CHAPTER 43

Maritime Transportation of Goods

I. INTRODUCTION

1. Conflicts and Unification

UNTIL the nineteenth century, the ancient modes of carrying persons and goods on the seas and on the highways did not cause many problems of conflict of laws; carriage by sea because universal conceptions had achieved a general maritime law, and carriage on land because territorial boundaries separated the laws. In modern times, this situation has changed. The transformation of marine commerce by powerful and costly vessels, by the enormous increase of traffic, and the many modern innovations in communication, just when the policies of national seclusion segregated the laws of the various countries, has multiplied and aggravated the conflicts of law.¹ Equally cumbersome were the legal complications arising from inter-state and international operation of railways. Sensitivity to these obstacles to commerce has been such that the unification of laws concerning carriage has been accomplished more readily than in most other fields. Railroad transportation has been unified in the United States by federal statutes and in almost all states of Europe by the Bern Convention on international carriage of goods, which upon its revision in 1924 was accompanied by a convention concerning carriage of persons and luggage. In the maritime and aeronautic fields, the technical rules of navigation have been in

¹ See BERLINGIERI, Verso l’unificazione del diritto del mare, seconda serie (1933) 20.
great degree unified; the almost universally enforced Convention of Brussels,1a that of Warsaw, and the Rome Conventions of 1933 and of 1952 all mark a vigorous impulse towards uniform private law. These and other significant efforts await final success.

Conflicts law remains awkwardly married to a worn-out scheme of lex loci contractus and lex loci solutionis, which, at least apparently, does not differentiate between the manifold means of transportation, its objects, and the types of related agreements. Similarly, the writers, as a rule, do not attempt to consider such distinctions, despite their indulgence in various opinions regarding the most appropriate single local connection for this whole congeries of contracts. In fact, the most recent enactments have served to destroy rather than to foster international uniformity.

Most discussion, judicial and literary, has been devoted to carriage of goods in maritime cases. For this reason we commence with this topic.

2. Types of Contracts Involved

In the various systems of transportation, contracts are classified differently, and even analogous types are often given different names. If all such categories were decisive for “characterization” in conflicts law, the rules would be illusory.

Fortunately, there are favorable influences: traditions inherited from a past more satisfactorily unified, similarity of habits in the international trade, and the support afforded by the prevalence of British shipping. Only recently have the codes begun to recognize the main types of contracts created by a long development. The following kinds of

1a For the status of ratifications of, and accessions to, the Convention, as of Jan. 1, 1962, see Revue Crit. 1962, 368 f. In addition, see for details Markianos, Die Übernahme der Haager Regeln in die nationalen Gesetze über die Verfrachterhaftung (1960).
contracts must be distinguished, in order to be adequately classified in conflicts law.

(a) Lease of vessel. The Roman jurists distinguished the hiring of a ship, viz., of a thing, a locatio conductio rei, from the contract of carriage, that is, for doing a job, locatio conductio operis. In the first case, there is no contract of transportation, and opinion is divided whether it is a maritime contract at all.

Demise. In the Anglo-American countries, the hiring of a vessel, termed the demise charter, has been defined for certain purposes, such as fixing the liability of the shipowner for the acts of the master and crew, or the statutory limitation of liability. In a demise, the owner agrees to transfer possession and control of the vessel to the charterer. The former remains only the “general owner” for the period of the charter, during which the charterer, who is to “man, victual and navigate” the vessel, is deemed to be the owner pro hac vice. This may be the case, even though the general owner appoints and pays the wages of the master and crew. This type of agreement is never presumed to have been made; it is less frequent in peacetime, though not extinct. It would seem to transcend the ordinary scope

2 In Scaevola, Dig. 19,2,62 § 11, when a vessel was hired for a voyage from Cyrenaica to Aquileja and was retained after loading at the port of dispatch for nine months, the rent for this time had to be paid by the lessee (conductor rei). In Labeo-Ulpian, Dig. 19,2,13 § 1, the skipper assumed transportation of a cargo by voyage charter (he is the conductor, i.e., operis). The latter type included carriage of goods (eod. 13, § 2) and of persons (eod. 19, § 7).

3 Scrutton, Charterparties (ed. 16) 4; Williston, 4 Contracts 3001, 3003 § 1074; Guzman v. Pichirilo (1962) 369 U. S. 698, 699 f.


To the same effect, Canada: Shipping Act 1934, 24 & 25 Geo. V., c. 44, p. 245, s. 653. In its present form, the Canada Shipping Act, Rev. Stat. of Canada 1952 vol. I c. 29 s. 661, which replaced the original s. 653 of the act, does not confine itself to a charterer to whom the ship is demised, but rather applies to “any charterer of the ship.”

5 Banks v. Chas. Kurz Co. (D. C. E. D. Pa. 1946) 69 F. Supp. 61, 66 in the case of the usual oral demise of lighters without motive power. It is not at all so “very rare” as the often repeated words of Vaughan Williams, L. J., in Herne Bay Steam Boat Co. v. Hutton [1903] 2 K. B. at 689 would indicate. Cf. the Indices to American Maritime Cases.
of the usual conflicts rules respecting "transportation" or "carriage." The parties are not in the relation of carrier and shipper.

_Bareboat lease._ The same is true of the transaction, well known in civil law, where a ship is leased so as to give the lessee full nautical as well as commercial control. In the simplest case, the vessel is not equipped for transportation of goods, or it is delivered without master and crew, in consideration of compensation for a term or a voyage. Such bareboat charter, services to be furnished, is certainly a contract alien to transportation. In the German doctrine, it was formerly sometimes contended that all contracts giving the charterer control of navigation should be excluded from the category of maritime contracts, while most French writers and their followers include them under affreightment.

In any case, as between the two parties to a demise or bareboat charter, the applicable law is more appropriately determined by the conflicts rules concerning leases of movable chattels than by those concerning transportation. Of course, if the law of the flag is invoked to cover all contracts regarding the use of a vessel, as in recent Italian notions, it operates also here.

(b) _Charter party (affreightment by charter)._ Under a traditional type of agreement, the shipowner furnishes the

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6 German _Schiffsniète_ in contrast with _Frachtvertrag_, see Wüstendörf er, _Seehandelsrecht_ (ed. 2) 116 ff.; Schaps-Abraham, 2 _Seerecht_ (ed. 3) 134 § 510 n. 5; pp. 267 ff. before § 556.

The new Swiss Shipping Act of Sept. 23, 1953, distinguishes clearly between bare-boat-lease (arts. 90 ff.), charter (arts. 94 ff.), and contracts of affreightment (arts. 101 ff.).

7 Danjon, 2 _Droit Marit._ §§ 744 ff.; Ripert, _Droit Marit._ (ed. 4) 245 ff. §§ 1341 ff.

_Lyon-Caen et Renault_ 533 § 622 distinguished this _affrètement-louage_ from _affrètement-transport_, but in the treatment starting in § 627 the comprehensive concept of affreightment is underlying.

Belgium: 1 Smeesters and Winkelmolen § 272.

8 C. Navig., Disp. Prel. art. 10.
ship as a whole, with master and crew. He agrees to deliver the cargo in good condition, dangers of the sea excepted, and assumes the marine risk as to the ship; the charterer determines the ports for loading and discharging the cargo to be delivered by him to the ship. The essentials of all charter parties are full control of navigation by the owner and directions for proceeding by the charterer. Although oral contracts are not excluded by usage and the codes, there is normally a written contract, originally a deed, a *carta partita* (whence the name comes), at present one of the printed standard forms of English origin. Constructive analysis of these forms has finally led to the assumption that they combine elements of hiring of things and hiring of services in a “mixed” contract.\(^9\)

The use of the ship and equipment may be granted for a time (time charter)\(^10\) or for a voyage. A promise of a proportional part or specific quarters in the vessel is sometimes included in this category, where the other characteristics of charter parties are present. It is so classified in the German Commercial Code, § 557, because charter party documents are usual in such cases. But these cases seem to have become rare. In the United States, usually “charter” carriage is distinguished from common carriage by the fact that the charterer engages the whole of the ship’s capacity.\(^11\)

Charter parties are in wide use in many branches of trade for reasons of organization and geographical considerations. Thus, for instance, American steel concerns shipping

\(^9\) For certain purposes of mercantile law, analysis is required for ascertaining which element prevails; see PAPPENHEIM, 3 Seerecht 87; SCHAPSK-ABRAHAM, 2 Seerecht (ed. 5) 266 f.

\(^10\) German: *(Eigentlicher) Zeitfrachtvertrag*, e.g., “Baltic Time Charter”; similar names in Scandinavian and Dutch languages; French: *affrètement a temps*; Italian: *noleggio a tempo*. Explicit distinctions between time charter and voyage charter are made in the Swiss Shipping Act of Sept. 23, 1953, arts. 94 ff.

\(^11\) ROBINSON, Admiralty 593 § 83; GILMORE & BLACK 170 § 4-1.
ore from remote South-American ports commonly enlarge their fleets by chartering “tramp” vessels. 12

(c) Carriage by general ship (Stückgüter-Frachtvertrag; affreightment with bill of lading). Under the ordinary contract of marine transportation, the shipmaster is under the exclusive control of the carrier, whereas the shipper has merely a right similar to that in rail transport of merchandise. The contract may include conditions obligating the carrier to load the goods in certain types of compartments, but though stowage is not necessarily at the discretion of the vessel, it is always under its responsibility.

The Netherlands Code, in treating this type of contract, distinguishes tramp and line steamers, 13 while the recent Italian law, apart from charter parties, somewhat obscurely differentiates transport of shipload or partial shipload from that of identified objects. In the Russian Law of 1929 (art. 73) charter parties are contracts in which the whole vessel, or a part of it, or identified spaces in it, are put at the disposal of the charterer, in contrast to contracts without such conditions. 13a

(d) Purpose of the distinction. Many further types can be differentiated. 14 However, thus far except for time charters, differentiation of all the variants included in groups (b), charter party, and (c), bill of lading, has been slow and somewhat difficult. 15 This fact may have caused the remarkable phenomenon that in the common law and in the

12 Other articles are sugar, wheat, rice, potash, bauxite, lumber, coal, oil etc. See C. D. MACMURRAY and MALCOLM M. CREE, Charter Parties of the World (1934) 4 ff.; JOHNSON-HUEBNER-WILSON, Principles of Transportation (1932) 467 ff., 560, 569 ff.
13 C. Com. arts. 517e-517y (special rules for carriage in line shipping); 520g-520t (for carriage not by line boats).
14 This regards especially the peculiarities in the services of privately operated or industrial carriers and the contracts, not of agency but of transportation, made by the United States Shipping Board for government-owned vessels.
15 PAPPENHEIM, 3 Seerecht 103.
Latin laws, charter parties and other forms of transportation have been prevailingly treated together under the general term of affreightment or carriage of goods, while German commercial law doctrine has consistently distinguished the two above groups, the technical name of *Stückgütervertrag* (contract relating to single packages)\(^{16}\) being employed for group (c). The Brussels Convention on bills of lading also distinguishes this latter contract although it extends its effects to negotiated bills of lading issued under a charter party.\(^{17}\)

In conflicts law, however, the two groups are quite commonly merged without any discrimination. This is true of the United States\(^{18}\) as well as of France\(^{19}\) and Germany.\(^{20}\)

By way of exception, the Dutch Law of 1924, in the absence of a contrary intention of the parties, applies to time charters the law of the flag, instead of the usual law of the place of contracting.\(^{21}\)

Under these circumstances, it would not be suitable further to divide the materials relating to carriage of goods by sea. Ultimately, it will nevertheless be easy to see that such failure to discriminate is improper. Not only must the lease of vessels be excluded but neither time nor voyage charters can be brought simply under the criteria appropriate to ordinary carriage by liners.

3. Carrier

"Carrier" includes the owner of the vessel and the charterer who enters into a contract of carriage with the shipper.\(^{22}\)

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\(^{16}\) Germany: HGB. § 556 No. 2.

\(^{17}\) Art. 1 (b), see infra n. 27.

\(^{18}\) Cf. MINOR § 169; BEALE § 346.7; see also DICEY (ed. 7) Rules 158, 159.

\(^{19}\) BATIFFOL 257 § 284 implies this; cf. BATIFFOL, Traité (ed. 3) 660 § 607.

\(^{20}\) 2 FRANKENSTEIN 573; NUSSBAUM, D. IPR. 281; SCHAPS-ABRAHAM, 2 Seerecht (ed. 3) 277 ff.; KEGEL, Kom. (ed. 9) 564.

\(^{21}\) The Netherlands: C. Com. art. 518g.

\(^{22}\) Convention of Brussels on bills of lading, art. 1 (a).
Private carrier. The important common law distinction between common and private carriers has some bearing on the application of the Harter Act and more recent federal legislation in American courts. But no consequence is known to have been drawn in conflicts law from the distinction.

Forwarding agent (French "commissionnaire," German "Spediteur"). The services of independent merchants operating as intermediaries in effectuating transportation are brought under very different categories in the various systems. Moreover, doubts exist almost everywhere concerning their treatment insofar as the rules of agency and the rules on carriage conflict. It would be disastrous if the conflicts rule should follow the variety of these domestic characterizations.

A model of international characterization may be found in the simple words of Scrutton, L. J., interpreting the concept of "carrier" for the specific narrow purpose of the Convention as one which "might include a freight agent or forwarding agent or carriage contractor in cases where by issuing a bill of lading he enters into a contract of carriage with the shipper."24

Whenever, we might say, any person, not a servant of either party, contracts with the shipper for carriage, whether by his own or another's services, the conflicts rules involving contracts of transportation ought to apply exclusive of those regarding agency inasmuch as they lead to different results.

4. Transportation Contract and Bill of Lading

It is elementary to distinguish between the contract of

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24 SCRUTTON, Charterparties (ed. 16) 466.
affreightment and the obligations flowing from a bill of lading. In theory, the relationships in the two sets of obligations are so differently shaped that two entirely different conflicts rules seem to be required. In practice, however, the picture appears modified. In the great majority of cases, there is either a written contract or a bill of lading, but not both. The former in almost every case involves a charter party, while in the modern conveyance of goods bills of lading are almost unfailingly used and usually incorporate the contract of carriage. The Hague Rules adopted in the Brussels Convention of 1924 illustrate the situation. They envisage in the first place the rights based on bills of lading issued in connection with ordinary carriage but also include, in the case of a charter party, bills issued to a charterer and endorsed to a holder. They exclude the relationship created by the charter party itself.

Although the systems vary in the details of the protection granted to an innocent holder, as for instance, whether the bill of lading constitutes prima facie or conclusive evidence, the bill everywhere dominates the relation between the carrier and a consignee who is a holder in due course. It follows that the bill of lading must prevail also for the purpose of conflicts law. Instinctively, the American and many other courts, as we shall see, are anxious to subordinate the law of the affreightment contract to that of the

25 Cf. PAPPENHEIM, 3 Seerecht 221: failure to issue a bill of lading may occur when goods are shipped on the account of the shipowner, in case of urgent dispatch and in coastwise shipping; 1 VAN HASSELT 363 f.

26 Hague Rules, art. I (b); in the United States, Carriage of Goods by Sea Act, 1936, 46 U. S. C. A. § 1301 (b). The same exclusion of charter parties in the relation between shipowner and charterer was assumed for the Harter Act, see ROBINSON, Admiralty 506; GILMORE & BLACK 175 f. § 4-2. This subject does not include of course the common phenomenon that charterers issue bills of lading to their customers.

Transfer of title in goods by transfer of the bill of lading is not in question here. In regulating this function, the law governing the creation and effect of bills of lading is subordinate to the law of the situs of the goods but never to the law governing the contract.

II. MAIN SYSTEMS OF CONFLICTS LAW

1. Choice of Law by the Parties

Remarkably, apart from restrictions on stipulations exonerating the carrier from liability,\(^{28}\) the usual attempts to restrict the efficacy of party autonomy in the determination of the general law of the contract, are all but absent. Probably due to the age-old conceptions of maritime intercourse, an appropriate stipulation or, in the absence of express agreement, the so-called presumable intention of the parties, universally justifies application of foreign law.\(^{29}\) Even the Soviet Maritime Law expressly states the right of the parties to modify the normal conflicts solutions; although the imperative Soviet rules are excepted, this ex-

\(^{28}\) Vol. II (ed. 2) p. 423.

\(^{29}\) See e.g.:

- Belgium: \textit{i Smeeesters and Winkelmoelen} 391 § 277.
- Denmark: Trib. marit. Copenhagen (May 17, 1889) 16 Rev. Autran (1900-01) 249.
- France: \textit{Lyon-Caen et Renault} 785 § 844; \textit{Ripert}, 2 Droit Marit. (ed. 4) 347 f. § 1432.
- Germany: 68 RGZ. 209; 122 RGZ. 316; \textit{Schaps-Abraham}, 2 Seerecht (ed. 3) 277 ff.
- Greece: \textit{2 Streit-Vallindas} 254 and n. 42.
press permission was in contrast to the general Soviet legislation at the time when the Merchant Shipping Code of 1929 was adopted.\(^\text{30}\)

This result is exactly the opposite of what the adversaries of party autonomy expect of a contract bound to such stringent provisions as those contained in the Harter Act and the Hague Rules.

2. United States

*Not the law of the flag.* The vast majority of American cases involving carriage are concerned with interstate transportation by rail or water. The simultaneous treatment of land and maritime shipments, therefore, serves to explain why the law of the flag has never been stressed.\(^\text{31}\) The fact that American ports were prevalingly served by foreign vessels may have contributed to this same result that in no case has the law of the flag been decisive. The most influential decision of the Supreme Court investigated the law of the flag in the light of a thorough review of the English cases and flatly rejected it.\(^\text{32}\)

*General maritime law?* In two significant cases of old standing, the federal courts resorted to the general maritime law as administered in the United States, in each case on the ground of the presumed intention of the parties. In

\(^{30}\) See art. 5 Merchant Shipping Code, *supra* n. 13a; Freund, *Das Seeschifffahrtsrecht der Sowjetunion* (1930) 39, 58. As to the efficacy of party autonomy under Soviet conflict of laws in general, see Vol. II (ed. 2) p. 375 n. 61 and 1 Lunz 166 ff.

\(^{31}\) The decision in *The Titania* (D. C. S. D. N. Y. 1883) 19 Fed. 101, 103, is nominally based on the English law of the flag, but at the same time shipment in England is emphasized.

The ground on which British law would have been applied in *Franklin Fire Ins. Co. v. Royal Mail Steam Packet Co.* (D. C. S. D. N. Y. 1931) 54 F. (2d) 807, if it had been proved, is unknown. The cases cited in 2 Wharton 1067 n. 14 for occasional application of the law of the flag are exclusively English.

\(^{32}\) *Liverpool etc. Steam Co. v. Phenix Ins. Co.* (1889) 129 U. S. 397, 449-453. See also *The Brantford City* (D. C. S. D. N. Y. 1886) 29 Fed. 373, 381, 384 (defending general maritime law against the law of the flag).
the first case, the domicil of the shipowner in Baltimore was expressly discarded; it was deemed of no importance since local connections of the carriage were at a considerable distance. In the second case, the fact that the contract was concluded in New Orleans was declared immaterial because the contract was between an American and an Englishman for an ocean voyage of an English ship (to Europe). In other decisions extending to a recent date, "our general maritime law" or "mercantile law" has been applied in lieu of foreign law recognized as governing, but not proved in the suit. This is but another name for the lex fori. No other use seems to have been made of this device, although admiralty jurisdiction covers a very large field and commonly is said to imply federal law.

Evidently, the above-mentioned old decisions are no longer authoritative. As the editor of Wharton has noted, whereas once the courts resorted to general maritime law in order to eliminate foreign law, it is now possible for the law of the place of contracting (or what they so term) to govern, since all matters of public policy are being taken care of by the growing body of Congressional statutes on maritime law.

Lex loci contractus. Although the Harter Act and the Carriage of Goods by Sea Act (1936) apply to inward as well as outward maritime carriage, this extension of scope

34 Watts v. Camors (1885) 115 U. S. 353.
38 Robinson, Admiralty 27 § 5; Gilmore & Black 43 ff. § 1-17.
39 2 Wharton 1069 f.
does not affect the problem of what law governs a contract of transportation in general. Characteristically, the Pomerene Act of 1916 has never been applied to bills of lading issued abroad for transportation to the United States. In fact, apart from the questions of liability imperatively regulated by the Acts of 1893 and 1936, it is commonly recognized that the law of the place of contracting has fundamental force in all contracts of transportation according to the great majority of American decisions. However, more accurate inquiry is necessary. Just how strong is the rule? And if the ancient approach through a general contracts rule is no longer attractive, is the rule in this particular field supported by special considerations? No direct answer can be expected from the decisions; they are seldom articulate on policy.

The original authority for the application of *lex loci contractus*, it is submitted, is a decision dating from 1843, which justifies itself merely by the allegedly well-settled general rule, citing three cases not involving transportation. Since then, this test constantly appears as the normal connection, sometimes as a "strong presumption," not easily rebuttable. But close investigation reveals additional factors. Attempts at such an analysis have already been made by Wharton, whose result, however, that the true criterion adopted by the courts was the domicil of the shipowner, has been refuted by the editor of his own work, Parmele. The latter suggested the importance of the commencement


40 As Batiffol 240 n. 1 notes, the cases, excepting two named by him, even express their solutions as though they were simply applicable to any kind of contract.


43 2 Wharton 1055.
of the voyage. Reviewed at present, the decisions of the last hundred years demonstrate that in the opinion of the courts the presumable intention of the parties governs and that this normally points to the place where, in the usual phraseology, "the contract was made." More accurately, the applicable law depends upon one of the following four situations:

(i) In most leading cases, the place of contracting is identical with the port of dispatch. Statements of American courts may be found purporting to apply a supposedly well-settled rule: "The contract of carriage was entered into in Roumania and performance began there, but was to be completed in this country, and therefore the contract is governed by the law of Roumania."46

(ii) In some cases, the law of the flag coincides with the above law.47

(iii) In others, the law applied was that of the port of dispatch alone, expressly without reference to the *lex loci contractus*.48

(iv) In a few decisions, other points of the journey are

44 2 Wharton 1063, 1072.

46 The Constantinople (D. C. E. D. N. Y. 1926) 15 F. (2d) 97, 98, concerned with a passenger's contract but citing the Liverpool Case, *supra* n. 45.
relied upon, these being regarded as places where performance occurs.

(a) In such connection, the place where the goods are damaged or lost appears decisive in several cases. In one case, expressly, in others presumably, the court was anxious to reach the law of the forum. This view ought to be entirely abandoned; it is due to a confusion between contract and tort.

(b) In one case, a vessel went from India to New York; part of the cargo was shipped in Colombo, Ceylon, and part in British India. Under the circumstances, the court discarded the Indian Carriage of Goods by Sea Act and without further motivation applied American law, i.e., the law of the forum, which was also the law of the port of destination.

(c) Apart from federal or New York public policy at the American port of destination with respect to clauses limiting carriers’ liability, certain special problems have been considered, here as in other countries, as most closely attached to the port of arrival.

137 F. (2d) 326, 1943 Am. Marit. Cas. 947,—both expressly rejecting the foreign lex loci contractus. In the Cypria Case, the court could, however, rely on the express incorporation of the American Carriage of Goods by Sea Act.

49 Most remarkable was the decision of the Pennsylvania Supreme Court in Hughes v. Pennsylvania R. Co. (1902) 202 Pa. 222, 51 Atl. 990 invalidating a New York exemption clause under the law of the forum, a decision strongly criticized by Parmele in 2 Wharton 1056 n. 1, 1060 n. 2, 1063 n. 6, but followed in a railway case, Zahloot v. Adams Exp. Co. (1912) 50 Pa. Super. Ct. 238, where an exemption clause of Pennsylvania was declared valid under the law of New York, the place of loss of the goods by negligence in delivery.

Analogous, Carstens Packing Co. v. Southern Pacific (1910) 58 Wash. 239, expressly applying lex fori; The Steel Inventor (D. C. Md. 1940) 35 F. Supp. 986 under the peculiar circumstance that the bill of lading referred to the Indian Act (as of dispatch) as well as to the United States Act (as of destination); the court chose the latter, for a loss by unloading in Baltimore. Louis-Dreyfus v. Paterson Steamships, Ltd. (C. C. A. 2d 1930) 43 F. (2d) 824 reaches a similar result by adopting the splitting theory of the Restatement. This view is in the minority; cf., e.g., The Miguel di Larrinaga (D. C. S. D. N. Y. 1914) 217 Fed. 678. It is expressly rejected in Carpenter v. U. S. Exp. Co. (1912) 120 Minn. 59, 139 N. W. 154.


51 Treated at length, Vol. II Ch. 33. In addition, see Yiannopoulos, Negligence Clauses in Ocean Bills of Lading (1962).

52 See infra Ch. 44 n. 94.
3. Great Britain

For a long time, numerous Continental writers have been accustomed to point to an English rule that carriage is governed by the law of the flag the vessel flies. They still regard this as an important confirmation of their analogous postulate. But the English authors who have contributed to this mistake have been more cautious.

In fact, the English decisions have applied the law of the flag to the extent of the authority given by the shipowner to the master so as to subject the shipowner as well as the cargo owner to liability. Apart from this, there is only one case of somewhat doubtful bearing. In its famous decision of 1865, the Court of Exchequer Chamber extended the law of the flag to the question whether the charterer and cargo owner who had paid the deficiency amount on a bottomry bond burdening ship, freight, and cargo, could recover from the shipowner. This not only involved the master's authority to issue a bottomry bond on the cargo but concerned also the liability to bear the burden so caused in the internal relationship between the owner and the cargo. It seems, therefore, a little optimistic for English judges subsequently to reduce the precedent of Lloyd v. Guibert to "such contracts as the master may be driven to

53 This same mistake also happened to Duff, J., in the Canadian Supreme Court, in Richardson v. "Burlington" [1930] 4 D. L. R. 527, [1931] S. C. R. 76, while the majority emphasized the lex loci contractus and the domicil of the parties, the result being the same. JOHNSON 475 hence should not have made an exception from the lex loci contractus prescribed in art. 8 of the Quebec C. C.

54 Especially, Foote 429 and Dicey (ed. 7) 823 Rule 159.


56 Lloyd v. Guibert (1865) L. R. 1 Q. B. 115, 128. Under the French law of the flag, the shipowner was freed by abandon of the vessel; under the other laws involved, he was not.
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make by necessity in the course of the voyage." In addition, the decision of the Exchequer Chamber proclaimed a far-reaching rule subjecting all liability for sea damage and its incidents to the law of the flag, and an advocate of this solution has contended that it could not be overruled by a decision of the Court of Appeal.

Nevertheless, it is quite obvious that the English courts do not feel bound by the rash pretensions of this old decision. This has been formally stated by Lord Merriman: "As regards the contract of affreightment as a whole, there is no necessary presumption that the law of the flag applies." Thus, not even the often alleged presumption, easily displaced by counterinferences, exists. This result is also amply supported by the cases, as pointed out by the Supreme Court of the United States as early as 1889. From the time when general maritime law was replaced by conflicts law, the English courts in reality have never considered any basic test other than the intention of the parties. It was most emphatically invoked in Lloyd v. Guibert itself and despite this precedent in all later cases. And in the other celebrated carriage case, In re Missouri, where the English law of the flag was applied, this was regarded as expressly intended, being supported by the

57 Lord (then Sir Boyd) Merriman, in The Njegos [1936] P. 90 at 107, on the ground of the distinction made by the Court of Appeal in The Industrie [1894] P. 58. The opinion on the proper law is given, although the parties did not expressly request it (p. 107) "in case it may be of assistance" to them. In The Assunzione [1953] 1 W. L. R. 929, 937 f. Willmer J. also was inclined to take the position that the principle of the law of the flag only applies to said contracts of the master; contra: Hodson L. J. in the same case, see The Assunzione [1954] 2 W. L. R. 234, 261 ff. For comments, see KAHN-FREUND, 17 Mod. L. Rev. (1954) 255; CHESHIRE, 32 Brit. Year Book Int. Law (1955-6) 123.
58 I forget the name.
59 Supra n. 57.
60 M. WOLFF, Priv. Int. Law (ed. 2) 435 § 416.
terms of the contract and of the bill of lading as well as by the English port of destination; the Court of Appeals confirmed the decision on these grounds only. The lack of preference for any fixed criterion has occasioned the complaint of an English admiralty judge that "there is abundance of authority for practically every proposition that has been put forward." Nevertheless, there is a certain pattern in the prevailing decisions.

Courts have relied:

(i) On the English forms used in the charter party or the bill of lading. Some decisions have expressly rejected inferences from the flag and disregarded the place of contracting. Others have mentioned only the English language or English documents in connection with the English port of destination. It is recognized in England as well as everywhere else that language itself is no useful criterion. Such references presumably meant and at least today would have to be understood to mean the English style of maritime affreightment.

At least in one case the English form alone seems to have been decisive.

A judge of the Exchequer Court of Canada has applied

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63 In re Missouri Steamship Co. (1889) 42 Ch. D. 321.
64 Langton, J., in The Adriatic [1931] P. 241 at 244.
66 The Industrie and Adriatic cases, supra n. 65.
67 The Adriatic and Aktieselskab etc. cases, supra n. 65. In The Assunzione [1953] 1 W. L. R. 929, 938 f. the judge emphasized rightly that the place of contract in many cases is quite fortuitous.
68 The Wilhelm Schmidt (1871) 1 Asp. Marit. Cas. (N. S.) 82; The San Roman (1872) L. R. 3 A. & E. 583, 592;啉semble, Woodley v. Mitchell (1883) 11 Q. B. D. 47, 51. The first two decisions have been criticized insofar as they involve agency of the master by necessity, which should have been determined by the flag, see editors of Scrutton, Charterparties (ed. 16) 25.
69 Aktieselskab etc., supra n. 65. But in The Metamorphosis [1953] 1 W. L. R. 543, 549 Karminski J. rejected the argument that the use of the English language in a charterparty or in a bill of lading is of specific significance; he regarded it as one of the matters which a judge has to consider.
American law, that is, the Harter Act, to a carriage of grain shipped from Buffalo, N. Y., to Montreal on a Norwegian ship on the ground that the contract was made in the United States and contained the "Jason Clause" necessary in this country but not necessary under Canadian or English law.\textsuperscript{70}

(ii) On the law of the place of contracting, either because the contract was made in England between domiciled parties or agents,\textsuperscript{71} or simply because the bill of lading was issued in an English port.\textsuperscript{72}

The preceding review of leading and other cases may show a certain preference for the application of English law, but they favor the \textit{lex fori} even less than most other countries. They do not justify in the least the astounding pronouncement of Dicey that a contract for the carriage of persons or goods from or to England or by a British ship is prima facie governed by English law,\textsuperscript{73} a statement that may have stimulated much particularism in other countries. In the light of a comparison with other courts, the English follow policies remarkably analogous to the general habits of courts elsewhere.

\textsuperscript{70} Bunge North American Grain Corp. and Fire Ass'n of Philadelphia v. SS. Skarp [1932] Ex. C. R. 212. In regard to the (plaintiff) fire insurance association, it is added that its insurance certificates contain an express reference to the Harter Act. The law of the flag is eliminated.

\textsuperscript{71} Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co. (1883) 10 Q. B. D. 521 (English port of dispatch and English parties); The Industrie [1894] P. 58, 72 (charterparty made in London between an English broker of the German shipowner and a London charterer, in the usual form of English charterparties); The Njegos [1936] P. 90 (charterparty made in London in the "Centrocon" form between the English agent of a Yugoslav steamship company and the English branch of a French firm, agent of an Argentinian skipper); the bill of lading follows the presumable law intended in the charterparty.

\textsuperscript{72} The St. Joseph (1933) 45 Ll. L. Rep. 180, 28 Revue Dor (1933) 180: the shipowner contracts by accepting the goods against the bill of lading. Hence where this operation occurs, there the contract is made.


\textsuperscript{73} Dicey (ed. 5) 686 ff.; no statement of this kind can be found in Dicey (ed. 7) 822 ff.
4. France and Belgium

Many decisions of the Court of Cassation and the lower courts have with unusual consistency applied the law of the place of contracting.\(^74\) This covers not only the form of charter parties and bills of lading but also the performance of the contract.\(^75\) Originally this rule was declared imperative,\(^76\) but it persists as a regular conflicts rule, susceptible of being replaced even by a presumable intention of the parties.\(^77\)

In a series of older cases, it is true, in France and still more so in Belgium, the law of the port where the goods arrive or should arrive, has enjoyed a more or less wide application.\(^78\) It seems certain, however, that this tendency has been overcome, and the place of performance has significance merely as a device for special problems.\(^79\)

The reasons for emphasizing the place of contracting are inarticulate in the decisions, since the rules directly derive from the inherited general contracts principle. But the writers are conscious that this place is usually identical with the place where the goods are dispatched. If in rare cases

\(^74\) Cass. civ. (Feb. 23, 1864) D. 1864,1.166 S. 1864,1.385; Cass. civ. (June 12, 1894) D. 1895,1.161, Clunet 1894, 806, 10 Revue Dor 147; Cass. req. repeatedly; Cass. civ. (Dec. 5, 1910) S. 1911,1.129, Revue 1911, 395; Clunet 1912, 1156 (on principle); for the many decisions of lower courts, see Ripert, 2 Droit Marit. (ed. 4) §§ 1428 ff.; 5 Lyon-Caen et Renault 785 ff. §§ 843 ff.; 1 Répert. 275-278; Van Slooten 17-22. Recently, Trib. com. Seine (Jan. 22, 1942) Nouv. Revue 1943, 77 applied the French law of the place of contracting as a matter of course. In addition, see Batiffol, Traité (ed. 3) 660 § 607 and recent cases cited there.


\(^75\) See Batiffol § 284.

\(^76\) Cass. civ. (Feb. 23, 1864) supra n. 74; cf. Batiffol 258.

\(^77\) Cass. civ. (Dec. 5, 1910) supra n. 74.

\(^78\) The law of the port of actual discharge was proclaimed as a rule governing performance in Antwerp (Jan. 14, 1891) Jur. Port Anvers 1891,1.19; App. Gent (May 2, 1901) Clunet 1902, 390, 16 Rev. Autran (1900-01) 842 (as dated April 27, 1901); a very faulty decision, 2 Frankensteiin 515 n. 66; Trib. com. Antwerp (Jan. 7, 1903) 18 Revue Autran (1902-03) 901.

\(^79\) See infra Ch. 44 pp. 289-290.
the two places differ, the courts have been divided, but in the opinion of the lawyers expert in commercial law, the port of lading has been preferred. 80 The contrary choice of law is not supported by a decision of 1885, 81 although it declared that the contract was completed in Norway by acceptance of an offer; in fact, Norwegian law was also indicated by the Norwegian flag and, above all, because the vessel was chartered for a transport from Norway to England.

The only significant doubt concerns the case where the parties are of common nationality. This the older writers were inclined to emphasize. 82 But the practical inconveniences of discriminating among customers according to their nationality are particularly pronounced when goods are shipped by the same vessel or on the same voyage. 83 There is no case supporting such exceptional treatment. 84

5. Germany

In this field, the German courts have rarely employed their theory of splitting the contract. 85 But they have deduced from their principle of *lex loci solutionis* the rule that maritime affreightment contracts of all kinds are governed by the law of the port of destination. This rule has been claimed to possess the widest possible scope. 86 Nevertheless,
after the practice of the Reichsgericht had been subjected to stringent criticism, experience also considerably modified this questionable theory. At present, the force of the principle may be regarded as seriously challenged, despite repeated contrary assertions in the German and international literature.

This does not include, of course, the application of special laws to certain problems, e.g., of the law of the port of destination dispatch to questions connected with lading, but is the result of actual replacement of the official criterion. Often enough, the contract has been subjected to a law other than that of the port of destination:

(i) Contracting by ship brokers or other agents in London who use an English charter party form has consistently been recognized as indicating submission to English law, quite as in the English case of The Industrie. This is not controverted by the fact that a contract of carriage made in London by the London branch of a Hamburg firm with the London broker of another Hamburg firm was determined under the German law. The form employed was printed in Hamburg, though in English, without references to English law, as was the usual document of the steamship agent in Hamburg whose name was carried at the head. In one case, where a German form of a Nitrate charter party was used in a contract made in Germany, German law was applied, with the excuse that the port of destination, to be determined by the charterer, was uncertain.

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87 2 BAR 219 n. 82; id., Int. Handelsrecht 439; RIPERT, 2 Droit Marit. (ed. 4) 348 § 1432; 2 FRANKENSTEIN 517 f.
88 RG. (Jan. 5, 1887) 19 RGZ. 33 (English law); OLG. Hamburg (Jan. 30, 1893) 14 Hans. GZ. 1893 HBl. 301, 4 Z. int. R. (1894) 353 (English law); RG. (April 4, 1908) 68 RGZ. 203, 209 (form of the Rio Tinto Company, Ltd. in London for its usual ore shipping from Huelva, Spain); RG. (Nov. 24, 1928) 122 RGZ. 316 (English law, intended by public policy based on HGB. § 614).
90 RG. (May 6, 1912) Leipz. Z. 1912, 548.
In another case, a charter party made in Germany concerning a voyage starting in Germany was regarded without hesitation as subject to German law.\(^91\)

(ii) When persons of common nationality contract in their own country, the Reichsgericht is satisfied with their intention to have such country's law applied.\(^92\)

(iii) When an English ship was chartered in a German port for a voyage to Vladivostok, German law was applied.\(^93\) The place of contracting and dispatch thus prevailed over the port of destination. In another case, the place of contracting and the nationality of the shipowner were theoretically mentioned as criteria.\(^94\)

(iv) Other exceptions have been unavoidable when the port of destination is uncertain. In the very frequent case where the port of destination is indicated optionally so as to include several places situated in different countries, such as a port in the United Kingdom or on the Continent between Le Havre and Hamburg, or on the North American and Canadian coast, not less than six solutions have appeared.\(^95\) No port of destination is given in time charter contracts; the port of dispatch or the flag must substitute.

**Forwarding agents.** German law accentuates the particu-

\(^91\) RG. (Jan. 2, 1911) 75 RGZ. 95. The ship was English and the destination Vladivostok.

\(^92\) RG. (Sept. 27, 1884) 13 RGZ. 122 (German law); (April 29, 1903) Hans. GZ. 1903 HBl. Nos. 102, 229, 231, 20 Revue Autran (1904–05) 80 (English law; also the flag was English; English law implicit, although the right of the German holder of the bill of lading is distinguished); (Dec. 14, 1910) JW. 1911, 225, 22 Z. int. R. (1912) 182; 24 id. (1914) 319 (German law; also the port of destination was German); (Oct. 5, 1932) 137 RGZ. 301 (German law; German parties, through bill from a German place to another German place via Holland).

\(^93\) RG. (Jan. 2, 1911) 75 RGZ. 95, 96, affirming OLG. Hamburg (Feb. 10, 1910) Hans. GZ. 1910 HBl. No. 76, correctly commented on by BATIFFOL 253 n. 2 against 2 FRANKENSTEIN 514.


\(^95\) SCHAPS-ABRAHAM, 2 Seerecht (ed. 3) 281 n. 39 before § 556 rejects connection with five advocated places, viz., the presumable port of destination, the port of distress, the order port, the place of contracting, and the domicile of the debtor, and accepts the law of the flag.
lar nature of freight agents contracting with carriers in their own name, in contrast with selling and buying agents or carriers. It is noteworthy that again the application of *lex loci solutionis* raises doubt. For the place where a *Spediteur* is to perform his duties to the shipper is in one view where he accepts and dispatches the goods,\(^\text{96}\) and in another his commercial domicil.\(^\text{97}\)

6. The Netherlands\(^\text{97a}\)

The Law of 1924 amending the Commercial Code on the occasion of introducing the Hague Rules sought to enlarge and assure its own force.

The law declares a great number of its provisions as compulsory for all ships leaving a Dutch port and with a certain exception regarding clauses of exemption, even for ships destined for Dutch ports.\(^\text{98}\) In addition, charters are subjected to certain provisions if the ship flies the Dutch flag even though they carry freight entirely outside of the Kingdom.\(^\text{99}\) Only time charters are allowed to change this effect by selecting a foreign law.\(^\text{100}\) This attitude exceeds even the maritime reservations of the United States laws, and in its extraterritorial scope covers duties newly imposed by the law.

Nevertheless, even this exercise of public policy is an exception and not the main rule involving carriage.\(^\text{101}\) So far as can be seen, the courts have quietly continued to apply

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\(^{96}\) RG. (Dec. 5, 1896) 38 RGZ. 194; Warn. Rspr. 1925, No. 33; Ratz in S RGR. Kom. HGB. (ed. 2) 118 § 407 n. 24 (where also two opinions are reported on the question concerning the place where the goods are redeliverable on request of the shipper).

\(^{97}\) OLG. Kolmar (Feb. 12, 1914) 39 Els. Loth. J. Z. 603 as cited in Lewald 220. Lehmann in Düringer-Hachenburg § 383 n. VII.


\(^{98}\) C. Com. (Wetbook van Koophandel) arts. 517d, 517y, 520t. One of these provisions, art. 517y, has been repealed by the Law of Aug. 15, 1955.

\(^{99}\) Arts. 518g, 520f.

\(^{100}\) Art. 518g.

\(^{101}\) Informative: Rb. Amsterdam (June 19, 1931) W. 12410, N. J. 1932, 177; I. Van Hasselt 414.
the customary principles of conflicts law. If the parties have not expressly agreed on an applicable law, their so-called intention is sought. The foremost theoretical criterion has remained the place of contracting, which, however, is used in at least two combinations, viz., (i) when the parties are of the same nationality and contract in their country, or (ii) when a charter party is signed in London by the parties or their authorized agents, with English forms, the forms being more important than other criteria.

7. Código Bustamante

The Código Bustamante distinguishes between two types. Contracts concluded by a carrier under his own conditions which the customer may only "accept totally" fall under the rule that "contracts of adhesion" are subject to the law of the carrier (art. 185).

102 See the long lists in I VAN HASSELT 361 ff.
103 Rb. Rotterdam (March 15, 1922) N. J. 1923, 245, 248: bill of lading, the cargo was received in the United States on a United States-owned vessel, American law. Rb. Rotterdam (Feb. 23, 1932) The Aslang, W. 12537, 28 Revue Dor (1933) 370: charterparty concluded in Paris between the Paris agent of the Danish shipowner and a French company, French law; Rb. Amsterdam (Dec. 23, 1932) N. J. 1933, 953: English insurance company suing a Dutch carrier for damages is barred by Dutch limitation of action because the insured shipper was a Netherlander, evidently contracting in Holland. In Rb. Amsterdam (June 19, 1931) supra n. 101, Dutch law applied, as the Dutch parties contracted in the Netherlands for a Dutch vessel destined for a Dutch port.
104 Hof s'Gravenhage (Nov. 14, 1913) W. 9615, N. J. 1914, 429; id. (June 19, 1914) N. J. 1914, 1256; Rb. Rotterdam (Dec. 14, 1928) N. J. 1930, 622: only the carrier was English, the charterer being the Soviet Corn Export Co., Ltd. in Moscow, but the ship was English and both charter and bills of lading were in English style. Rb. Rotterdam (Jan. 14, 1929) N. J. 1929, 1361, reversed on other grounds, App. Hague (April 25, 1930) N. J. 1930, 111: the captain of a United States-owned vessel letting it while in Antwerp harbor to an Antwerp firm for a voyage from Antwerp to a British port; the parties must have had the English law in view, as the charter party was in the typical English maritime contract form; Rb. Rotterdam (Oct. 29, 1930) W. 12729, N. J. 1934, 631, I VAN HASSELT 423: voyage charter, a German coal concern hiring from an Italian shipowner, through London brokers, the vessel shall take the coal in Rotterdam and carry it to Ancona. Contrarily, Rb. Rotterdam (Oct. 16, 1935) N. J. 1936, No. 59 correctly discards American law but fails to justify why Dutch rather than English law should govern the charter party.
An affreightment not being of this category is governed by the law of the place from which the goods are dispatched (art. 285). But "acts of performance" are placed under the law of the intended place of performance (art. 285 par. 2).

Local laws and regulations are reserved (art. 199).

8. Latin-American Public Policy

Law of the place of performance compulsory. In important codes, the idea that a contract performable in the territory must be treated under the domestic law, has been repeated for special application to contracts of transportation. The place of making the contract and the nationality of the ship are immaterial for this purpose, although the texts strangely speak only of "foreign" ships, which could mean that contracts involving domestic ships are all under an imperative lex fori. In the prevailing view, the parties can not validly agree on a foreign court.

Law of the place of contracting compulsory. In Chile, the domestic law is forcibly applied to affreightment "on foreign ships" made in a port of the Republic although the master be a foreigner.

105 Vol. II (ed. 2) p. 423.
106 Thus, art. 1091 of the Argentine Commercial Code is only a special application of art. 1209 C. C. (new 1243); MALAGARRIGA, 7 Cód. Com. Coment. 137.
107 Argentina: C. Com. art. 1091; S. Ct. (Nov. 5, 1870) 9 Fallos 492, 495.
Brazil: C. Com. art. 628.
Paraguay: C. Com. art. 1091.
Uruguay: C. Com. art. 1270.
109 Argentina: The majority of the Cám. Fed. Cap. (June 6, 1906) Sáens v. Mala Real, affirmed the right of prorogation, although a dissenting vote allowed it only where delivery and payment are agreed to be made abroad. But S. Ct. (Nov. 16, 1936) 36 Revue Dor (1937) 100 has decided for the prohibition.
Brazil: Not allowed, Sup. Trib. Fed. (May 6, 1925) 85 Rev. Dir. 327 No. 269.
110 Chile: C. Com. art. 975 par. 1.