the *lex loci actus*. This is also the rule accepted by the Geneva Convention of 1930 on Conflict of Laws in connection with Bills of Exchange, with this difference that since the personal law on the continent of Europe is the law of nationality and not the law of domicile, *lex patriae* takes the place of *lex domicilli*. Further, the Geneva Convention imports the doctrine of *renvoi* into this question, so that if the national law of the *de cujas* provides that the law of another country is competent, this latter law shall be applied, coupled with, as Gutteridge puts it, "a short-circuiting of the to and fro process, or a rupture of the *circulus inextricabilis* at the first *renvoi*." [22a] According to this eminent lawyer, in practice, the rule produces the same result as the rule of *lex loci contractus*.[22b] Apart from the fact that the Geneva Convention is adopted by some sixteen countries this rule is widely accepted in Europe. This was also the rule (the rule of Geneva Convention minus the *renvoi* doctrine) in the Japanese Code of 1898 and the Chinese Code of 1918. But there are obvious difficulties in adopting the rule embodied in the Geneva Convention of 1930, because, in our legal system the connecting factor between a person and his personal law is domicile and not nationality. Though, to adopt the rules of an international convention is usually a step towards the desirable unification of rules, it is not so in this case. The claims of *lex domicilli* is based on the interest which the society to which a person belongs or the country in which he has made his home, has in the protection of that person and his interests. The claims of the *lex loci actus* is based

21. Graveson, *The Conflict of Laws*, 4th ed., p. 238.

22. Cheshire, *Private International Law*, 6th ed. p. 231.

22a. "The Unification of the Law of Bills of Exchange" by Gutteridge in The British Year Book of Int. Law, 1931, p. 13, at p. 23. For *Circulus inextricabilis*, see Dicey, p. 79.

22b. *Ibid* p. 24.

on the requirements of commercial convenience. In the common law legal system, now it is generally recognised that, so far a commercial transactions are concerned, the link between a person's capacity and his domicile is very weak. The validity of a contract the parties to which have capacity according to the *lex loci actus* is upheld in almost every legal system.[23] Criticism against the *lex loci actus* theory is based on the argument that the place of contracting may be uncertain or fortuitous.[24] Whatever may be the merit of this argument as applied to capacity to make ordinary commercial contracts, it has very little force in the case of negotiable instruments. The uncertain or fortuitous character of the *locus contractus* in other contracts arises from the fact that the contract may not be in writing, or that it may have been made through letters or over the telephone or telex and that there is great difference between the rules which the various countries apply to the determination of the place of contracting of contracts concluded in each of the above methods which lead to uncertainty and sometimes to ambiguity. There is less room for uncertainty or for ambiguity in a negotiable instrument because the contracts appear on the face of the document itself and further, they are usually required to conform to strict forms. The only ambiguity that may arise is where the contract is made in one of the civil law countries or countries that have adopted the Geneva Convention of 1930, because according to the law of those countries, the contract is made where the signature is affixed on the instrument, whereas according to our law in order to complete the contract delivery is necessary. The main characteristic of the type of negotiable instruments we are dealing with is that it is intended to circulate in the course of modern international commerce and therefore, to make the validity of contracts contained in it depend upon a law other than that of the country where the contract is made is not in keeping with the exigencies of commerce and would cause much inconvenience and injustice. Therefore the rule that the capacity of the parties to a negotiable instrument should be governed by the *lex loci contractus* is a sound one.

Validity

The draft proposal of the Law Commission subjects the question of validity to the law of the place where the contract whose

23. American Restatement of Laws. ss. 333. Though there is no decided case in English law, text book writers are mostly agreed that the Courts would so hold. This is also the position in all the legal systems of Europe. The exception to the general rule in the Geneva Convention of 1930 also is to the effect.

24. See Cheshire. p. 223 ; Dicey, p. 772.

validity is in question is made. The proposal lacks clarity because validity may be as to requisites of form or as to the essence or the substance of the agreement or both. On the face of it, the section proposed by the Law Commission seems to imply both. However, that is obviously not the intention of the authors, because they say in para 30 of the report that in formulating this rule they have followed the provision of sub-section (1) of Section 72 of the English Act, which specifically deals with requisites in form only. So far as the formal validity of the instrument or the acceptance or negotiation is concerned, the rule embodies the principles which is almost universally accepted and which on relevant considerations seems reasonable to apply. There is further reason to think that this sub-section is confined only to formal validity because the liabilities of the parties, which are matters of essential validity are dealt with by the sub-section that follows, which subjects those matters to the law of the place where the instrument is payable. However, as this is not clear from the wording of the section itself, it requires to be clarified.

The question which law determines or which laws determine the essential validity of a negotiable instrument is a difficult one to answer, all the more so because of the uncertainty as to what constitutes essential validity. The obligations of the parties to the instrument which are matters of essential validity are dealt with by the Law Commission in sub-section (b) (i) of the proposed section 108, which subjects the liabilities of all the parties to the instrument to the law of the place where the instrument is payable. Thus irrespective of where a particular obligation has arisen, or is payable and irrespective of the proper law of the contract which has given rise to the obligation, the obligation will be subjected to the law of the place where the instrument is payable, not of the place where the particular obligation is payable or has arisen. This rule is not part of any developed system of conflict of laws, and therefore requires some investigation.

The Negotiable Instruments Act in force subjects the liabilities of the maker of the note and the drawer of the bill to the law of the place where the instrument is made, and those of the acceptor and indorser to the law of the place where the instrument is payable. The maker of the note is the principal debtor, like the acceptor of the bill. The obligations of the drawer are similar to that of a surety. And therefore to place the liabilities of the maker and those of the drawer in the same category is to apply the wrong law to one of them. Similar is the result of placing the acceptor and the indorser in the same category, because their liabilities arise from different contracts. The

English Act does not refer to the obligations of the parties expressly But the term 'interpretation' used in sub-section (2) of Section 72 according to Chalmers, the draftsman of the Act includes the obligations of the parties, and this view is now supported by judicial *dicta* [25] and the opinion of text book writers [26]. If this is so, the English Act subjects the question of essential validity *i.e.*, of obligations of the parties, to the *lex loci contractus*. This rule has been criticised as being not in accordance with the requirements of commerce. [27] And it is also stated that the phrase *lex loci contractus* as used here, really means *lex loci solutionis*. [28] This is the view of the draftsman, Chalmers himself. Chalmers, in drafting this rule, intended to give effect to Story's formulation of the rule, but failed to do so [28] . The rule as is clear from the words—and the words make it perfectly clear that the applicable law is *lex loci actus*—does not appear to enjoy much support. Were it to mean what its draftsman intended, the rule would be very close to that of the Geneva Convention. The question led to prolonged and thorny discussion at the Geneva Convention which ultimately agreed upon the solution that the liabilities of the acceptor of the bill of exchange and of the maker of the promissory note should be governed by one law, namely, the law of the place where the instrument is payable and that any other obligation, for example of the drawer or an indorser should be governed by the *lex loci contractus* [29]. This appears to be a sound application to the question of essential validity, of what is known as the 'several laws' doctrine.[30] A bill of exchange as well as a promissory note is described as a congeries of contracts dependent upon one original contract. [31] Though the original contract [32] always has a certain effect upon others, nevertheless, the

25. See *Embiricos* v. *Anglo-Austrian Bank* (1905) 1. K.B. 677 at p. 686; *Alcock* v. *Smith* (1892) I. Ch. 238; See also a Canadian Case, (1895) Q.R. 8 S.C. 358.

26. See Graveson, Cheshire, Dicey.

27. See Falconbridge, *Selected Essays on Conflict of Laws*, 2nd edition; *Dicey's Conflict of Laws*, 7th ed. p. 853.

28. Chalmers, *Bills of Exchange*, 12th ed. p. 223; Wolff, p. 481; Dicey, p. 852.

28a. See Dicey, Wolff.

29. Art. 4 of the Geneva Convention of June 7, 1930, for the Settlement of certain Conflict of Laws in connection with Bills of Exchange and Promisory Notes.

30. The phrase appears to be coined by Falconbridge. It is now adopted by others; see for example, Dicey's, 7th edition.

31. See *Dicey's Conflict of Laws*, 7th ed., p. 841.

32. The original contract in the case of a bill, is between the drawer and the payee, the first indorsee or the first transferee as the case may be, and in the case of a note, between the maker and the payee, the first indorsee or the first transferee, as the case may be.

several contracts are distinct and different, and therefore the liabilities of each of these parties—the drawer, the indorser and the acceptor of a bill and the maker and the indorser of a note—are distinct and different. The several contracts may not all be substantially connected to the same legal system and therefore, may have to be subjected, not to a single law, but to several laws. The 'several laws' doctrine prevails in Europe, in the United Kingdom, in the U.S.A. and in Canada. It is a doctrine which is almost universally accepted. [33] The 'single law' doctrine proposed by the Law Commission has never been advocated by any of the eminent jurists. [34] The 'several laws' theory enables each contract contained in the negotiable instrument to be subjected to the law most appropriate to govern it. The single law theroy subjects all the contracts to the law of the place where the instrument is payable. This is not objectionable so far as the liabilities of the maker and acceptor are concerned. But as regards the liabilities of the endorser (such as those attached to him by our municipal law in the case of an 'inland instrument' by, say, Sections 35 et seq or Section 80) the rule turns a blind eye to the factual situation and employs a mechanical yardstick to measure his liabilities. Supposing a bill of exchange is drawn on a banker in Utopia and payable there. A in India indorses it in favour of B. The contract which has given rise to A's obligation is made in India. And if A's obligation has to be enforced, it is enforceable in India. In such a case is it not unjust to govern A's liability by the law of Utopia? It is reasonable to expect that A and B would have the Indian law in mind, being the law of the place where they are conducting their transaction, when considering what would be their rights and liabilities. Substance of the obligation *i.e.*, essential validity being a matter admittedly within the competence of the parties to a contract to determine, to govern their obligations by the law intended by them to govern, or in the absence of such intention, presumed to be intended by them, as reasonable persons, appears to be more in accordance with justice than to govern their obligations by some other law. To subject the liabilities arising out of a contract to its proper law is also in accordance with business convenience. [35] A further consideration which is relevant in formulating any rule of conflict of laws, is the international unification of

33. Dicey, p. 842.

34. Gutteridge (British Year Book of Int. Law, 1931;), Falconbridge, Dicey, Cheshire, Wolff, Graveson—all these jurists support the 'several laws' theory.

35. See Falconbridge, *Selected Essays on Conflict of Laws*; Dicey, p. 853 et seq.

the rules, which again weighs in favour of the 'several laws' rule as embodied in Article 4 of the Geneva Convention.

Presentment, Dishonour Protest and Notice of Dishonour :

The Law Commission has proposed the rule that the law of the place where the instrument is payable shall govern all questions concerning presentment dishonour, protest and notice of dishonour. However, this is subject to the overriding clause (to which all other provisions are also subject to) that it will have effect in the absence of a contract to the contrary. How far the parties to a negotiable instrument should be free to choose the law applicable to the determination of the legal questions arising from it is discussed later in this paper. Leaving aside, therefore, the overriding clause for the present, the Law Commission's proposed rule as contained in (b) (ii) to (b) (v) of section 108 can be said to be an improvement both on the existing Indian provision contained in section 135 of the Negotiable Instruments Act, 1881, and the English provisions contained in section 72 (3) of the Bill of Exchange Act, 1882. It is more complete and detailed than the former [36] and it avoids the ambiguities for which the latter has been criticised.[37] The rule gives effect to the principle of *locus regit actum*, the principle embodied in the above English section, but without the obscurity of the language of the same. The place of presentment for payment obviously and that for acceptance usually is the place where the instrument is payable. Protest is closely connected with the place where the instrument is dishonoured, that it would be unjust to make the holder comply with the requirements of any law except that of the place where it is dishonoured (*i.e.*, where it is payable). The same argument holds good so far as the notice of dishonour to be given by the holder is concerned. The rule is therefore just and convenient.

The necessity for protest as regards *foreign bills* is also dealt with in the Law Commisson's proposal at section 71 which embodies the rule contained in the existing section 104. According to section 71 a *foreign bill* must be protested for dishonour if so required by the *law of the place where it is drawn.* The section only refers to protest to be made in India.[38] Therefore section 71 makes an exception to the general

36. Section 135 only deals with "what constitutes dishonour and what notice of dishonour is." There is no mention of presentment and protest and the choice of law applicable thereon.

37. The wording of section 72(3) has been criticised for its obscurity by almost all the text book writers. (Cheshire, Graveson, Dicey, Wolff.)

38. Though it does not say so *expressis verbis*, it is clear that the section is intended to apply to cases where the protest is to be made in India.

rule contained in Section 108 (b) (v), namely, that the necessity for protest is governed by the law of the place of payment. Where the bill payable in India is dishonoured, whether it is necessary or not to protest the bill for dishonour is governed not by the law of the place of payment but by the law of the place where the bills is drawn. Section 71 is not in contradiction to Section 108 (b)(v) and its effect is to liberalise the conflict of law provisions concerning the necessity for protest.

Presentment, protest and notice of dishonour are certain measures which the holder has to take to protect or enforce his rights. They are not 'duties' in the strict sense of the word. The use in English enactment, of the word 'duties' to describe these acts has not passed without criticism.[39] Still the words "duties of the holder" appear in connection with presentment in the Law Commissioner's proposed draft. The corresponding provisions of the Geneva Convention[40] appear to be worded more accurately in this respect.

How Far is the Doctrine of Autonomy Applicable to the Choice of Law Governing the Incidents of a Negotiable Instrument:

According to the Law Commission, the parties to the negotiable instrument are free to choose the law or laws by which any or all the incidents of the instrument should be governed. This is much further than the contractual freedom conceded by any law so far not only as regards negotiable instruments, but as regards mercantile contracts generally. The existing Indian Act follows the law generally applicable to contracts by allowing the parties to choose the law applicable to the obligations of the parties. In the English enactment there is no reference to the will of the parties. There is no mention of it either in the Geneva Convention or in the various codes in force in the continent of Europe. However, none of them excludes it either. Therefore the position would be the same as obtaining in contracts generally *i.e.*, it should be taken that these legal systems concede to the parties to a negotiable instrument the same freedom as is obtaining to the parties to any other contract. As regards contracts generally, the intention of the parties is given effect to in most legal systems though not to the same extent. Only the American *Restatement* leaves no room for the intention of the parties.[41] The legal system of the European continent requires

39. See Wolff, Dicey.

40. Art. 8: "The form and the limits of time for protest, as well as the form of the *other measures necessary for the exercise or preservation of rights* concerning bills of exchange or promisory notes, are regulated by the laws of the country in which the protest must be drawn up or the measures in question taken, (Emphasis added).

41. The rule contained in the Restatement (ss. 332 et seq.) has been criticised for its rigidity. But it is not because it does not give effect to intention, but because

that the law chosen by the parties must be internally connected to the contract. It is only the 'intention' theory of Dicey based on the Benthamite tradition of individual utilitarianism and its corollary of the maximum degree of liberty of contract, that gives the widest latitude to the parties to an international contract in the matter of the choice of the proper law. However, the Courts in England have not accepted this theory without imposing certain restrictions on the freedom of the parties to choose the proper law.[42] And it is only with regard to the proper law of the contract that the choice is left to the parties. As Cheshire says "the law to determine whether a binding obligation has been created cannot be left to the free will of the parties."

> "People cannot by agreement substitute the law of another place.....an agreement is not a contract except as the law says it shall be, and to try to make it one is to pull on one's bootstraps. Some law must impose an obligation and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes."[44]

The above statement of Justice Leonard Hand may not be correct when applied to all the incidents of a contract, but it certainly represents an important truth on certain legal incidents of contract. The scope and content of the contractual obligation are matters which fall within the sphere of free will of the parties. "If they could have dealt with them explicitly, there is no reason why they may not deal with them indirectly by reference to a particular system of law."[45] Referring the substance of their obligation to a particular legal system is only another way—a more convenient and precise way—of describing the bargain. But it is a different thing when parties seek to choose

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the criteria it adopts for determining the applicable laws is arbitrary such as the place of contracting or the place of performance and fails to take into account all the relevant considerations.

42. In the *Vita food case*, which is generally given as authority for the "intention" theory, Lord Wright imposes three conditions: the choice must be *bona fide*, legal and should not offend against the public policy of the forum [1930] A.C. (P.C.) 277, 290, On the other hand, see Denning, L.J. (as he then was) in *Boissevain* v. *Weil* (1949) 1. K.B. 482. He says that the proper law of the contract depends not on the will of the parties, but on the place with which it has the most substantial connection.

43. Cheshire, p. 216.

44. Leonard Hand in *E. Gerli & Co.* v. *Cunard S.S. Co.* 48 F. 2d. 115. (2nd Cir. 1931).

45. Prof. Cheatham, in 48 *Col. L. Rev.* 1267. (1948).

the law which shall govern their capacity or the question whether a binding obligation has been created. Similarly a transaction which is illegal or forbidden by the law to which it naturally belongs cannot be made legal by parties deliberately choosing a different law. These are matters of contract law in which parties obviously cannot have a say.[46] The argument applies with equal force to negotiable instruments as to other contracts. There is some reason on the other hand for a more restricted application of the doctrine of autonomy to contracts contained in a negotiable instrument. The formal validity of a contract is generally regarded as belonging to the sphere of *lex loci actus*. As however, the place of contracting in ordinary contracts may be fortuitous, and the contract may therefore have no other connection to the place of contracting, it is generally agreed, and is also upheld in the practice of many legal systems, that the contracting parties may, in the alternative observe the formalities of the proper law of the contract.[47] The place where a negotiable instrument is drawn or its acceptance or the indorsement is made is not likely to be fortuitous. It is not likely that these transactions may be more intimately connected to some other place than that of the place of contracting.[48] Therefore there is no reason here to interfere with the compulsory application of the locus *regit actum* maxim. Further, a negotiable instrument particularly a bill of exchange is meant to circulate in the course of

46. Both judges and jurists have affirmed it. Apart from Leonard Hand who is quoted above, the great judge and jurist Denning has expressed similarly in *Boissevain* v. *Weil* [1949] 1 K.B. 482, at 490. See also Latham L.J. in *Mynott* v. *Barnard* (1939) 62 Comm. L.R. (Australia) 62 at p. 80. As to jurists see Wharton, *Conflict of Law*, 3rd Ed ; Lorenzen, 30 *Col. L.R.* 658 ; Cheshire, p. 214 et seq.

The famous *Vita food case* (1939) A.C. (C.C.) 277 will illustrate the point. Residents of Newfoundland and New York entered into a contract of carriage by sea. Though a Newfoundland statute provided that the Hague Rules should apply to any contract of carriage for outward voyage, the parties sought to evade these rules by stipulating in the contract that it should be governed by English law. The Privy Council upheld their choice. The result was that the parties were able to continue a practice, to suppress which the Hague Convention was signed and that this evasion of the Hague Rules was condoned by the Privy Council in spite of the fact that Great Britain had solemnly signed the Hague Convention.

47. This is the case in German, Swiss, Austrian, Hungarian, Norwegian and Swedish law—See Wolff, p. 446.

48. In ordinary contracts, the connecting factors may be multifarious. For an example see the English case, *The Assunzione* ([1954] P. 150). There were probably a dozen or so connecting factors. They are listed by Cheshire in his book at p. 212/13. In the case of indorsement, acceptance and the making of the bill of exchange the only connecting factors possible are those connected with the place where these transactions have taken place.

business and during such circulation it may be indorsed by many persons. To make those who thus become parties to the instrument to comply with the formalities of any law other than that of the place of indorsement would be not in accordance with business convenience. The compulsory application of the *lex loci actus* is also desirable from the point of view of international unification as most other legal systems follows this rule. [49]

Presentment, protest and notice of dishonour also appear to be equally apt for the imperative application of the *locus regit actum* rule. The considerations of business convenience and international unification of conflict rules, both point in that direction. To subject the requirements of presentment for instance, to a law other than that of the place of payment would be to introduce unnecessary difficulties, all the more so because the rule of *locus regit actum* is almost universal. [50] Therefore it is not advisable to leave the choice of law applicable to these acts to the volition of the parties.

The other questions dealt with by the Law Commission are relating to the date of maturity and to payment and satisfaction including questions of the money of payment and the rate of exchange at which the instrument is to be paid. It is obvious that these questions cannot be governed by any law except that of the place of payment and therefore the choice of any other law by the parties would be ineffective. Therefore these are not matters on the law governing which the parties may have a say.

49. However, there is one difficulty which arises from the difference between Common law and Civil law in the meaning attached to the term "place of contracting". In Civil law, the place of contracting is the place where the signature is affixed. In Common law delivery is necessary to complete the transaction and therefore the place of contracting is the place where the instrument is delivered after signing—See Section 46 of the Negotiable Instruments Act, 1881.

50. See Section 72(3) of the Bill of Exchange Act for English law. For American Law see Restatement on Conflict of Laws; (The Uniform Negotiable Instruments Act does not contain conflict rules); See Art. 8 of the Geneva Convention of 1930 (on Conflict of Laws) for the law on the continent of Europe.