CHAPTER 45

Other Transportation Contracts

I. MARITIME TRANSPORTATION OF PERSONS

CARRIAGE of persons by sea, because of certain features, has become a separate topic in the more recent municipal enactments.* Conflicts law has not given it much special attention. Some writers, it is true, have urged the significance of the flag, with more insistence than for carriage of goods, because a passenger boards the ship in person, stays under the captain’s discipline, and is subject to the national penal jurisdiction of the ship’s country.¹ However, not until the Dutch rule for time charters² and the Italian law of 1942³ did any decision or law declare for the law of the flag.

Passenger tickets often refer to the law of the vessel, but this still leaves the subsidiary rule open.

1. Lex Loci Contractus

In addition to the usual advocates,⁴ a few American decisions have characteristically employed the law of the place.

* A convention on the carriage of passengers by sea was signed at the Brussels Conference of April 29, 1961; see 63 Dir. Marit. (1961) 381 (French and English) and 10 Am. J. Comp. Law (1961) 445 (English). For a comment on the draft, see PRODRÔMIDES, “La responsabilité du transporteur dans le transport international des passagers et de leurs bagages,” 9 D. M. F. (1957) 195, 259.

¹ SCERNI 243; BATIFFOL 260 § 287. NUSSBAUM, D. IPR. 286, risks the assertion that the law of the flag governs “without doubt.” Most plausibly, this view is advocated by TORQUATO GIANNINI, Il passaggiero marittimo istruito (Milano 1939). Some authors have suggested that the law of the flag should govern only if there is a real contact between the ship and the country of the flag; see SCHAPS-ABRAHAM, 2 Seerecht (ed. 3) 815 before § 664 n. 19.

² The Netherlands: C. Com. art. 533 p.

³ Italy: Disp. Prel. C. Navig. art. 10.

⁴ DIENA, 3 Dir. Com. Int. 376 and cit. n. 5.
of contracting. A Massachusetts decision before the Harter Act, under the *lex loci contractus*, enforced an English exemption clause to which the Cunard Line referred in the ticket for a voyage from England to the United States.\(^5\) The same court, however, again sanctioned the application of English law to a voyage from Ireland to Massachusetts, although the passage was booked in Boston. For justification the court construed the contract made in Boston by the passenger's daughter as a mere preliminary to the "contract ticket" received in England.\(^6\) A better reason would have been that the embarking rather than the booking was decisive. In a more recent case, a ticket was bought in the United States for a voyage from Alaska to Seattle. The passenger, an Indian girl, was attacked, probably in the waters of British Columbia, by two Negroes of the crew. Tort action against the company according to the law of this Canadian province was excluded for procedural reasons. But action for damages according to general maritime law was granted because the carrier had the contractual duty to protect passengers against violence of its own crew.\(^7\) In this case it would have been immaterial if the ticket had been bought in British Columbia, or if the vessel had flown the Norwegian or the Japanese flag. The only consistent theory was expressed by one court when it applied the law of the place where the journey begins.\(^8\)

In several recent cases the courts had to deal with contractual clauses requiring that suit for personal injuries sustained by a passenger must be brought within a certain limited time. It has been held that the validity of such

clauses is governed by the law of the place of contracting. But when a ticket contained an express choice of law clause, the law designated has also been applied to the contract limitation period as well as to the problem of whether the defendant waived the defense flowing from that contractual provision.

2. Other Contacts

Repetitiously, we may briefly note that a few European writers think that the passenger, subject to the carrier’s fixed conditions, must also be under its law, to which the Código Bustamante agrees. The Treaty of Montevideo points to the place of the maritime agency, and some German authors to the port of destination.

Soviet law declares itself applicable whenever one party is a citizen.

3. Special Laws

The passenger’s coming on board and leaving the ship are subject to local laws, if these are different from the governing law. Thus, the Dutch law provides that the (Dutch) provisions including those applicable before or at embarkation and those applicable at or after disembark-

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9 Ficker, 4 Rechtsvergl. Handwörterbuch 481; Scerni 244 f.

10 Código Bustamante, art. 185.


12 Schaps, before § 664 n. 8; contra: Bar, Int. Handelsr. 442; 2 Franken­stein 536.

13 Law of June 14, 1929, art. 4 (2), see Freund, Das Seeschifffahrtsrecht der Sowjetunion (1930) 70.
ing, always apply if the embarkation takes place in a Dutch harbor.\textsuperscript{14}

That many local administrative rules are to be observed by a vessel in leaving and landing and that they have compulsory force are facts which the contracting parties are deemed to contemplate. Emigration laws are not the only ones so to be observed.

4. Conclusion

As American courts correctly see it, it is no convincing argument that the monopoly of a carrier points to the tacit acceptance of his domiciliary law. Nor has the law of the flag any natural claim to regulate the contractual rights and duties of a person alien to the ship’s nationality. However, it has been persuasively said that it is more awkward to discriminate among passengers than to differentiate goods on board a vessel. Is there an objective criterion outside the ship for establishing a sound local connection?

The port of destination must be excluded. An American acquiring a ticket for China cannot be considered by any argument to have contracted under Chinese law. But it is no less a mistake to freeze the applicable law at the technical point of completing a legally binding contract. Booking in Rio de Janeiro for a voyage from New York to Southampton, or accepting in Rio a stateroom for such a crossing, offered by cable by a New York travel bureau, does not establish Brazilian law as dominant.

Where the desirable stipulation for an applicable law is missing, the agreed port of departure may be accepted as the important center of the contractual relationship. The objection that the choice of this port is accidental is not true. No passenger regards his point of embarkation as immaterial. He may think that he is allowed to board the ship

\textsuperscript{14} Dutch C. Com. art. 533c par. 2.
at a subsequent landing place, in Montevideo instead of Buenos Aires, in Cherbourg instead of Southampton, but he will presume that this makes no difference in his contract, as he also will not expect to recover the price difference if his berth has remained unfilled. Nevertheless, as mentioned earlier with regret, New York applies American law on grounds of public policy where a ticket for passage between two foreign ports is purchased in the United States.

The choice, therefore, is between the port of departure indicated on the ticket and the flag. The latter may be preferable.

II. MARITIME TRANSPORTATION OF BAGGAGE

The Continental literature has expounded that the obligation of carriers to transport baggage, at least when checked for this purpose, is a collateral pact annexed to the contract of passage; but it has been asserted at the same time that the rights and duties flowing from this agreement are analogous to those relating to the carriage of goods. It follows in the municipal field that it does not matter whether the baggage is “free,” that is, paid with the ticket, or must be paid separately. In the conflicts field, the consequence is that the rules involving carriage of goods would be correctly applied.

The well-known decision of the British Privy Council of concerning lost luggage has been considered a leading

15 Vol. II (ed. 2) pp. 423 f.
16 Baggage taken by a passenger to his stateroom, in a traditional widespread opinion, is not subject to contractual obligation. But analogy to the liability of innkeepers has sometimes been advocated, and more recently the literature definitely prefers contractual liability for any baggage by sea or land. See for France, JEAN IZE, Responsabilité en matière de transport des bagages (Paris 1936) 34, 38, 42.
17 5 LYON-CAEN et RENAULT § 831; Dutch C. Com. art. 533 par. 1. Contra: T. GIANNINI, supra n. 1.
case for maritime and even for all contracts. The English law of the place of contracting was applied, but it happened to agree with both parties' domicil, the flag of both vessels engaged in the carriage, and the port of departure. Under analogous circumstances, an American court, before the Harter Act, declared valid under English common law a clause limiting liability of the vessel to a value of ten pounds. The vessel was English, went from England to the United States, and the ticket was bought in England.

The law of the flag, in this case again, has much attraction.

III. FLUVIAL TRANSPORT

The much-needed unification of the law involving international transportation on rivers and canals has failed to materialize despite strenuous efforts before they were temporarily ended by World War II. Territorial law has, of course, paramount importance with respect to territorial waters, rivers, lakes, and canals. Nevertheless, many conflicts of laws are possible and should not all be left simply to the state where the waterway is situated.

In the carriage on the great lakes, canals, and rivers between the United States and Canada, the conflicts principles are taken without hesitation from the maritime model; this is an effect of the through bills recognized in

19 Id. at 291.
20 The Majestic (C. C. A. 2d 1894) 60 Fed. 624, reversed (1897) 166 U. S. 375, 381 on the same basis of English law, because the clause on the back of the ticket was not a part of the contract.
21 Advocated by 2 FRANKENSTEIN 536, SCERNI 244, MONACO 141, adopted by Italian C. Navig. Disp. Prel. art. 10.
22 On developments since the Vienna Congress and the more recent Barcelona Convention and Statute of 1921, which included nationality and registration of vessels, ownership, and collision, see OSBORNE MANCE, International River and Canal Transport (1944) 4, 21. Of the older literature: NIBOYET, "Étude de droit international privé fluvial," 5 Revue Dr. Int. (Bruxelles) (1924) 333.
both countries. The port of departure furnishes the applicable law.\textsuperscript{23}

The matters not yet covered by international drafts such as limitation of liability, assistance and salvage, attachment, and documents of transport, deserve unification, and at least an international clarification of the conflicts principle.\textsuperscript{24}

\textbf{IV. Land Transportation}

Carriage of goods is prominent in conflicts discussion, but no material difference attaches to the carriage of persons and baggage.

Interstate commerce legislation in the United States and the Bern convention on the carriage of goods by rail, now accompanied by a convention on the carriage of persons and baggage, in their large scope have practically eliminated the conflicts of laws.\textsuperscript{24a} Universally, some progress has been achieved by the very wide acceptance of through transporta-

\textsuperscript{23} Grammer Steamship Co. v. James Richardson & Sons, Ltd. (D. C. W. D. N. Y. 1929) 37 F. (2d) 365, 368, aff'd (C. C. A. 2d 1931) 47 F. (2d) 186: lake freighters from Ontario to Buffalo, under two charters and bills of lading, Canadian law. (The court speaks only of the Canadian place of making the contract.) See also Louis-Dreyfus v. Paterson Steamships, Ltd. (C. C. A. 2d 1930) 43 F. (2d) 824 as to the main governing law, but see \textit{supra} Ch. 44 p. 290 with respect to the law governing performance. As an example of an internal American carriage under the New York Produce Exchange Canal Grain Charter Party No. 1, see James Richardson & Sons, Ltd. v. Conners Marine Co. (C. C. A. 2d 1944) 141 F. (2d) 226.


A Convention on the Contract for the Carriage of Goods by Inland Waterways (C. M. N.) and a Convention on the Carriage of Passengers and Luggage by Inland Waterways (C. V. N.) are now in the drafting process with the International Institute for the Unification of Private Law in Rome; see Year-Book 1960, 399 and 89 n. 1.

\textsuperscript{24a} In addition to these treaties, a Convention on the Contract for the International Carriage of Goods by Road (C. M. R.), signed at Geneva on May 19, 1956, is now in force; see Comunità Internazionale 1956, 563. An analogic Draft Convention on the Contract for the International Carriage of Passengers and Luggage by Road (C. V. R.) has been adopted by the International Institute for the Unification of Private Law in Rome; see 1960 Year-Book 255, and the commentary by \textit{HOSTIE, id.} at 87.
tion to the effect that a contract of carriage is considered "one contract" in certain situations involving successive carriers.

The outstanding model for such unity of contract is the case where a carrier undertakes transportation over a distance which he does not intend to reach within his own business. He concludes and signs the only contract to which the consignor is a party. The subsequent carriers are his agents in performing the contract. In the absence of an express provision, he is liable for loss or damage occurring on any part of the journey.25 A situation which is equivalent in many respects arises when the agent dealing with the consignor acts in his own name and as authorized agent for preceding or subsequent carriers or the latter are made liable by law. Where thus all carriers, or the first and the last, are considered liable, usually each carrier is only responsible for losses on his own line,26 but there are exceptions of joint and several liability for the whole carriage.27

In view of the present scarcity of conflicts in the United


United States: See infra n. 79. E.g., Uniform Straight Bill of Lading, issued by a railroad for rail and water carriage from a point in one state to a point in another state, see Palmer et al., Trustees v. Agwilines, Inc. (D. C. E. D. N. Y. 1941) 42 F. Supp. 239, 1941 Am. Marit. Cas. 1566; Lyons-Magnus v. American Hawaiian S. S. Co. (1941) 1941 Am. Marit. Cas. 1291 (through bill from Italy to New York and by coast to San Francisco).

Belgium: 1 Smeesters and Winkelmolen § 464.

Germany: HGB. §§ 432 par. 1, 449 ("Hauptfrachtführer" and "Unterfrachtführer"); 137 RGZ. 301.

The Netherlands: C. Com. art. 517v.


The Netherlands: C. Com. art. 517w par. 2.

Italy: For transport of persons, C. C. (1942) art. 1682; and as to usual clauses, BRUNETTI, Manuale del diritto della navigazione marittima e interna (1947) 259.

27 The Netherlands: C. Com. art. 517w par. 1.

Italy: C. C. (1942) art. 1700 cf. Vivante, 4 Trattato Dir. Com. §§ 2102 ff.; Asquini, infra n. 43, 470 § 180 (as to the former C. Com. arts. 399, 411).

States and Europe, Batiffol has referred to the numerous former American and French decisions.28

1. Carriage of Goods

Law of the place of shipping. The vast majority of the American cases of the time previous to interstate regulation proclaimed the law of the state where the goods were shipped and the contract of carriage was made,29 a duality of premises often stressed in the formulations of the courts. The same has been the constant position of the French courts throughout.30

The revised text of the Montevideo Treaty on commercial law, abandoning the law of the place of destination, which generally governs, applies the law of the place of contracting31 to the form, effects, and nature of a unitary contract of through carriage, affecting the territory of several countries. A contract that promises cumulated services of several carriers by a single and direct instrument of transport,32 is recognized as unitary.

Law of the place of loss. In a former minority view, the law of the place where the goods are injured or lost governed. This theory has been favored by some English and Continental writers and some French and American

28 BATIFFOL 233 ff.
29 See the cases in Beale's many notes recorded by BATIFFOL 238 n. 4 and in BATIFFOL 239 f. § 267. For example, see the much cited decisions, Grand v. Livingston (1896) 4 App. Div. 589, 38 N. Y. Supp. 490; Powers Mercantile Co. v. Wells-Fargo & Co. (1904) 93 Minn. 143, 100 N. W. 735; Carpenter v. U. S. Export Co. (1912) 120 Minn. 59, 139 N. W. 154.
30 France: A long series of identical decisions, Cass. (March 31, 1874) S. 1874-1.385; (Aug. 25, 1875) S. 1875.1.426; (Aug. 14, 1876) S. 1876.1.478 etc.; cf. BATIFFOL 243 f. An old decision App. Colmar (June 30, 1865) S. 1866.2.25 considered the (French) place of contracting rather than the Alsatian place of dispatch; but Trib. Céret (April 22, 1921) D. 1921.2.145 is cited to the opposite effect.
Argentine decisions to this effect and 4. VICO 151 § 165, have been superseded, see infra n. 37, but the Montevideo Treaty on Int. Com. Terr. Law, art. 14, adopts the law of the place of contracting.
32 Id. art. 15. A similar provision in art. 259 of Código Bustamante probably refers to the law of contracts of adhesion, art. 185.
decisions.\textsuperscript{33} It was approved by Minor because the result achieves identity of solutions for tort and contract actions.\textsuperscript{34} Such a split may be intended by the parties,\textsuperscript{35} and in fact is very frequently stipulated. But as a confusion of the spheres of contract and tort, the rule deserved its rejection.\textsuperscript{36}

There are, however, modern parallels. To some extent, the Argentine Supreme Court shares the view that each distance is governed by its own territorial law.\textsuperscript{37}

A comparable result is reached by the Dutch reform legislation of 1924. It has been taken for granted that the carrier contracting for through carriage on his own account is only responsible according to the laws obtaining in each territory passed. The same division, a fortiori, characterizes the liability of several carriers.\textsuperscript{38}

\textit{Law of the place of destination.} While the place of the loss has sometimes been considered a place of performance, a few decisions, some of them involving lost baggage, applied the law of the place where delivery is due.\textsuperscript{39}

\textsuperscript{33} See Foote 456; Batiffol 237 n. 1; for American cases, see 2 Beale 1163 n. 2 and Batiffol 235 n. 4.

\textsuperscript{34} Minor 381 § 160.

\textsuperscript{35} France: Cass. civ. (June 12, 1883) S. 1884.i.164; (Dec. 4, 1894) D. 1895.i.526; opposed by Batiffol 236, not rightly in my opinion.

\textsuperscript{36} See, e.g., Faulkner v. Hart (1880) 82 N. Y. 413, 422; Echávarri, 3 Cód. Com. 525; Batiffol 234 ff. §§ 262, 263.

\textsuperscript{37} Argentina: S. Ct. (Sept. 28, 1931) 36 Jur. Arg. 839 (Molins & Cía. v. Ferrocarril Central de Buenos Aires) assumes a unitary enterprise of carriage from Paraguay to Argentina but emphasizes that this does not prejudice the application of the territorial laws of the states along the line of travel. This may have been an obiter dictum in a case where the assumption of delay of the transport depended on the speed territorially prescribed, but has been understood in a broader meaning. Cf. Cám. Com. Cap. (June 3, 1938) 62 Jur. Arg. 792; Cám. Apel. Mendoza (May 10, 1941) 74 Jur. Arg. 793.

\textsuperscript{38} The Netherlands: C. Com. art. 517v: The carrier makes himself liable for the whole distance “in conformity with the law applicable to each part of the transport”; art. 517w par. 1: “Two or more carriers who accept goods ... are liable for the entire carriage in conformity with the law in force for each part of the transport.”

The prevailing criterion, disguised as *lex loci contractus*, has been defended against the emphasis on performance by arguing that the contract is one and the performance a continuous act not restricted to the final delivery;\(^{40}\) that the shipper is presumed to send the goods under the law he knows;\(^{41}\) and that dispatching includes the commencement of performance,\(^{42}\) or, under certain theories is essential for the conclusion of the contract.\(^{43}\) More often, the plurality of the places of performance has been said to leave the law of the place of contracting the only available one. The truth is that a carriage contract has its only material center in the place of dispatch, which has little to do with contracting and more with the delivery to the carrier and his acceptance, the Roman *receptum*, than with performance.

*Special law.* It would seem that the incidents of loading and unloading should have a special rule analogous to maritime carriage. The Montevideo text of 1940, in fact, establishes as a special rule that the law of the state where the delivery is made or should have been made to the consignee, governs the question concerning its performance and the form of the delivery.\(^{44}\) A decision of the French Supreme Court may really rest on such a consideration; it determines the formalities and the time for protest as well as for the request for examination of the goods ac-

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\(^{42}\) Cole, J., in McDaniel v. Chicago & N. W. Ry. Co. (1868) 24 Iowa 412 stressed that it was necessary to transport the goods consigned to Chicago on the territory of Iowa. See more cases in BATTIÉFOLO 239 n. 2.

\(^{43}\) See ASQUINI, Del contratto di trasporto, in BOLAFFIO e VIVANTE, 6 *Il codice di commercio commentato* (ed. 6, 1935) II 147 § 49. The Bern and Rome Conventions are considered to require the acceptance of the goods, see ARMINJON, *Droit Int. Pr. Com.* 431 § 245.

according to the (foreign) law of French Morocco rather than according to the Algerian (French) law of the shipping place.\(^{45}\)

2. Carriage of Persons

The transportation of passengers on railroads does not cause much conflict of laws at present. We may take it from the former practice of the American courts that here, too, the place of departure as indicated in the ticket supplies the law.\(^{46}\) The reason, again, is not that the contract is a "real" contract needing performance for its completion, which is a minority opinion. In the majority view, the ticket is only evidence.\(^{47}\)

A case that has retained some actuality in the United States concerns "free passes," providing gratuitous transportation but expressly excluding liability for accidents. The latter stipulation has been recognized under federal law,\(^{48}\) and in cases of multiple contacts under the law more favorable to the validity of the clause.\(^{49}\) It would be simpler and more satisfactory to realize that such a clause is perfectly justifiable under any law if, and only if, the grant of free transportation is a courtesy and not a part of wages.

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\(^{45}\) Cass. civ. (April 12, 1938) 5 Nouv. Revue (1938) 627, reversing a decision of the App. Cour of Paris which applied the *lex loci contractus*. The 1940 text of Montevideo on Com. Terr. Law, art. 15 par. 2, adopts the special rule of the place of arrival for questions concerning delivery, see *infra* n. 84.


\(^{47}\) *Dalloz*, 1 Nouveau répert. de droit (1947) 770 No. 89.

\(^{48}\) Francis et al. v. Southern Pacific Co. (C. C. A. 10th 1947) 162 F. (2d) 813, aff'd, 333 U. S. 445, *cf.* Ins. L. J. 1947, 761 (pass issued under the Hepburn Act, 49 U. S. C. § 1 and based on federal law). A different situation existed in Sasinowski v. Boston etc. Ry. (C. C. A. 1st 1935) 74 F. (2d) 628 (a circus train); transportation was held to be agreed upon by the railway and the employer, a circus, and governed, with its exemption clause, by the Massachusetts law of the place of contracting because the railroad acted as a private carrier.

\(^{49}\) Atchison, Topeka, & Santa Fe R. Co. v. Smith (1913) 38 Okla. 157, 132 Pac. 494.
SPECIAL OBLIGATIONS

We may note here a Belgian decision elucidating the relation between contract and tort from a point of view not yet mentioned in this work. By judgment of a court in Rome, Italy, a streetcar company was declared liable simultaneously upon tort and breach of contract, for the damage done to the family of a man killed in Tivoli, near Rome. The action for enforcement in Belgium was denied for the reason that the damages were wrongly assessed in Italy. The family could sue only for tort since such claim is personal. In contract they could sue only for the damage suffered by the deceased himself, on survival of his action. To explain this curious case, it may be noted that Italian legislation did not hold railways responsible for damage without proof of negligence.

V. AIR TRANSPORTATION

1. The Warsaw Convention

In commercial law, air transport has essentially the same position as maritime transport. Charters of planes and consignments are comparable to charters of ships and bills of lading. Charters are distinguished as flight or voyage charter, time charter or lease, and charter hire.

It has been said that the document of carriage, either of goods or of persons, regularly contains a clause referring to a specific law, which is ordinarily that of the carrier.

In the absence of such clause, conflicts problems would

51 See Vivante, 4 Trattato Dir. Com. §§ 2167 f.
52 Monaco 146 with citations.
54 Thus, the U. S. Av. R. Indices.
55 Van Houffe, La responsabilité civile dans les transports aériens intérieurs et internationaux (1940) 61.
be particularly hard to solve if the Warsaw Convention and its almost worldwide adoption⁵⁶ had not eliminated the most conspicuous sources of trouble. Like the Hague Rules which inspired them, the provisions of the Convention, cutting through the opposing interests involved and smoothing out the legal distinction of tort and contract, have found a middle road, more favorable to their air carriers than some preceding special laws.⁵⁷ By such enactments as the British⁵⁸ and the Brazilian,⁵⁹ the rules of the Convention have been incorporated into the national body of law, to be applied also with respect to nonmember states.

The Convention provides that any clause shall be null and void which purports to infringe the rules of the Con-

⁵⁶ See Vol. II (ed. 2) p. 342. A few words are due here to this international achievement, including tort and contract claims. On the reassumption of the prewar drafts and amendment proposals to the Convention, see KNAUTH, 1946 Annual Survey 771.


In 1961 a Convention supplementary to the Warsaw Convention, and relating to carriage by air performed by a person other than the contracting carrier, has been adopted by an international conference at Guadalajara and has been enacted in Great Britain (10 and 11 Eliz. 2, c. 43) and West Germany (1963 BGBl. II. 1160); see RIESE, "Die internationale Luftprivatrechtskonferenz und das Charterabkommen von Guadalajara (Jal., Mexico) vom 18. September 1961," 11 Zeitschrift für Luftrecht (1962) 1.


⁵⁷ This has been observed with some astonishment in Italy, App. Milano (April 29, 1938) Giur. Ital. 1939 I 2, 53.

⁵⁸ British Carriage by Air Act, 1932, 22 and 23 Geo. 5, c. 36. This act will cease to have effect as soon as the Carriage by Air Act, 1961, 9 and 10 Eliz. 2, c. 27, comes into full effect; see JOHNSON, "Carriage by Air Act, 1961," 25 Mod. L. Rev. (1962) 569.

⁵⁹ Brazil: Código do Air, D. Lei No. 483, of June 8, 1938, art. 68 par. ún; see HUGO SIMAS, Código brasileiro do air (1939) 164.
vention by determining the law to be applied (article 32). Thus party autonomy is limited to matters not covered by the Convention. In view of this restriction, it is doubtful whether the parties to a contract of carriage by air may choose the law according to which their contract is to be construed, as an English author has submitted. The General Conditions of the former International Air Traffic Association, now International Air Transport Association (both known as IATA), implementing it, assure that the paramount clause referring to the Convention, if at all material, is practically never omitted.

It has also been doubted whether the Convention covers contractual relations or only liability for tort. The Convention, however, not only applies to air transportation without such distinction but determines its applicability according to certain terms of the contract of carriage between the carrier and the individual passenger.

2. Relation to National Laws

The national rules have been reduced by the Convention to a somewhat obscure scope. The literature distinguishes between a carriage international in the meaning of the Convention, which is a particular concept, and international carriage in the "ordinary sense." But the latter is entirely unnecessary as a technical concept.

The Convention's definition of its own applicability has recently raised doubts informative for studies of choice of law. The Convention includes carriage between the terri-

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60 But it is not correct to suggest that all choice of law clauses in air passenger tickets or air waybills are invalid, as one author does; see Herzog, "Validity of Contracts Exempting Carriers in Interstate and Foreign Commerce from Liability," 11 Syracuse L. Rev. (1959) 177, 199.


62 Art. 1 (2) of the Convention.

63 Crossing of a border and a single document of transportation are required, cf. Lemoine 387 § 555.
tories of two parties to the Convention and the case where, departure and destination being within the territory of one contracting power, a stopping place in the territory of any other power is agreed upon. In postwar discussion it has been recognized that this delimitation imposes an unwarranted and possibly unenforceable burden upon aircraft of nonmember states (e.g., upon a Portuguese air line taking passengers from New York to Bermuda) and subjects air lines to different systems of liabilities according to the distances indicated in the tickets. In the United States, moreover, it has been complained that the maximum amount of liability, often inadequate for American standards, strangely differs from the superior compensation due in the same case of an accident within the United States, to other passengers with a domestic ticket.

Yet it has been replied:

"On the other hand, to base the applicability of the Convention solely upon the nationality of the aircraft irrespective of the place of departure or destination, or the 'lex loci contractus' (or, which may be the same thing, upon the proper law of the contract), would raise difficulties of jurisdiction, and also practical difficulties since aircraft of different nationality flying the same route might be operating upon a different liability basis . . . possibly a combination of the two criteria may prove to be the solution."

The municipal laws raise questions respecting the relation of the Convention to federal and state statutes. The few

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65 Rhyne, "International Law and Air Transportation," address of July 16, 1948, 47 Mich. L. Rev. (1949) 41, 56. See the discussion mentioned supra n. 56 last paragraph.
66 Wilberforce, supra n. 64. But when the Convention was amended by the Hague Protocol in 1955, supra n. 56, its provision on applicability remained practically unchanged.
American cases in point deal with the following questions.\textsuperscript{66b}

\textit{Death of passengers.} The Warsaw Convention has been implemented in Great Britain by certain provisions set out in the Second Schedule of the Carriage by Air Act, 1932. Thereby, the liability is enforceable "for the benefit of such of the members of the passenger's family as sustained damage by reason of his death." With this complement, the courts have since applied article 17 of the Warsaw Convention, stating that "the carrier shall be liable for damage sustained in the event of death or wounding of a passenger..."\textsuperscript{67} Accordingly, the British courts recognize a cause of action governed by the new law rather than by Lord Campbell's (Fatal Accidents) Act.\textsuperscript{68} Deprived of such statutory assistance, the American decisions thus far rendered have not determined "who may be thought to be injured by a death."\textsuperscript{69} It seems that these courts have made up their mind to the effect that the cause of action for the death of a passenger is determined by the law of the place where the death occurred,\textsuperscript{70} including the Death on the

\textsuperscript{66b} For cases dealing with the Convention in other than conflict-of-laws respects, see GUERRERI, American Jurisprudence on the Warsaw Convention (Montreal 1960).

\textsuperscript{67} Schedule 2. Cf. for details, SHAWCROSS & BEAUMONT, Air Law (ed. 2, 1951) 383 ff. § 408.

\textsuperscript{68} Grein v. Imperial Airways, Ltd. [1937] 1 K. B. 50, 1936 U. S. Av. R. 184, and \textit{ibid.} p. 211 reversing the judgment of the K. B.


\textsuperscript{70} The decisions in the cases Choy, Wyman, Garcia, and Indemnity Insurance Co. (as 69, 71, 72) are understood in this sense by ORR, "The Warsaw Convention," in \textit{31 Va. L. Rev.} (1945) 434 n. 18; RHYNE, Aviation Accident Law (1947) 270; see also GOLDBERG, "Jurisdiction and Venue in Aviation Accident Cases etc.," 36 Cal. L. Rev. (1948) 41, 55 f. n. 59.
High Seas Act. Perhaps, a case could be made for the death statute of the *lex fori*; international draftsmen are likely to think of this first, and the British implementation rests on such an autarchic ground. But the *lex loci delicti* has doubtless a better claim in tort actions.

In one of the American cases, the Warsaw Convention was applied to a death on the high seas, but as the Convention says nothing about interest on the debt of compensation, the court looked to the Death on the High Seas Act which, however, is likewise silent on interest.

3. The Remaining Problems

Most questions not covered by the Convention have been uniformly answered in the General Conditions mentioned above. One of these conditions prescribes that the consignment should be printed in one of the official languages of the country of departure. This is a new hint in favor of the law of that country for the remaining questions. How-


74 *Supra* p. 312. *Cf.* Grein v. Imperial Airways, *supra* n. 68; if the carriage were not international in the meaning of the Warsaw Convention, it would be governed by the IATA agreement.
ever, a Dutch court took it for granted that Dutch law governed an air passage concluded with the Royal Dutch Airways in Bangkok, Siam. And the Convention itself seems to point to the law of the forum.

VI. Mixed Through Carriage

Mixed through routes in international trade, with alternating transportation by railway, vessel, and aircraft have lacked adequate legal and organizational machinery, with the main exception of the through bills in the traffic between the United States and Canada, and the American Ocean Bill of Lading, the latter as used for export, issued by a railroad, includes the maritime carriage. Although separate "local" bills of lading may be issued on the subsequent stages to the signer of the through bill, as shipper, the original bill is the document intended to represent the goods, in order to finance the transaction and to assure the right to delivery. Usually a clause provides that no carrier is liable for loss, damage, or injury not occurring while the goods are in its custody. Difficulties in foreign countries in recognizing the American bill to its full extent have probably diminished.

75 Rb. s'Gravenhage (Feb. 28, 1935) W. 12884. Application of the carrier's domiciliary law is also urged by the Inst. Dr. Int. in a recent resolution; see Revue Crit. 1964, 166 f., art. 5 par. 2.

76 Vol. II (ed. 2) p. 342 n. 32.

77 HuGo Simas, Código brasileiro do air (1939) seems to understand art. 68 par. 2 of the Brazilian Code to the same effect.

78 See the excellent summary by Bagge, "Der Durchfrachtverkehr," Z. ausl. PR. (1936) 463; also in his article, "International Through Bills of Lading," Commercial and Financial Chronicle (New York 1945) 1340, 1362.


81 See, e.g., The Iristo (D. C. S. D. N. Y. 1941) 43 F. Supp. 29.

82 RG. (June 23, 1939) 161 RGZ. 210 refused to consider an American bill, termed through bill (under which the goods were shipped from New York to Hamburg to be delivered in Leipzig but not delivered there), because the
There have been other efforts to create appropriate facilities for through carriage, however. Thus, the International Union of Railroads has concluded an agreement with the International Air Transport Association (IATA) on combined international air-rail transportation, with implementing accords.\(^83\) The recent Montevideo text extends the unity of a contract in case of a through bill to mixed transportation on land, sea, and air, but is neither ratified nor implemented.\(^84\)

Through bills of lading in any sense of the word very commonly contain a reference to the conditions usual in the bills of lading of the on-carrying steamer or other carrier. Such a clause in a maritime through bill of lading has been declared to be recognizable only insofar as it is consistent with the original bill.\(^85\) But with this restriction, particularly in mixed carriage, the measure of liability is separately determined for each kind of transportation. In the case of an ocean through bill, issued by a railway on the basis of the Pomerene Act, the Carriage of Goods by Sea Act of 1936 took care to provide that insofar as the bill relates to the carriage of goods by sea, the bill is subject to the new Act. This section has been repealed because it was obviated by the federal legislation of 1940.

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\(^83\) LEMOINE 435 § 629.

\(^84\) Montevideo Treaty on Com. Terr. Law (1940) art. 15 par. 2. A draft convention on international combined traffic is discussed by PRODROMIDES in 14 D. M. F. (1962) 67.

\(^85\) The Idefjord, Blumenthal Import Corp. v. Den Norske Amerikalinje (C. C. A. 2d 1940) 114 F. (2d) 262, 266. Imperative rules of the original maritime carriage continue for continued sea carriage. Thus the British Carriage of Goods by Sea Act is considered applicable even though only the first part of a through bill of lading refers to a departure from a port in the United Kingdom and transshipment is to be effected in a foreign port. SCRUTTON, Charterparties (ed. 16) 461 f. On the other hand, art. I excludes the distance not by sea, SCRUTTON, id. 467.
Clearly, the provisions of the Bern Convention on the liability of railways do not extend to a continuation of the transport by sea. Conformably to this, where a cask of brandy (cognac) was shipped from Cognac to Le Havre by rail and from Le Havre to New York by sea, and breakage occurred during the land transit, the exception from liability for negligence of the servants or agents under French law was recognized.

So far as the scattered attempts to solve the conflicts problem go, they reflect the present defective organization of combined international carriage. The consignee may be relieved by some provision from the necessity of receiving the goods at an intermediate place, but neither he nor the consignor is entitled to the benefits of the original bill as an exclusive embodiment of all rights. It seems to have been justifiably concluded therefrom in conflicts law that in this unorganized succession of carriers it is inevitable to let each part of the distance stand by itself. Hence, rights and liabilities are determined under the law of the territory where the individual facts completing the cause of action occur, be it loss or damage during carriage or any incident of delivery.

Contrarily, the perfection of interstate and export through bills in the United States and Canada eliminated the former division of opinions on the same question and has promoted the application of the law where the original through bill is issued. Under this approach and with all the usual precautionary stipulations, the exceptions needed in favor of local laws do not seem to require other consideration than in the case of ordinary bills of lading issued by one carrier.
