Chapter 44

Maritime Carriage of Goods: Comparative Conflicts Law

I. The Contacts

1. Obsolete Connections.

(a) General maritime law. The modern English cases no longer mention general maritime law with respect to transportation of goods. In the United States its only remaining role seems to be to substitute for foreign law that is not proved; so the term is just another word for lex fori.¹

(b) Place of accident. Another connecting factor no longer seriously to be considered is the place where the goods are lost, destroyed, or damaged. This local connection enjoyed some favor in American² and other³ courts, but has nothing to recommend it with respect to a voyage contractually assumed by one carrier on one vessel. Only by confusion of tort and contract could such a view originate in actions sounding in contract.

The following local connections are used in the absence of a law agreed upon by the parties which is respected everywhere, at least in principle (supra p. 239).

¹ Supra Ch. 43 pp. 241, 246.
² Supra Ch. 43 p. 244 at n. 49.
³ Belgium: Trib. Antwerp (April 26, 1939) Rechtskund. WB. 1939, c. 409 No. 82: a stipulation limiting to 10 centimes per kilogram the liability of the carrier, cannot be applied in case of negligent maintenance of the ship according to the Dutch C. Com. art. 470 (applied through reference in art. 748), the Belgian law being replaced by the law of the country where the damage occurred.
2. The Flag

The often-assumed preference of English courts for the law of the flag to govern affreightment contracts, if it ever existed, disappeared long since. Much less has it been a feature of American and other laws until very recently. Even the reference to the nationality of the ship as an additional clue to the presumable intention of the parties, once popular, has practically vanished.

It is difficult for me to ascertain to what degree the stipulations in bills of lading for the law of the flag flown by the ship have remained in usage. Such clauses may be reasonable and useful to a certain extent, although courts have to view the problem under quite different considerations in the absence of a party agreement.

Nevertheless, it is remarkable that the principle abandoned by the courts has encountered increasing favor with writers of various countries. They had restricted success in the Dutch law reform of 1924, but quite recently two Italian writers advocating the law of the flag scored a full victory in the present Code of Navigation (1942) providing that "contracts of hire, charter, or transport are governed by the national law of the vessel or the aircraft, in the absence of a different intention of the parties." The arguments advanced for this view have always

---

4 Supra pp. 245-247.
5 Supra p. 241 n. 32. But see for Denmark, Borum and Meyer, 6 Répert. 225 No. 91.
Germany: RG. (April 14, 1920) 98 RGZ. 335.
France: Fromageot, 18 Revue Autran (1902-03) 742, 766 f.; Ripert, 2 Droit Marit. 384 § 1468; J. Eynard, La loi del pavillon (1926) 164; Batiffol 247 f.
Germany: Bar, Int. Handelsrecht 439; Schaps 515; 2 Frankenstein 518, 523.
Italy: See next note.
8 Scerni 208; Monaco 135.
9 Art. 10, Disp. Prel. to the Codice della Navigazione of 1942.
culminated in two incontestable advantages. In the first place, this principle avoids differentiating goods delivered to the same ship on one voyage according to the nationality or domicil of each shipper, or to the individual places of shipping or arrival. In the second place, the law indicated by the flag, besides being uniform, is easy to recognize for all persons interested and usually regarded as the only one familiar to the master. This assuredly means superiority over the many uncertainties connected with the place of destination. For the Italian solution, it has been added that this principle secures each of the national maritime laws its application in exact proportion to the respective country’s participation in the world traffic—an argument truly reminiscent of the ideals once proclaimed by Mancini’s theory of the national law. Would Italy, without this antecedent, have been converted to the law of the flag?

However, if the virtues of this device are so obvious, how could they have escaped the attention of the courts in practically all countries? Why did the Anglo-American judges desert this temporarily much-considered rule? One answer was given as early as 1886 by an American admiralty judge. “Practically,” he said, “the extreme rule (of the law of the flag) would require all merchants to acquaint themselves, at their peril, with all the details of the municipal law of every nation with whose ships they might deal, even in ordinary commercial transactions; certainly a most onerous, if not impracticable, requirement.”10 This, it is true, has only the merit of making us aware that every test, including that of the flag, burdens some of the parties involved with the dangers of ignoring the applicable law. Why the courts prefer the law of the port of dispatch to that of the flag, is a matter of guessing but the fact itself shows that the

nationality of the vessel is not regarded as eminently important. With the modern expansion of shipping, the major ports have a constant stream of incoming and outgoing vessels; great uniformity of conditions and tariffs prevails in the shipping pools; and nautical skill appears in comparable equivalence. The date and place of sailing, adequate space facilities, and personal acquaintances are of greater weight than the registration of the ship. Freight may be handled by a broker without naming a ship or even a line. A maritime agent may announce to his clientele the next outgoing vessels and their destination but issue the bills of lading on his own form for an unnamed shipowner.\(^\text{11}\) Or, acting for a shipping pool, he may accept the goods without determining which line will take care of the carriage.\(^\text{12}\) All this confirms an insight taught by the history of commercial law. In our time, by a complete change from ancient economic organization, an enterprise of transportation on the sea is an entity almost independent from the individual ships and the persons performing navigation and carriage. If a particular vessel is agreed upon at all, providing the vessel has become a collateral rather than a principal duty.\(^\text{13}\)

These may be speculative reasons for an irrefutable phenomenon. But there is one certain disadvantage of applying the law of the flag in foreign countries, which the courts must have felt in some way. If the law of the ship governs the contract and the bill of lading as a whole, its provisions are added to the imperative prescriptions of the lex fori. Moreover, prohibitions such as those directed against clauses of exemption from liability have to be applied inter-

\(^\text{11}\) The Iristo (D. C. S. D. N. Y. 1941) 43 F. Supp. 29 at 35, supra Ch. 43 n. 45, calls this a "haphazard manner of conducting such a large business."

\(^\text{12}\) See for the same situation in air carriage, Lemoine, Traité de droit aérien (1947) 396.

\(^\text{13}\) See the forceful summary of development by Garrigues, Curso de derecho mercantil, II, 2, esp. 740.
nationally if they are the law in the country of the port of dispatch. In the United States and a few other countries, a court would also have to observe, in addition to the law of a foreign place of dispatch and the law of the flag, large portions of its own law if the goods are deliverable in the country. Business and courts do not even consider complicating the situation in such a manner. The simplicity imagined by the advocates of the flag does not materialize.

Except for its lighthearted adoption in the hasty Italian compilation of 1942, the law of the flag is positively pertinent only by express agreement and in such problems as the authority of the master and the limitations on the shipowner's liability. It has been deliberately disregarded in the Brussels Convention on bills of lading, with the result that shipping in foreign trade even in vessels registered in the United States is not subject to the law of the flag.

3. Domicil of the Shipowner

Some writers have expressed sympathy with the personal law of the carrier, that is, his domicil, rather than that of the ship. The shipping companies, it is argued, are vitally interested in a uniform legal treatment of their affreightments, and uniformity cannot be guaranteed except by the law of their headquarters. This view has been adopted by some German decisions and writers, and the Swiss

14 England: The Industrie; The Njegos; and for other countries, see supra p. 146.

Denmark: Trib. marit. and com. Copenhagen (Dec. 23, 1931) 28 Revue Dor (1933) 215 applies the Greek law of the flag simply to the authority of the master in deciding how to protect the cargo.

15 France: 5 Lyon-Caen et Renault § 268.

16 2 Meili 369; Bar, 2 Int. Handelsr. 438 (as to the carrier's duties). Rolin, 3 Principes 259 § 1243; Raape 260; cf. on land transportation, the unanimity of the European doctrine, Batiffol 104 § 118. Inst. of Int. Law, 22 Annuaire (1908) 291, art. 2 (1).

17 See Nussbaum, D. IPR. 231 and n. 2.
Federal Tribunal. The same opinion, in the terms of the theory of *contrats d'adhésion*, appears in the *Código Bustamante*.

The logic of this theory is challenged as usual by the American antimonopolistic tendency. Above all, it is true for affreightment what in 1841 Judge Taney said with less foundation about the law governing the authority of a master to make a charter. He refused to take into consideration that the shipowner resided in Maryland, for one thing because Baltimore had no part in the conclusion of a charter in Chile for carriage to England, and again, because the domicil of one party is not competent to determine his own rights and duties in a contract. As in this case, the main office of the owner or carrier may be far distant from the scene envisaged by the acting persons. With what justification can a contract made in Argentina with the Argentine agent of a French shipping company be subjected to French law? The courts in Argentina are certain not to follow this law.

These objections are avoided by the international commercial Treaty of Montevideo, of 1889, article 9, making affreightment dependent on the domicil of the maritime agency that concludes the contract. If, however, the maritime agency is situated at the port of dispatch, or in the same country as this port, the result is adequate not because of the location of the agency but because the port is situated there. For if, on the other hand, the provision should mean that Argentine law governs when an agent in Buenos Aires contracts for transportation from Montevideo to Brazil, this does not make sense.

---

18 BG. (July 12, 1922) 48 BGE. II 281 f.; cf. Oser-Schoenenberger 1608 n. 11; 2 Schnitzer 515; BG. (Jan. 20, 1948) 74 BGE. II 81, 85.
19 Córdigo Bustamante, art. 185
21 This remark is borrowed from Lemoine 395.
22 Bustamante, Manual 372.
The section is remarkable only in the fact that in this instance the Treaty of Montevideo abandons its tenaciously predicated *lex loci solutionis*.

4. Place of Contracting

The law of the place of contracting is the prevailing principle in the American courts, the declared French rule, and probably the favorite approach in many countries, including Italy until its recent legislation. It is also sometimes resorted to in individual embarrassing cases.

Yet, the familiar objections to the mechanical *lex loci contractus* are increased in this special application by the absurdity of a maritime contract naturally governed by the tradition of the seafaring nations, depending on the law of an inland shipper who happens to be in the role of accepting the offer sent by a shipping agent. On the other hand, in the inverse case where a carrier through his local agent in the usual course of business accepts applications for transport written on his own standard form, the law of his

---

23 *Supra* pp. 242-245.
24 *Supra* pp. 249-250.
25 E.g., Belgium: *Supra* p. 249 n. 74.
The Netherlands: C. Com. art. 498 (old), changed from former systems, see VAN SLOOTEN 15; at present prevailing rule of the courts, see *supra* p. 254.
27 England: *Supra* p. 248.
Germany: *Supra* p. 253.
28 Lyon-Caen et Renault 793 § 850 and, following them, authors who advocate the law of the flag, have availed themselves of this convincing argument by illustrating it with Swiss shippers not having any maritime law. During the last war, however, Switzerland used a fleet of its own and provided it with an emergency legislation drawn from the international conventions and usages. But this change rather confirms that the natural governing law is not inland.
country is favored not because his agent there completes the contract by signing, but because he will dispatch the goods therefrom.

5. Port of Destination

Under the guidance of Savigny's *lex loci solutionis*, the German courts proclaimed the law of the port of destination for charter parties as well as ordinary affreightments. This doctrine, as seen above, could not be maintained, and with the exception of Greece, has only sporadically been followed in other countries. The Treaty of Montevideo has repudiated it.

Under a one-sided public policy, it is true, certain Latin-American codes impose themselves on foreign-governed carriages to domestic ports. The motives are very similar to the true background of the German practice. This, either in the result or by intention, protects the German consignees in overseas trade against foreign rules less favorable to innocent holders of bills of lading.

Technically, the alleged rule has often been criticized as impracticable whenever the ship sails with optional or uncertain orders or when it does not reach its destination. From a commercial point of view, the situation should not differ for a particular ship’s journey, possibly for the same shipper, according to the various foreign places to which

29 *Supra* Ch. 43 p. 251.
30 *Supra* Ch. 43 pp. 251-253.
31 E.g., Belgium: App. Gent (May 2, 1901) Clunet 1902, 390 (*lex fori*) and other cases; *supra* p. 249 n. 78.
Greece: See 2 STREIT-VALLINDAS 252 n. 38.
The Netherlands: C. Com. art. 498 (old); Rb. Rotterdam (Jan. 23 1907) Clunet 1912, 291.
32 Actas de las Sesiones 560, allegedly because there is no one place of performance, cf. SEGOVIA, El derecho internacional privado y el Congreso sudamericano de Montevideo (1889) 78.
34 NUSSEBAUM, D. IPR. 283.
35 RAAPE, D. IPR. 260.
the goods are sent. Although the intended place of delivery may have importance in certain respects for the rights of the consignee or holder of the bill of lading, it certainly does not deserve to qualify the entire contract.

6. Port of Dispatch

Much of our preceding survey has shown the sound tendency of practice to localize carriage in the port where the goods are brought into the custody of the carrier and the bill of lading is issued.\textsuperscript{36} The introduction of the Hague Rules has furnished an important, though scarcely noticed, support to this theory. To illustrate the attitude taken by most member states of the Brussels Convention, the British Carriage of Goods by Sea Act, 1924, section 1, applies the Hague Rules to “the carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland.” Since the Rules themselves are restricted to “contracts of carrying covered by a bill of lading or any similar document” (article I b), the English Act is applicable under two conditions, viz., that carriage starts in England and that it is covered by a bill of lading. It is immaterial at what place the contract of affreightment may legally be regarded as concluded. This method of viewing affreightment is just what the courts must have in mind when they emphasize the place of contracting in the same breath with the port of dispatch.

Furthermore, the Dutch law demands application of numerous provisions to carriage from Dutch ports rather than to affreightments made in Holland.\textsuperscript{37} And a strange provision of the Soviet law is only explainable by the same idea. The Maritime Code applies (in the absence of party

\textsuperscript{36} Supra Ch. 43 ns. 45 ff., 71 f., 80, 93, 98; Código Bustamante, art. 285.

\textsuperscript{37} The Netherlands: C. Com. arts. 470, 470a, 517d, 520t.
agreement for a foreign law) to all transports from Russian ports, but to those from foreign to Russian ports only in suits before Soviet courts. This means evidently that foreign judgments applying the law of the port of dispatch, if no party is a Soviet national, will be recognized.

Sometimes this same port has been fitted into the conventional pattern by terming it the place where, in addition to the contracting, the commencement of the performance by the carrier occurs. In other cases, doctrinal appearances were saved by emphasizing the beginning of transport as the most important part of the performance. On the other hand, legal construction seems to have helped some writers to prefer the port of dispatch to the place of contracting if situated in different countries; they have followed the theory reminiscent of the Roman receptum navitarum, which conceived the contract of affreightment as a kind of real contract, requiring for its formation the delivery of the goods to the carrier. All these overly technical considerations are beside the point. The administrative provisions of all kinds imposed on outgoing vessels also affect the business of shipping and the activities of maritime agents. The stricter policy of the maritime states has been implemented by imperative rules of private law such as those restraining exemption clauses in carriage from their ports. This is the background on which the entire operation is deemed to be centered at the place where the goods are delivered for carriage by sea and the all-important bill of lading, or possibly a bill of receipt for lading, is issued.

The most serious objection to this solution might be borrowed from the old argument against the law of the

38 Soviet Union: Maritime Law of June 14, 1929, art. 4 (b); Freund, Das Seeschifffahrtsrecht der Sowjetunion (1930) comments that probably the port of dispatch is thought to be usually identical with the place of contracting.
40 Thus, probably 5 Lyon-Caen et Renault 792 § 850.
place of contracting: goods loaded on the same ship in several ports should not be subjected to different laws. But this disharmony is easily remedied by a clause in the bills of lading stipulating for the same law. Furthermore, dispatch is at least an indisputable fact, whereas the place of contracting is not, and it is in the nature of a sea voyage touching several countries that the law under which goods are accepted may vary.

7. Subsidiary Lex Fori

The Soviet Maritime Law resorts to the law of the forum in the absence of an express party agreement on the applicable law in any of the following cases: whenever the transport is between Russian ports or from Russian to foreign ports; if both or even only one of the parties is a Soviet citizen or juristic person, even though the transport may run between foreign ports; and if the suit is decided in a Soviet court, with respect to transport from a foreign to a Russian port. The last provision gives the foreign law of the port of dispatch a slight concession.

8. Public Policy

The law of the forum is prescribed for certain problems with respect to outgoing vessels everywhere; with respect to outgoing and incoming vessels in the United States, Holland, and Belgium; for the entire contract with respect to outgoing vessels in Chile; and to incoming vessels

41 Soviet Law of June 14, 1929, art. 4 (b); cf. Freund, Das Seeschifffahrtsrecht der Sowjetunion (1930) 59, 70.
42 Supra n. 38.
46 C. Com. art. 975 par. 2.
in Argentina and Brazil.\textsuperscript{47} This list is not exhaustive, of course.\textsuperscript{48} The climax is reached by the Maritime Code of French Morocco; all its provisions concerning the rights and duties of the parties to a carriage “apply to every transport destined to or originating in the ports of the French zone of Morocco,” even though the bill of lading or document of carriage is issued abroad, between foreigners, or the parties stipulate that the contract of transport should be governed by a foreign law. Any stipulation of this kind is null and void.\textsuperscript{49}

9. Conclusion

Comparative observation results in some positive conclusions on the subject.

(a) \textit{Ordinary carriage}. In the first place, the legislative situation of the maritime countries and the circumstances of the modern line steamers have promoted a universal tendency of the courts towards a conflicts rule that gives prevalence to the law of the port of dispatch. The law of the flag is no longer important, even in England. In Germany the law of the port of destination has been practically abandoned as the general law of the contract. The few remains of the mechanical conception of \textit{lex loci contractus} can easily be assimilated to the really significant rule.

(b) \textit{Charter parties}. In the second place, it follows that all conflicts rules of the world used on this subject are wrong when they are applied as in the current theories, to all contracts of transportation, if not even to demises. The above assumed rule has justification only when a bill of lading or

\textsuperscript{47} Argentina: C. Com. art. 1091.
Brazil: Introd. Law, art. 9; C. Com. art. 628, and see supra p. 255 n. 107.
\textsuperscript{48} For the normal application of the Hague Rules, in case of outgoing vessels, see Vol. II, pp. 420, 425.
\textsuperscript{49} French Morocco: Dahir of March 31, 1919, art. 267; Louis Rivière, 3 Traités, codes et lois du Maroc (1925) 880.
"a similar document" is issued. It does not have any bearing on charter parties.

The question of the law adequate to charter parties has in fact given rise to most of the litigation reviewed above. Actually, the method regularly followed by the courts, American, English, German, and others, is always the same, the so-called method of cumulating connecting factors. Frequently, the courts indulge in another common tendency, the inclination toward the *lex fori*. But we also encounter a common preference for the English law when the parties are represented in the great center of vessel chartering in London, and the contract is made there on a standard form of the trade.

It would seem that in otherwise doubtful cases it is again the formulary from which the charter has been printed that decides to which country's legal environment a charter party belongs. But when the same blank form is uniformly used in several countries, or throughout the world, as has been achieved by successful efforts for unification in our time, this argument loses its value.\(^{50}\)

Negatively, it is also certain that in a charter party the ports are totally immaterial,\(^{51}\) except when a vessel lying in a foreign port is let by the master to a local charterer. Indeed, if an English firm in Calcutta charters a Norwegian ship lying in the port of Calcutta for a voyage from the Straits Settlements to San Francisco, the latter locations do not support conflicts consideration; the place of contracting ought to prevail.

50 This point of view would justify, for instance, the Appeal Court of Memel (Oct. 11, 1934) to Z. ausl. PR. (1936) 142, applying the law of the forum to a charter party concluded in Memel on the "Baltwood" form of 1926 between a Danish and a French firm, both represented by a local broker with loading and dispatching to be in Memel.

51 "While bills of lading are ordinarily given at the port of loading, charter parties are often made elsewhere," Willes, J., in Lloyd v. Guibert (1865) L. R. 1 Q. B. 115, 127.
A new problem arises when a charter party is governed by a law other than that of the country in which a bill of lading is issued. In this case we shall see that if possible the former law is deemed to extend to the bill.

II. Scope of the Law of the Contract

1. In General

On principle, the law governing any maritime transportation of goods covers conclusion, effects, and termination of the contract. These include such problems as the common law presumption that a charter party is not a demise, the nature of warranties and conditions, the liability of the shipowner and of the charterer for delay in delivery, damage and loss of the goods, the exemption clauses, the obligation to pay freight, the remedies for breach or recovery accorded by law or agreement, and the question whether an action is in rem or in personam.52 “Particular average” is nothing else than damages, subject to the law of the contract.53

The most important of all clauses, the stipulation eliminating or lessening the carrier’s legal liability, as earlier discussion of this subject has shown, is also subordinated to the law governing the contract in general.54

Illustration. Cotton was shipped on an English vessel from New Orleans to Le Havre. The bill of lading con-

52 Treaty of Montevideo on Int. Com. Law (1889) art. 22.
That limitation of liability, so differently organized at present, should be classified as substance, but is unfortunately treated as a procedural incident, has been indicated in the discussion of torts, Vol. II p. 351. For a case demonstrating the monstrous effects of the procedural theory, see KNAUGHT, “Renvoi and Other Conflicts Problems in Transportation Law,” 49 Col. L. Rev. (1949) 3.
53 Cf. The Constantinople (D. C. E. D. N. Y. 1926) 15 F. (2d) 97, 98 (regarding a passenger’s suit for breach of contract).
54 Vol. II pp. 418 ff.
France: Cass. civ. (June 12, 1894) S. 1895.1.161; 5 Lyon-Caen et Renault 791 n. 1.
tained a clause that delivery of the goods should be taken by
the consignee along side board. When fire destroyed a part
of the goods piled on the quay, the effect of the clause was
tested under American and French law. In the prevailing
and correct view, the American law alone should have been
decisive.

This liability of the shipowner based on the contract and
covered by the law of the contract, as may be recalled, is
concurrent with his liability for tort.

The following applications deserve discussion.

2. Formalities of Contracting

Although the charter party derives its name from the
deed on which it was written, neither this contract nor an
agreement of carriage need be in writing to have legal
existence. But writing is often required for evidence and
as such is subject to the conflicts rules on form, mainly the
rule *locus regit actum* in its various shades.

In the absence of recognized usages, however, the gov-
erning law alone decides whether the shipper is entitled to
demand a bill of lading (as in the United States and Ger-
many); how many parts a set of bills should have; whether
the costs of the bill are common or whom they burden.
Significantly, the German courts, contrary to their main
rule calling for the law of the port of destination, are forced

55 Trib. Le Havre (April 18, 1899) 15 Revue Autran (1899-1900) 101.
See especially RG. (May 28, 1936) 151 RGZ. 296.
Italy: Cass. (July 14, 1938) 40 Revue Dor 354; C. Navig. (1942) arts. 377,
385, 420.
Peru: C. Com. art. 665: form of the “póliiza de fletamento.”
Soviet Russia: Maritime Law of June 14, 1929, arts. 75, 121, cf. Freund,
Das Seeschiffahrtsrecht der Sowjetunion (1930) 37.
58 United States: Harter Act, § 4; Carriage of Goods by Sea Act, 1936,
§ 3 (3).
Germany: HGB. § 642.
to determine by the law of the port of dispatch whether the master has to issue a bill of lading.\textsuperscript{59}

In the Soviet Union it is prescribed that affreightment contracts must be registered; if they are made abroad, they have to be registered with the Soviet consul. This provision is sanctioned not by nullity of the contract but by the prohibition for the vessel to enter or leave a Russian port.\textsuperscript{60}

Hence, this is no formality; failure may be a cause of non-performance.

3. Interpretation of the Contract

"Construction" of the contract as a whole, of course, is subject to the law governing the latter.\textsuperscript{61} For example, the frequent clause in an English charter party saying that the master will sign the bill of lading as presented by the shipper without prejudice to the charter party, has been construed in a German court according to English law.\textsuperscript{62}

But also in respect to certain terms, courts have developed detailed presumptions which apply in connection with and apart from usages. Thus, the French doctrine expounds that the law of the place of contracting which governs the contract also determines what is meant by "tons," although if freight is measured by "tons delivered," the law of the port of destination is competent to complete the meaning.\textsuperscript{63}

As to usages, apart from the local customary rules for loading, unloading, and delivery, customs of trade are continuously admitted to "explain ambiguous mercantile expressions"\textsuperscript{64} under the general conditions for reading them.

\begin{footnotes}
\item[59] RG. (Dec. 5, 1887) 20 RGZ. 52, 61.
\item[60] FREUND, Das Seeschifahrtsrecht der Sowjetunion (1930) 13, 67 f.
\item[61] SCRUTTON, Charterparties 19 ff., art 7, treats the conflicts law under this denomination.
\item[63] App. Rouen (Dec. 30, 1874) Clunet 1875, 430; 5 Lyon-Caen et Renault 790 n. 2; for the term "management," see Trib. com. Marseille (May 6, 1892) Clunet 1892, 1149; cited by all writers.
\item[64] SCRUTTON, Charterparties 25.
\end{footnotes}
into the contract. We may repeat that the universal use of English clauses is not a reference to English law.\(^{65}\)

Illustration. A charter between German parties held to be governed by German law contained the familiar English cesser and lien clauses. What the combination of these two clauses means, was investigated by the German Reichsgericht\(^{66}\) under the rule of the BGB., § 133, prescribing search for the true meaning of terms, although the result conformed to the interpretation of the clause found in Carver's Carriage of Goods by Sea.

4. Rights Flowing from a Bill of Lading

The relationship between an affreightment and the bill of lading is rarely examined in conflicts law, perhaps because the subject is not all too clear in most municipal systems. Attention is focused if not exclusively on the general doctrine of negotiable instruments, preferentially on the function of commercial instruments in the transfer of title in the goods rather than their obligatory aspect. Our solution can merely be tentative.

(a) Formalities of issue and endorsement are undoubtedly governed by the rule, *locus regit actum*. Whether the bill is special, to order, or to bearer should simply be determined on the same principle; but this is a controversial matter of more general nature.

(b) The authority of the master. It is universally settled that the master's power to determine the conditions for a bottomry on the cargo, or even to pledge the credit of the cargo owner, etc. are subject to the law of the flag. But does this law also decide who is bound by the master's signing the bill of lading?

Illustration. A New York corporation, time charterer of a Norwegian vessel, let it under subcharter to the Canadian Ocean Dominion Corporation. The vessel took cargo in

\(^{65}\) Vol. II p. 534.

\(^{66}\) RG. (Dec. 14, 1910) JW. 1911, 225.
Halifax, N. S., and later in St. Joseph, N. B., and the master signed bills of lading by a formula causing litigation on the question who was obligated by them, the shipowner, the charterer, or the subcharterer. The American court held, correctly, that Canadian, not Norwegian nor American, law decided and therefore under the circumstances only the shipowner was liable to the holder.\(^67\)

(c) The effects of endorsement are determined by the law of the place of endorsement, according to the principles of negotiable instruments.\(^68\) When a bill of lading was issued and endorsed in blank in Czarist Russia, and so sent by the shipper to the buyer in France, the French court recognized that under the then Russian law a blank endorsement did not protect any holder against defenses which the carrier could oppose to the shipper.\(^69\)

(d) Remaining problems. What law, however, decides the main body of questions, such as the conditions of holding in due course? Or the extent to which the right of an innocent holder, or the right of the carrier for the payment of the freight, stipulated in the bill, is independent of a preceding contract between consignor and carrier not referred to in the bill? What law determines the effect of the much-employed abbreviated references in the bill to a charter party? Is it the law of the contract? The problem is not the same as in the case of a bill of exchange or promissory note. The rights embodied in a bill of lading are nowhere regarded as independent of the consideration given therefor; at most, as in German law, they are isolated from the affreightment by the formal writing, and in many jurisdictions even this theory is not accepted.\(^70\)

Law of the port of destination. For a court presuming

\(^{67}\) The Iristo (D. C. S. D. N. Y. 1941) 43 F. Supp. 29.

\(^{68}\) E.g., Greece: App. Athens (1925) No. 418, 37 Themis 378.


\(^{70}\) For recent treatment in Italy, see MESSINEO, 2 I titoli di credito 173; SCORZA, 2 La polizza di carico (1936) 218 § 265.
that the law of the port of destination is intended by the parties, a part of the problem is removed. The most justifiable feature of the German port of destination doctrine is the argument that the rights of the holder ought to be safeguarded by the law of the country where he is entitled to request delivery of the goods. In a French appreciation of this doctrine, it has been observed that the successive parties not involved in the original transaction are interested only in the place of prospective delivery. The effects of the instrument on transfer of title and the right of obtaining physical possession of the goods, are thus united under the same law.

Likewise, if the right of the carrier against the receiver for payment of the freight, is assigned to the law of the port of destination, it may simultaneously be based on the bill of lading and on the contract or the acceptance of the goods. The Reichsgericht needlessly construed the rights of the carrier towards the consignee as flowing from the acceptance of the goods rather than from the contract and therefore as subject to a separate conflicts rule. However, the criticism that the right of the carrier, flowing from acceptance according to § 614 of the German Commercial Code, is not independent of but substantially identical with the right created between the original parties, is a domestic-minded theory. The conflicts rule should cover any rights accruing to and against third beneficiaries, however the municipal theory construes them.

It may be appreciated that by such method the same law

71 Last decision (according to the “General Register,” vols. 161-170) 169 RGZ. 257, 259, with the understanding that the bill of lading may refer to another law such as that agreed upon in the affreightment contract.
Also the Greek practice before the Code of 1940 shared this doctrine, see 2 Streit-Vallindas 253 f. n. 41, on the basis of lex loci solutionis.
72 Batiffol 255 § 281.
73 RG. (April 29, 1903) Hans. GZ. 1903 Hbl. No. 102, 20 Revue Autran (1904-05) 80.
74 2 Frankenstein 523, arguing on the German HGB, § 614.
SPECIAL OBLIGATIONS

will control the effects of both contract and bill of lading, in defining the position of a person who is consignee and holder. But the unity of law so gained is lost in another respect.

For it has admittedly been impossible to extend the law of the port of destination to the creation of bills of lading. Even the German courts determine the substantive conditions for the formation of such bills under the law of the place where the instrument is issued.\textsuperscript{75} The Reichsgericht has also admitted that the laws of the contract and of the bill may differ on the ground of the intention of the parties.\textsuperscript{76} But this is true under any theory.

\textit{Law of the port of dispatch.} When the governing law of the affreightment is taken from a place where the contractual relationship begins, the solution is less easy. American decisions do not answer the question squarely, but it is safe to assume that they apply the same law, termed \textit{lex loci contractus} in affreightment, also to the creation and effects of bills of lading. The Italian practice before the new Code of Navigation was outspoken to this effect.\textsuperscript{77}

It was again the odious privilege of the German Reichsgericht to deviate from this natural idea. In an old case,\textsuperscript{78} a bill of lading was signed by the master of an English ship at Bombay, himself and the shippers being Englishmen.

\textsuperscript{75}\textsc{Schaps} § 642 n. 31; \textsc{Staub-Heinichen} in \textsc{Staub} 424 Anhang zu § 382 ns. 62 f.
\textsuperscript{76}RG. (Nov. 24, 1928) 122 RGZ. 316.
\textsuperscript{77}Cass. (May 25, 1926) \textit{Rivista} 1927, 112 (limitation of action); App. Trieste (May 30, 1933) \textit{Rivista} 1933, 250 (validity of clause of jurisdiction).
\textsuperscript{78}RG. (May 2, 1894) 34 RGZ. 72. No such preoccupation is visible in the earlier decisions of \textsc{ROHG}. (March 28, 1879) 25 \textsc{ROHGE}. 93 (English law for the charter party because of the form used; fire exemption clause in both the charter party and the bill of lading, but English construction prevails over (old) German \textsc{HGB}. art. 659). But \textsc{ROHG}. (May 30, 1879) 25 \textsc{ROHGE}. 192 in a case of goods in fact not shipped, rejected an alleged usage in Wilmington, N. C., allowing the signing of bills of lading before embarkation of the goods on the ground of German law; RG. (Dec. 5, 1887) 20 RGZ. 52, in view of an analogous usage of New Orleans, held it pertinent whether the holders acquiring the bill knew that in fact it was only a bill received for shipment.
There was no question but that English law governed the contract. The bill stated the loading of a certain cargo and promised to deliver it in Hamburg. But through a fraud for which one of the shippers subsequently was jailed, the goods were not brought on board. The court refused to apply the English rule that the master cannot bind the shipowner by signing bills of lading for goods that were never shipped at all, and other English defenses of the owner. It asserted the German protection of an innocent purchaser of the bill, whenever the destination is a German port. This result was precariously based on the old fiction of the debtor's spontaneous submission to the law of the foreign place of performance, simply by his agreeing to perform at that place. But the court went farther and placed the German rule under a compulsory public policy, namely the rule that the bill of lading constitutes, as between the owner and the holder in good faith, obligations independent of the carriage contract and unconditionally performable, whenever delivery is due in Germany. This one-sided policy, though approved by certain authors, and not overruled, is an erratic element in the recent practice of the German courts.

**Rationale.** For the holder of the bill of lading, the goods are of primary concern. Where the goods will be, or ought to be, when discharged from the vessel and delivered at the end of the maritime voyage, is eminently important for him. But consignees and holders of the bill are not the only interested persons. In the eyes of the insurance company in the country of dispatch and of the banker financing the

---

79 Scrutton, Charterparties 72 and n. (b). The contrary German rule prevails also in the United States, Uniform Bills of Lading Act, 1909, § 23; Pomerene Act, 1916, § 22, cf. Knauth, Ocean Bills of Lading 130 f.; and e.g., in Italy, see Cass. (March 22, 1934) Foro Ital. 1934 I 929.

80 34 RGZ. at 79; RG. (Sept. 24, 1910) 74 RGZ. 193, 194.

81 Lastly, Nussbaum, D. IPR. 284 n. 1.

82 In RG. (Nov. 24, 1928) 122 RGZ. 316, 319 embarrassment is recognizable.
seller, the port of arrival may be a very far distant place, often an uncertain one, and ordinarily not a familiar contact.

At any rate, the law governing the contract of carriage should extend to the bill of lading in the following cases:

(i) An express reference in the bill of lading to a specific law takes care of the question for everyone concerned.

(ii) Where the bill of lading refers to the conditions in use by the carrier, or to a charter party, concluded either between the parties to the bill or between the shipowner and the carrier, it is natural that one law ought to govern the entire relationship. Such a reference effectively lessens the independence of the instrument, allowing the holder to oppose defenses outside the bill of lading. The problem has arisen in the English cases.

An English decision of 1933, though strangely complicated, shows the tendency to subject a charter party and the ensuing bill of lading to one law, "in deviation from the law where the goods were exchanged against the bill of lading," which would normally have governed the relationship between the shipowner and the holder.83

A thorough study, however, was given to the question by the admiralty counsel and judges in The Njegos.84 The charter party was clearly subject to English law—made in London by agents of the parties (Yugoslav shipowners and a French company) in English on the Chamber of Shipping River Plate ("Centrocon") form, and in addition containing the usual English arbitration clause. The bills of lading, in

83 The St. Joseph (1933) 45 L. L. Rep. 180, 28 Revue Dor (1933) 180. As far as I understand, Belgian law, in principle, as the law of the port of dispatch and issuance of the bill of lading, would govern the relationship between the Norwegian shipowner and the holder, the Guatemalan government. But the charter party between the owner and the French charterers did not refer to Belgian law and the bill was declared nonnegotiable; the Hague Rules were not even implicitly referred to in the bill, therefore the Belgian limitation of the shipowner's liability (Hague Rules) was not applied.

84 The Njegos [1936] P. 90.
English form and English language, were issued in Buenos Aires for destinations in Norway and Denmark. The bills incorporated “all the terms, conditions, and exceptions” of the charter party, “including the negligence clause,” but were not deemed to include the arbitration clause. The receivers of the goods, Norwegian or Danish nationals, acquired the bills. The President, Sir F. B. Merriman, speaking for the court, held that “the sensible business man must be assumed to intend that the contract shall be read with the English interpretation which admittedly attaches to the charter party as such, though that interpretation is nowhere expressly stated, but it is to be inferred from several indications. . . .”

A recent Italian writer, Scerni, has given attention to the subject. He also thinks that where the parties enjoy full freedom in selecting the law, their intention is that the reference in a bill of lading to a charter party includes the applicable law.

Where the bill of lading fails to refer to a previously written document, so as equitably to justify extension of the law concerned to the bill, it is logical to keep the choice of law for both sources of obligation separate. The parties may easily remove this by any clause admitting uniformity.

85 Id. at 105.
86 Scerni 219. Assuredly, Scerni denies party autonomy to the then Italian commercial law (art. 58 C. Com.), a wrong thesis in my opinion, and inadequately requires an express stipulation for the applicable law in the charter party or the model bill of lading printed in the charter.

A relevant argument is to be found in a Dutch decision, Rb. Rotterdam (Oct. 16, 1935) N. J. 1936, No. 59, upholding an obligation of the holder of the bill to pay the freight at the value of gold dollars before the American depreciation. The charter party made in London with a clause for arbitration in London evidently was governed by English law. But the bill of lading issued in a Dutch port by a Dutch line to an American corporation referred merely “to all the conditions and exceptions and liberties contained in the charter-party”; this was not to be extended either to arbitration or to English law, and Dutch law applied. The court, however, argued on the basis of the presumable intention of the parties.
4. Distance Freight

Under English and American basic conceptions, the carrier has to perform an entire undertaking for a specific sum. Freight is owed only on proper delivery. Consequently, in case of disaster at sea, if no goods are salvaged, no freight is due. Of course, more recently, usual clauses, such as "freight to be deemed earned, ship or goods lost or not lost," reverse the situation. In most civil law countries, on the contrary, at least the part of the freight proportional to the voyage accomplished at the place of loss, is regarded as earned. This distinction is very well recognized and has been a subject of drafts of unification from 1907. It has been unanimously understood in the courts of the world that the solution depends on the law governing the contract of affreightment which is prevailingly the law of the "place of contracting." This is a perfect example of universal agreement.

87 Blackburn, J., in Appleby v. Myers (1867) L. R. 2 C. P. 650 at 661, as used by Scrutton, Charterparties art. 143.
88 On the broader meaning of this clause in a case including all freight due at destination, see Pope & Talbot, Inc. v. Guernsey-Westbrook Co. (C. C. A. 9th 1947) 159 F. (2d) 139, 141.
89 E.g., France: C. Com. art. 296 par. 3.
Italy: C. Com. (1882) art. 570; C. Navig. (1942) art. 436 is interpreted to the same effect by Brunetti, C. Navig. Marit. (1943) 2057 n. ix. Cf. Trib. Livorno (March 29, 1941) Dir. Int. 1941, 275 (applying the Italian lex loci contractus on the ground of the former art. 58 C. Com. against the different German law stipulated.
Spain: C. Com. art. 623.
Argentina: C. Com. art. 1088.
Mexico: C. Com. art. 737, etc.
Japan: C. Com. art. 613; new C. Com. (1938) art. 760.
Sweden: Marit. Law, art. 129, the measure of the freight conditioned by the circumstances.
90 Berlingieri, Verso l'unificazione del diritto del mare (1932) 142.
France: App. Douai (Nov. 10, 1885) 1 Revue Autran (1885-6) 360; 5 Lyon-Caen et Renault § 849.
Germany: RG. (April 4, 1908) 68 RGZ. 203, 209.
MARITIME CARRIAGE OF GOODS

5. Right of Payment for Freight after Delivery

Whether a lien on the cargo should be regarded as a property interest, remains subject to the *lex situs* or depends on the law of the flag, according to theories not to be discussed here. But commercial liens in favor of the freight are always based on obligatory rights. A case in the Italian courts furnishes an excellent illustration.

An Italian firm, subsequently in bankruptcy, chartered by contract made in London a ship of the Italian shipping company "Garibaldi." The cargo was unloaded on the dock in Genoa. According to Italian law (C. Com., 1882, art. 580), the captain was not entitled to retain the goods but could enforce a claim for the freight. Under English law, however, a master waives the lien by delivering the goods without requiring payment. The Appeal Court\(^{92}\) and the Supreme Court\(^{93}\) did not hesitate to apply English law as the *lex loci contractus*. The Italian ship should hence have retained the goods contrary to the Italian legal provision, considered imperative in municipal law. It was also immaterial that the act in question was closely connected with delivery.

III. Special Laws

1. Port Regulations

There seems to be universal agreement that local provisions and usages in both the port of dispatch and that of arrival are determinative of the rights of the parties with respect to the technical operations of loading and unloading.\(^ {94}\)


\(^{93}\) Cass. (June 8, 1933) Foro Ital. 1933 I 938, Rivista 1933, 492, 28 Revue Dor (1933) 349.

\(^{94}\) United States: The Dartford (C. C. A. 1st 1938) 1938 Am. Marit. Cas. 1548, 1555 (whether Saturday is a half holiday in Boston), citing Holland
This rule extends to the formalities to be fulfilled with the authorities; the beginning, interruption, and speed of loading and unloading, in particular the lay days, when the contract is not specific; the method of stowage; the computation of weighing expenses and allowance of expenses, when loading is difficult; the procedure for formal ascertainment of damage, etc. The local standards also govern the rights of the carrier against a shipper who fails to deliver the goods to the vessel on time. Such rights to demurrage do not depend on the question whether the duty to pay for delay in loading or unloading beyond the permitted period is construed as a supplement to the freight


England: The Thortonale, Hick v. Tweedy (1890) 63 L. T. R. 765-C. A., 6 Revue Autran (1890-91) 474, 7 id. (1891-92) 327: lex loci contractus governs, but the usages of the port where the charter party ought to be performed determine such questions as at what moment a vessel is ready for loading, provided that the usages are recognized also by the foreigners using the port.

France: 5 LYON-CAEN et RENAULT § 851.

Germany: SCHAPS n. 21 before § 556.

Italy: DIENA, 2 Dir. Com. Int. 358 § 167; SCERNI 209.

The Netherlands: C. Com. art. 517d par. 2 cf. art. 458 (old) of the C. Com.


Quebec: C. C. art. 2460.


France: FROMAGEOT, 18 Revue Autran (1902-03) 742; 5 LYON-CAEN et RENAULT § 851; 2 DE VALROGER § 690; but see as to certain citations of cases, VAN SLOOTEN 23 f.

Germany: OLG. Hamburg (Nov. 11, 1889) 45 Seuff. Arch. 258; (March 27, 1913) HANS. GZ. 1913, HBl. 181 No. 86.

5 LYON-CAEN et RENAULT § 851.


102 In U. S. v. Ashcraft-Wilkinson Co. (D. C. N. D. Ga. 1927) 18 F. (2d) 977, reversed on other grounds (1929) 29 F. (2d) 961, the suit involving demurrage is decided without hesitation under American law, the vessel, probably Italian, having arrived in Savannah.
MARITIME CARRIAGE OF GOODS

(as in the French courts) or as damages (according to the prevailing conception). 103

Since, however, the contract may dispose of all these questions, it may also, under certain circumstances, be deemed to refer these to the law governing the contract in general. 104

2. Lex Loci Solutionis

(a) Modalities of performance. According to its usual role, the law of the place of performance governs modalities of delivery of the goods 105 and of payment of the freight. 106 The currency of payment is also included. 107 Whether the master has to give notice before unloading, 108 and in what manner the bill of lading has to be tendered, 109 belongs to the same category.

The law in force at the port of arrival thus serves as lex loci solutionis to the same effect as in its function just mentioned sub (1). Other formulations are more doubtful.

(b) Broader statements. In one formulation, the law of the port of arrival embraces everything involving discharge of the vessel, receipt of the goods, and measures regarding damage and deficiencies. 110 The German Reichsgericht, restricting its old rule of the law of the port of destination, still favors it as a special law for various problems. 111

---

103 See on the controversy, 5 Lyon-Caen et Renault 728 § 797.
106 5 Lyon-Caen et Renault § 851.
108 1 Van Hasselt 364. The question is answered in the negative in England in the absences of stipulation, Scrutton, Charterparties 141, 153.
110 1 Smeesters and Winkelmoelen 393.
111 Germany: RG. (Nov. 24, 1928) 122 RGZ. 316 defines the scope of the law of the port of destination, when the contract is generally governed by
The *Código Bustamante* provides that "The acts of performance of the contract (of affreightment) shall be effectuated in conformity with the law of the place where they should be performed." (art. 285 par. 2)

It is uncertain, however, whether this formula really intends to include more than the rules expressed *supra* (1) and (2) (a). But it does not go so far as a new section of the Montevideo Treaties submitting the "contract" to the law of the place of performance if the latter is in a member state.\(^{112}\)

Finally, some writers, followed temporarily by a few decisions, have applied the theory by which the contract is divided into conclusion and performance.\(^{113}\) Under the former Italian Commercial Code, this was the doctrine of the courts,\(^{114}\) until the Court of Cassation liberally recognized the foreign *lex loci contractus*.\(^{115}\)

Although the Restatement utilizes the same divisive method, Judge Learned Hand in his well-known judgment in a carriage case,\(^{116}\) has been less outspoken in defining the scope of the law of the place of performance. Repeating the alleged rule that the initial validity and interpretation of a

---

\(^{112}\) Montevideo Treaty on Navigation (1940) art. 26, *supra* n. 47.

\(^{113}\) Asser-Rivier, *Elémens* § 33; Fromaget, 18 Revue Autran (1902-03) 744; Lyon-Caen et Renault § 851; Répert. 269 No. 21.


\(^{114}\) Italy: C. Com. (1882) art. 58; App. Trieste (May 31, 1932) Rivista 1934, 583, 28 Revue Dor (1933) 349: maritime carriage from France to Italy; notice of damage in Italy has to observe Italian C. Com. art. 415.

\(^{115}\) Cass. (June 8, 1933) *supra*.

contract are governed by the law of the place of making the contract, but that any breach or nonperformance is governed by the law of the place of performance, he nevertheless started his own investigation by the observation that “the boundaries of this doctrine are not easy to find.” The issue, moreover, was whether a grain shipment from Duluth to Montreal with transshipment in Pt. Colbourne was subject to American law with respect to the entire distance or was governed by the Canadian Water-Carriage of Goods Act with respect to a loss occurring in the Canadian port. The decision derives the latter answer from the fact that the carrier\footnote{The second ship, carrying the goods from Pt. Colbourne was chartered by the defendant's agent, and therefore the defendant carrier was liable for the ship “as for his own.”} was in the course of performing his duty in Canada when the negligence of his servant occurred. But this formalistic language reveals the idea that the carrier, by promising transportation to be made first in the United States and then in Canada and stipulating for exoneration from negligence was subject to the American public policy invalidating the clause only so long as the goods were moving to the border. This idea is certainly not far from the intentions of the carriers in through routes, as we shall observe. Personally, I think the decision, as to the result, is right.

Of course, from such a point of view, the contrary construction is not excluded, viz., to the effect that the entire contract is subject to the American law because it was centered here. This conclusion would be nearer to the tendency of the great majority of American decisions applying the \textit{lex loci contractus} to every problem.

However, which construction to prefer is evidently a matter of interpretation of the contract, and this \textit{interpretation} is a legal matter belonging without doubt to the law governing the contract or, in the language of the American
judges, including Judge L. Hand, to the law of the place of contracting.

Unfortunately, no such justification can be furnished for a subsequent decision of the Second Federal Circuit Court,\textsuperscript{118} which comprises within the scope of "performance" the question whether the carrier's misdelivery of the goods is a breach, and whether this excuses the cargo owner from giving notice of nondelivery within five days after discharge, as stipulated. The court assigns these questions in the instant case to German law, a decision that is in all too perfect harmony with the ill-reputed German doctrine. The effect of a contractual clause in the case of events not foreseen by the parties is a problem of contractual construction and has nothing to do with the place of performance. In this case the rules and regulations of Hamburg properly determined only the conduct of the carrier's agent for the purpose of delivery; no question of this sort was involved.

A firmer grip on these exceptions to the general law of the contract is urgently needed.

The overwhelmingly prevailing conception extends the unitary law of the contract to the existence, excusability, and effects of nonperformance. It would seem also that a stipulation exempting the carrier from damages under certain circumstances on the ground of misdelivery belongs to this scope.\textsuperscript{119}

(c) \textit{Custody in case of refused acceptance.} A case decided by the German Supreme Court is a good illustration. A German, having sold 2000 pairs of bicycle pedals to a buyer in Birmingham, England, contracted with an agent in Hamburg for their carriage which was performed through

\textsuperscript{118} Bank of California, N. A. v. International Mercantile Marine Co. (C. C. A. 2d 1933) 64 F. (2d) 97.

\textsuperscript{119} To this effect, M. & T. Trust Co. v. Export S. S. Corp. (1932) 256 N. Y. Supp. 590, reversed, 259 N. Y. Supp. 393, re-aff'd (1932) 262 N. Y. 92, applies American federal law as \textit{lex loci contractus}, as against the law of French Morocco as \textit{lex loci destinationis}. See also infra n. 124.
the Hamburg agent of the General Steam Navigation Company by steamer to Norwich, from there by the Great Eastern Railway to the station at Curzon Street. The buyer refused to accept the goods, and the railroad notified shipper and consignee that the goods were stored at the sender's risk at the railway depot. Delivery was finally delayed by servants of the railway. The Court, applying English law, stated that the duty of custody owed by the carrier on the ground of the affreightment contract was terminated when the buyer refused to accept the goods in a reasonable time, and hence the Hamburg agent was not liable for subsequent events. 120

(d) *As imperative law.* We have encountered the law of the place of performance as necessarily governing the liability of carriers in transports to the ports of the United States, Belgium, and, conditionally, the Netherlands; 121 the entire contract in Argentina and Brazil; 122 and various problems in Germany. 123

Chile, where affreightments made in a Chilean port are subject to the *lex fori*, moreover, imposes its domestic law “as to everything regarding the unloading or any other act that should be done on Chilean territory.” (C. Com. art. 975 par. 2)

None of these last three extravagances is compatible with international reciprocity.

IV. LOSS OF RIGHTS OF THE CONSIGNEE

1. Failure to Give Notice of Loss or Damage

*Legal provisions.* Before the introduction of the Brussels Convention concerning bills of lading, an informative controversy arose in France on the application of article 435

120 RG. (April 10, 1901) 48 RGZ. 108.
121 Supra p. 267.
122 Supra pp. 255, 268 n. 47.
123 Supra p. 283 n. 111.
(par. 1) of the French Commercial Code which barred all actions against the master and the insurers for damage done to the goods if the goods have been accepted without protest. In one view, this provision was classified under the incidents of discharging, governed by the law of the port of arrival, and therefore applied to all ships arriving in French ports. But the Court of Cassation always adopted the opposite theory that the law intended by the parties, or other general law of the contract, includes time and formalities to be observed by the consignee. This certainly is the sounder view. To the contrary, an Italian decision regarded the analogous provisions of the former Italian Commercial Code, article 415, as pertaining to the incidents of delivery; yet this rested on the construction of the then conflicts rule of the same Code, article 58.

The Brussels Convention has been less rigorous. If the notice of loss is not given at the time when the goods are removed into the custody of the person entitled to delivery, only prima facie evidence of acceptance is constituted. Rebuttal by proof to the contrary being possible, the notice is no longer a necessary prerequisite to suit. In accordance with our view expounded earlier the new rule ought to be applied in all courts when the Convention is adopted in the state of the port of departure. In the United States, of course, it is applicable also to homeward bills of lading.

The conflicts problem is thereby eliminated in American courts but remains unsettled for shipments to all other countries from those which have not adopted the Rules.

124 Trib. com. Marseilles (Dec. 29, 1920) 33 Revue Autran (1922) 93, Clunet 1922, 1011; RIPERT, 2 Droit Marit. § 1466 n. 4 and in Revue Dor (1925) 289; 5 LYON-CAEN et RENAULT 793 § 852.
125 Cass. civ. (June 19, 1929) S. 1929.1.309. This opinion has been advocated by DIENA, 2 Dir. Com. Int. 408.
126 App. Trieste (May 31, 1932) 28 Revue Dor (1933) 349.
128 The Southern Cross (1940) 1940 Am. Marit. Cas. 59.
Stipulation limiting the time for claims. Clauses in bills of lading requiring that notice should be given to the carrier and claims brought within a certain period of time, in principle depends on the law of the contract. This has been recognized by American courts.\textsuperscript{130}

Under the Brussels Convention, a clause limiting time to less than one year is ineffective.\textsuperscript{131} On this ground such clauses have been rejected in American decisions as to both outward\textsuperscript{132} and homeward\textsuperscript{133} bills of lading. Longer periods are permitted.\textsuperscript{134}

Apart from such modification by public policy, the law of the port of departure ought to govern.

It is a different consideration when public law is declared to intervene. In a Canadian through bill, the time for claims after delivery was restricted to four months, and such stipulation was held inoperative after the shipment passed the Canadian border into the United States, because a pro-

\textsuperscript{130} Before the introduction of the Brussels Convention, in The President Monroe (1935) 286 N. Y. Supp. 990, the clause would have been determined under the expressly stipulated law of the Strait Settlements, if this had been proved.

In The Carso (1937) 1937 Am. Marit. Cas. 1078, it seems that the governing law was English, but the court did not find a reason for distinguishing English and American authorities holding the clause to be valid.


Recently the clause was upheld in an interstate shipment not considered subject to the Carriage Act of 1936, Newport Rolling Mills v. Miss. Valley Lines (1943) 50 F. Supp. 623, 1943 Am. Marit. Cas. 793.

Opposite solutions appeared in Bank of California N. A. v. Int. Mercantile Marine Co. (C. C. A. 2d 1933) 64 F. (2d) 97 criticized \textit{supra} n. 118, where, however, American law was substituted, no proof of German law being offered; and in Duche v. Brocklebank (D. C. E. D. N. Y. 1929) 35 F. (2d) 184, applying American law as that of the port of arrival.

\textsuperscript{131} Convention, art. 3 (6); 49 Stat. 1207, § 3, 46 U. S. C. § 1303.


\textsuperscript{133} The Zaremba (C. C. A. 2d 1943) 136 F. (2d) 320, 1943 Am. Marit. Cas. 954.

vision of the Interstate Commerce Act required a minimum period of nine months. 135

2. Limitation of Actions

The legal provisions restricting the time during which a carrier may be sued for nondelivery or defective delivery, are regarded as substantive in Continental laws. For they affect the right, although only the action is barred. 136

Although the French writers share this view, 137 the French Supreme Court disagrees. This court once, precisely in a case of affreightment, announced the theory that the domicil of the debtor governs limitation 138 and in another such case has reiterated this questionable idea. 139 Nevertheless, the period of limitation is characterized as substantive.

An American court, however, disregarded the French limitation to one year of the action against a carrier and applied the lex fori, when the holder sued upon a bill of lading issued at the French port of departure and stipulating for French law; this follows the usual approach of common law lawyers. 140

136 See Vol. I pp. 64-67 and infra Chs. 52 and 53; for an action against a carrier see, e.g., App. Bologna (June 2, 1913) Riv. Dir. Com. 1914 II 43.
137 5 Lyon-Caen et Renault § 854; Lerebours-Pigeonnier § 358; x Répert. 269 § 25; Batiffol § 584.
140 A. Salomon, Inc. v. Compagnie Générale Transatlantique (1929) 32 F. (2d) 283.