Conflicts Problems in International Bills of Lading: Validity of "Negligence" Clauses

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Introduction

For almost a century, bills of lading clauses relieving the shipowner from liability for negligence have been the subject of a spectacular conflict. In countries where cargo interests dominated, "negligence" clauses were declared invalid; in other countries, where hull interests prevailed, such clauses were given effect under the cover of an almost unlimited freedom of contracting. By the end of the past century, the world was divided into shippers' countries and carriers' countries; and the domestic policy was frequently carried into the international field by the adoption of conflicts rules safeguarding the application of domestic standards to bills of lading involving international contacts. Thus, due to varying domestic standards and conflicts

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*Research Associate Professor of Law, Louisiana State University.

1. Clauses aiming at exonerating the carrier from liability for negligence are commonly called "negligence" clauses. See KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 120 (1953).

2. See COLE, THE CARRIAGE OF GOODS BY SEA ACT 11 (1937); SCAPEL, LA NOUVELLE LEGISLATION SUR LES TRANSPORTS DES MARCHANDISES PAR MER 14 (1936); SAUVAGE, LA LEGISLATION NOUVELLE SUR LES TRANSPORTS MARITIMES DES MARCHANDISES 1 (1937); AUBURN, LES TRANSPORTS DES MARCHANDISES PAR MER 3 (1938); KNAUTH, op. cit. supra note 1, at 119.

3. E.g., England and France were predominantly "carrier-countries," while the United States was a "shipper's country." See SCAPEL, op. cit. supra note 2, at 21; GRAVESON, BILLS OF LADING AND THE UNIFICATION OF MARITIME LAW IN THE ENGLISH COURTS, IN CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS 57, 59 (1949); ASTLE, SHIPOWNERS' CARGO LIABILITIES AND IMMUNITIES 2 (1951). See also Avis de M. Ramadier, Chambre, Annexe No. 3500 p. 968 ("There are shippers' nations... and carriers' nations"); RIPERT, LA RESPONSABILITÉ DES PROPRIÉTAIRES DE NAVIRES ET L'UNIFICATION DU DROIT MARITIME, D.M.F. 703 (1954). There was also a conflict between shippers' lawyers and carriers' lawyers. See Ripert, LA LOI FRANCAISE DU 2 AVRIL 1936 SUR LE TRANSPORT DES MARCHANDISES PAR MER, RIVISTA DE DIRITTO DELLA NAVIGAZIONE 367 (1936); WÜSTENFÖRSTER, GUTACHTEN ÜBER DIE VERSCHLECHTERUNG DER RECHTSLAGE DER REEDER DURCH DIE HAAGER REGELN, HANSA 929, 931 (1928); GRAMM, DAS NEUDEUTSCHE SEEFRACHTRECHT NACH DEN HAAGER REGELN 73 (1938); KNAUTH, op. cit. supra note 1, at 119; COLE, op. cit. supra note 2, at 13.

4. There was thus a conflict of substantive rules and a conflict of choice of law rules. See 1 RIPERT, DROIT MARITIME 255 (1952); PLAISANT, LES RÈGLES DE CONFLIT DES LOIS DANS LES TRAITÉS 3 (1945). Where the doctrine of freedom of contracting prevailed, as in France and Great Britain, the parties were given freedom to select the applicable law; where limitations were imposed on
rules, the same clause inserted into an international bill of lading could be valid in one country and invalid in another, and the liability of the carrier could vary with the fortuitous or selected forum. As a result, an untenable situation was created: security in international transactions was minimized, the negotiability of bills of lading was imperiled, and world trade was seriously hampered.

The United States, having first succeeded in reaching a compromise between the conflicting interests of carriers and shippers in its domestic law, took the lead in urging a uniform international regulation of the carriers' liability. The need for such regulation was generally felt, and action was taken by interested business groups and international institutions. After several decades of preparatory work, the movement for uniformity culminated in an international convention "for the unification of certain rules of law relating to bills of lading," signed in Brussels, on August 25, 1924.

Most of the maritime nations, including the United States, have ratified or adhered to the Brussels Convention; others,

the carrier's right to exonerate himself from liability for negligence, as in the United States, the forum law was declared applicable as a matter of law to all contracts concluded or performed within the forum jurisdiction. See Sauvage, MANUEL PRATIQUE DU TRANSPORT DES MARCHANDISES PAR MER 7 (1955); Marais, LES TRANSPORTS INTERNATIONAUX DE MARCHANDISES PAR MER ET LA JURISPRUDENCE EN DROIT COMPARÉ 5 (1949); Colinvaux, THE CARRIAGE OF GOODS BY SEA ACT 1 (1954); Graveson, supra note 3, at 64; infra notes 19, 24.

5. See Knauth, op. cit. supra note 1, at 120, 121, 122 (1947 ed.) ; 2 Ripert, DROIT MARITIME 796 (1929 ed.).

6. See Knauth, op. cit. supra note 1, at 120; Astle, SHIPOWNERS' CARGO LIABILITIES AND IMMUNITIES 7 (1951).

7. See note 29 infra.

8. See Graveson, supra note 3, at 59; Knauth, op. cit. supra note 1, at 118.

9. On the history of the movement for unification see, Stroeder, GESCHICHTE DER KONVOGEMENTSKLÄUSEL (1954); Dob, BILL OF LADING CLAUSES AND THE INTERNATIONAL CONVENTION OF BRUSSELS 13 (1956); Scrutton, CHARTER PARTIES 453 (1955); Carver, CARRIAGE OF GOODS BY SEA 164 (1952); Ripert, LA CONFÉRENCE DIPLOMATIQUE DE BRUXELLES, 2 DOR 49 (1923); LA COMMISSION DE BRUXELLES, 4 DOR 55 (1923); Falconbridge, CONFLICTS OF LAWS 396 (1954); Knauth, op. cit. supra note 1, at 107 (1947 ed.).

10. LEAGUE OF NATIONS, TREATY SERIES 17 (1931). This agreement was the result of the combined efforts of the International Law Association and of the Conference on Maritime Law. The International Law Association at its Hague meeting of 1921 agreed on a body of rules known as the "Hague Rules, 1921" (30th Report, II, 254-256). These rules were initially intended to be incorporated in bills of lading by agreement; subsequently, they were recommended as a basis of domestic legislation by the Diplomatic Conference on Maritime Law (Brussels, October 1922). The rules were amended in Brussels by a committee appointed by the Conference, and finally, the Convention was signed on August 25, 1924.

11. See list. Colinvaux, op. cit. supra note 4, at 182; Knauth, op. cit. supra note 1, at 453.
without adhering, have enacted domestic legislation incorporating the rules agreed upon in Brussels. However, this substantial uniformity of domestic legislation has not eliminated the conflicts problems arising in the determination of validity of negligence clauses inserted into bills of lading involving international contacts. The area of application of the (uniform) forum law, as well as choice of law rules, differ from country to country; and depending on the place of litigation, the same bill of lading may or may not be subject to the Brussels Convention even where the forum is in a signatory country and the contract of affreightment involves contacts with another signatory country. It seems therefore that, as in the past, a negligence clause may be given effect in one country and denied effect in another, contrary to both the letter and the spirit of the Brussels Convention.

12. See list, Colinvaux, op. cit. supra note 4, at 153.
13. The uniformity is neither general nor complete. Not all maritime nations have signed, ratified, or adhered to the Brussels Convention; and those which became party to this agreement, failed, as a rule, to comply with it in all respects. Conflicts between texts incorporating the uniform rules into national legal systems are frequent. See Knauth, op. cit. supra note 1, at 147; Graveson, supra note 3; at 62; Diena, *Principes du Droit International Privé Maritime*, in 51 A.D.I.R.C. 405, 414 (1935); Comment, *Ocean Bills of Lading and Some Problems of Conflict of Laws*, 58 Col. L. Rev. 212 (1958); The St. Joseph [1933] P. 119, 134 ("The nations have not adopted a uniform system of applying the Hague Rules. Most nations have not embodied them in their law at all, others differ in the way they have adopted them. . . . It is somewhat alarming to contemplate how many doors to confusion in mercantile business are opened by these attempts to legislate for the whole world").
14. Cf. Diena, supra note 13, at 414. Conflicts may effectively be avoided only by unification, and universal adoption, of an entire branch of law. And even in that case conflicts problems may arise, unless the uniform law is interpreted uniformly in all countries. See 1 Ripert, Droit Maritime 73 (1950); Scape, op. cit. supra note 2, at 108; Bonecasse, Le Droit Commercial Maritime 374 (1931); Stoeder, supra note 9, at 96. See also International Law Association, 30th Report II, p. 42 (1922); Sir Norman Hill, *International Shipping Conference*, Report 45 (1921); Joint Parliamentary Committee, Report 130 (1930); Stag Line v. Foscolo, Mango and Co. [1932] A.C. 328, 342, 350. The Brussels Convention has not eliminated conflicts: it unified only "certain rules" applicable to a "fraction" of the entire contract of affreightment; and these unified rules have been interpreted in a most uniform way. Cf. note 13 supra.
15. Due to varying conceptions with regard to the method of unification employed by the Brussels Convention, the area of application of the uniform rules as forum law differs from country to country; and this is so not only where the uniform rules are voluntarily adopted, but also where incorporated to discharge an international obligation assumed by signing and ratifying the Convention. Cf. 2 Ripert, Droit Maritime 261 (1952); The St. Joseph, supra note 13.
17. This was the very purpose of the Brussels Convention. Cf. notes 6, 9, supra; Graveson, op. cit. supra note 3, at 60; Falconbridge, op. cit. supra note 9, at 396.
18. See Knauth, op. cit. supra note 1, at 161 et seq. The usual method employed by carriers is: deliberate failure to comply with the legislation at the place of issue of the bill of lading, exacting the insertion of a clause paramount incor-
It is the purpose of this paper to define the law applied by
American courts to negligence clauses contained in international
bills of lading. A historical survey of the United States legisla-
tion, and a brief analysis of its provisions, will be followed by
an investigation designed to ascertain (1) the validity of negli-
gence clauses inserted in bills of lading governed by the Brussels
Convention as enacted in the United States (domain of uni-
formity); and (2) the applicable law to similar clauses inserted
in bills of lading outside the scope of that convention (domain
of contractual freedom).

FROM CONTRACTUAL FREEDOM TO UNIFORM REGULATION

General Maritime Law

Under the law of the United States, as it existed until the
middle of the past century, the contract of affreightment was
generally enforceable according to its own terms. Since the
1880's, however, the American federal courts resolutely refused
to enforce "unreasonable" conditions inserted into bills of lading,
such as clauses which exempted the shipowner from liability for
his own or his servants' negligence.10

Contracts of affreightment involving significant foreign con-
tacts were governed by the law selected by the parties,20 and
in absence of agreement, by the law of the place of contracting21
as impliedly intended.22 Nevertheless, unreasonable limitations
of liability contained in contracts which were to be performed
in part or in whole in the United States, were considered con-

19. See Knauth, Transportation Law, in Annual Survey of American Law
538, 539 (1951).

20. The Oranmore, 24 Fed. 922 (D. Md. 1885) (giving effect to the intention
of the parties that English law be applied to a contract of affreightment concluded
in the United States for the carriage of goods to Liverpool). See also The Ken-
sington, 153 U.S. 263 (1902) ; Knott v. Botany Mills, 197 U.S. 69 (1900) ; The
196, 202, 100 N.E. 1025 (1913).

(1889) (carriage of goods from New York to Liverpool, subject to the law of the
place of contracting, as impliedly intended). See Nolde, Les Conflits des Lois
Maritimes en Droit Americain, 22 Rev. Dr. Mar. Comp. 36, 43 (1930) ; Knauth,
Renvoi et Autres Conflits de Droit en Matiere Maritime, 29 Rev. Dr. Mar. Comp.
36, 43 (1930) ; Delaume, Note, Rev. Dr. Int. Pr. 214 (1950).

22. See Liverpool and Great Western Steam Co. v. Phoenix Ins. Co., 129 U.S.
397 (1889) ; Nolde, supra note 21, at 43.
This legal regime did not successfully safeguard the interests of American shippers, nor did it encourage the growth of American shipping industries, and with a view to attaining such aims, the Harter Act was passed in 1893.

**The Harter Act, 1893**

The Harter Act, though originally conceived as an instrument of international trade war, and as a concession to the interests of American shippers, in fact worked a compromise between shippers' and carriers' interests. Under that law, clauses relieving the shipowner from liability for loss or damage to the cargo arising from negligence were declared "null and void and of no effect," but the shipowner was relieved from liability for negligence "in navigation or in the management" of the vessel, if he used due diligence to make his vessel seaworthy.

Initially designed to apply to foreign trade only, the Harter Act was extended to cover domestic trade as well, and was declared applicable to all shipments to and from the ports of

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26. See The E. A. Shores Jr., 73 Fed. 342, 346 (E.D. Wis. 1896); Colinvaux, _op. cit._ supra note 4, at 3. See also Knauth, _op. cit._ supra note 1, at 120, 121.


29. See Colinvaux, _op. cit._ _supra_ note 4, at 3. Cf. Pan-Am. Trade and Credit Corp. v. The Campfire, 156 F.2d 603, 605 (2d Cir. 1946); Knauth, _op. cit._ _supra_ note 1, at 121, 122; Gilmore & Black, _Admiralty_ 125-26, §§ 3-25 (1957).


32. See The E. A. Shores Jr., 73 Fed. 342, 344 (E.D. Wis. 1896); Knott v. Botany Mills, 179 U.S. 69 (1900); Knauth, _op. cit._ _supra_ note 1, at 121.

the United States.\textsuperscript{34} This act, still in force insofar as \textit{not} superseded by the Carriage of Goods by Sea Act, 1936,\textsuperscript{35} plays an important role in the regulation of both the domestic and the international trade of the United States.

\textbf{The Carriage of Goods by Sea Act, 1936}\textsuperscript{36}

The Carriage of Goods by Sea Act was enacted in view of the pending ratification by the United States of the Brussels Convention of 1924. The act reproduced, with some variations of language,\textsuperscript{37} the text of Articles I to VIII of the Convention, and, in addition, included several other provisions defining its area of application and its relation to other legislation of the United States. A brief summary of the most important provisions of the Carriage of Goods by Sea Act is here appropriate.

\textit{Subject-matter regulated.} In accordance with the Brussels Convention, the Carriage of Goods by Sea Act regulates only contracts of affreightment evidenced by bills of lading, and only with regard to damages occurring between the time of loading and discharge to cargo carried in the hull of the vessel; cargo agreed to be carried on deck, and so carried, and carriage of live animals are expressly exempted.\textsuperscript{38}

\begin{itemize}
  \item \textsuperscript{34} The Ferncliff, 22 F. Supp. 728 (D. Md. 1938) (Japan-New York); Navigazione Libera Triestina v. Garcia and Maggini Co., 30 F.2d 62 (9th Cir. 1929) (Costa Rica-San Francisco, Cuba-Los Angeles). See also KNAUTH, \textit{op. cit. supra} note 1, at 122; Delaume, \textit{supra} note 21, at 214. \textit{But cf.} Louis-Dreyfuss v. Paterson Steamships, Ltd., 35 F.2d 353 (W.D.N.Y. 1929).
  \item \textsuperscript{35} The Carriage of Goods by Sea Act, 1936, supersedes the Harter Act, 1893, from "tackle to tackle" with regard to goods carried to or from the ports of the United States, in \textit{foreign trade}. See Carriage of Goods by Sea Act, 1936, 49 Stat. 1212 (1936), 46 U.S.C. § 1311 (1953); The Monte Iciar, 167 F.2d 334 (2d Cir. 1948); Export S.S. Corp. v. American Ins. Co., 26 F. Supp. 79 (S.D.N.Y. 1938), reversed on other grounds, 166 F.2d 9 (2d Cir. 1948); Mackey v. The United States, 23 F. Supp. 14 (S.D.N.Y. 1948), aff'd, 197 F.2d 241 (2d Cir. 1952). See also note 65 \textit{infra}; KNAUTH, \textit{op. cit. supra} note 1, at 163. With respect to the \textit{domestic trade}, the parties are simply given option to subject the contract to the Carriage of Goods by Sea Act, by express stipulation. See KNAUTH, \textit{ibid}.
  \item \textsuperscript{36} 49 Stat. 1207 (1936), 46 U.S.C. § 1900 (1953). For its legislative history, see KNAUTH, \textit{op. cit. supra} note 1, at 128.
  \item \textsuperscript{37} The textual variations between the act and the Brussels Convention were made with the intention of clarifying the meaning of the Uniform Rules rather than altering their effect. See Memorandum, State Department (June 5, 1937): "The foregoing differences from the Convention, made in the Carriage of Goods by Sea Act, are intended primarily (1) to clarify provisions in the Convention which may be of uncertain meaning thereby avoiding expensive litigation in the United States for purposes of interpretation and (2) to co-ordinate the Carriage of Goods by Sea Act with other legislation of the United States." 51 Stat. 269 (1937).
\end{itemize}
Substantive provisions. The act introduces into all bills of lading covered by it certain standard clauses defining the risks assumed by the carrier (which are absolute and irreducible) and the immunities the carrier can enjoy (in absence of contrary agreement). Clauses relieving the carrier from liability for negligence in the loading, handling, stowing, carrying, keeping, and in the discharge of the goods are declared null and void; the carrier, however, is relieved from liability arising from negligence in the “navigation or management” of the vessel.

Area of application. Section 13, first paragraph, of the Carriage of Goods by Sea Act, provides that “This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade.”

Clause paramount. Section 13, last paragraph, provides that “every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this Act.”

In addition to passing this act, the United States deposited its ratification of the Brussels Convention on June 29, 1937.

40. Carriage of Goods by Sea Act, 49 Stat. 1212 (1936), 46 U.S.C. § 1312 (1953). The opening phrase of the act provides that “every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act.” The two provisions have the same meaning. See Knauth, op. cit. supra note 1, at 152.
41. Carriage of Goods by Sea Act, 49 Stat. 1213 (1936), 46 U.S.C. § 1312 (1953), last paragraph. This “express statement” is commonly called the “clause paramount.” See Falconbridge, Conflict of Laws 398, note (k) (1954). No case has been found involving an attempt to circumvent this provision; however, as in Great Britain, failure to insert this clause in a bill of lading issued in the United States will not entail its cancellation. See Vita Food Products v. Unus Shipping Co. Ltd. (1939) A.C. 277 (P.C.). Without regard to any other contact, or to contractual stipulations providing for the application of foreign law, the act will be applied to all bills of lading coming under Section 13, first paragraph, whether or not the parties have complied with the clause paramount requirement of Section 13, last paragraph. See infra notes 51, 52; Knauth, op. cit. supra note 1, at 121 (1947 ed.); Dor, Bill of Lading Clauses and the International Convention of Brussels 24 (1956), citing The Ciano, 69 F. Supp. 35 (E.D. Pa. 1946); The Aakre, 122 F.2d 469 (2d Cir. 1941); Shackman v. Cunard White Star, Ltd., 31 F. Supp. 948 (S.D.N.Y. 1940). These cases are not conclusive. The Ciano involved a shipment from Spain to Philadelphia, and as the bill of lading was issued outside the United States, the insertion of a clause paramount was not compulsory. In the Aakre, the bill was also issued outside the United States. Finally, in Shackman v. Cunard, where the bill of lading had been issued in New York, the parties had actually complied with the act, and a clause paramount was inserted into the bill of lading.
The Brussels Convention

Textual variations between the Brussels Convention and the Carriage of Goods by Sea Act, render necessary an investigation with regard to the binding force of the Convention on courts and individuals in the United States.

Under the United States Constitution, an international treaty ratified by the President and the Senate, if self-executing, is part of the law of the land.42 The Brussels Convention, however, was ratified subject to an "understanding" that if the provisions of the Convention and the provisions of the Carriage of Goods by Sea Act should conflict, the act shall prevail over the Convention.43 Thus, while undoubtedly a part of the law of the United States, the Convention is not directly binding upon courts and individuals; the law governing bills of lading is to be found in the Carriage of Goods by Sea Act.44

As the Carriage of Goods by Sea Act incorporated, almost literally, the substantive provisions of the Brussels Convention (Articles I to VIII), the most important conflict between the two texts concerns their intended area of application. Article X of the Convention declares "The provisions of this Convention shall apply to all bills of lading issued in any of the contracting states";45 section 13 of the Carriage of Goods by Sea Act, on the other hand, makes the act applicable to contracts for the carriage of goods to or from the ports of the United States in foreign trade.

Like several other signatory countries, the United States has thus departed from the system envisaged by the Brussels Convention. Section 13 of the Carriage of Goods by Sea Act compared to Article X of the Convention appears to be wider in

43. See Ratification of Convention by the United States, Second Understanding. Ratification was advised and consented to April 1st, 1935 (with one understanding) and May 6, 1937 (with a second understanding) and deposited on June 29, 1937. Cf. KNAUTH, op. cit. supra note 1, at 77.
44. See KNAUTH, op. cit. supra note 1, at 153.
45. While in other countries (e.g., France) Article X of the Brussels Convention has been interpreted as a conflicts rule referring to the law of the place of contracting, the same article has been explained in the United States as a promise by each signatory country to apply the Convention to every (ocean) bill of lading issued within its territory. See KNAUTH, op. cit. supra note 1, at 152, 154. A similar interpretation prevailed in England. See CARVER, CARRIAGE OF GOODS BY SEA ACT 207 (1952).
scope with regard to some bills of lading, and narrower with regard to others. Where the carriage is to or from the ports of the United States in foreign trade, the act applies to bills of lading issued in a non-signatory country; but it does not apply to bills of lading issued in another signatory country where the carriage is between foreign ports, or to bills of lading issued in the United States for the carriage of goods between American ports.

However, since according to the Protocol of Signature the High Contracting Parties were given option to exclude from the uniform regulation their domestic trade, deviation from the Convention is actually made only with regard to bills of lading issued in a signatory country for the carriage of goods between foreign ports. Such bills of lading according to Article X should be subject to the Convention as a matter of law. According to the American practice they are subject to the Convention only where the latter is contractually incorporated, or where the contract is localized in a country adhering to the Convention. While in such cases the carriers may have an opportunity to limit their liabilities contrary to the letter and spirit of the Brussels Convention, it cannot be seriously contended that the American practice prejudices the achievement of international uniformity. Such cases are rare; and the American courts may well resort to the law of the place of contracting or even decline jurisdiction and thus relegate the parties to a forum abroad which would apply the Convention to the bill of lading in question.46

THE DOMAIN OF UNIFORMITY: NO CHOICE OF LAW

It is well settled in the United States that all bills of lading covering carriage of hull cargo (other than live animals) to or from the ports of the United States in foreign trade, from the time of loading until discharge, are subject to the Brussels Convention as incorporated into the Carriage of Goods by Sea Act.47

46. Cf. infra notes 58, 65, 77-79.
Any clause inserted into such bills of lading exonerating the carrier or the ship from liability for negligence (other than in the navigation or management of the vessel), or lessening that liability otherwise than as provided in the Carriage of Goods by Sea Act, is null and void.48

However, apart from agreements directly exonerating the carrier from liability for negligence, exonation may be attempted by clauses stipulating the application of a more favorable foreign law or by clauses granting exclusive jurisdiction to the courts of a foreign country.49

Stipulation of the applicable law. Following the long established precedent of the Harter Act, Section 13, first paragraph of the Carriage of Goods by Sea Act50 has been interpreted as a rule of public policy which precludes any other choice of law with regard to bills of lading coming under it. Thus a stipula-


50. See supra text at note 40. Quite apart from the interpretation given to this section, it seems that Section 3(8) would be sufficient to preclude the application of foreign law to bills of lading covered by the act where the foreign law would “lesseh” the liability of the carrier. Cf. supra text at note 48.
tion providing for the application of foreign law to a bill of lading covered by the Carriage of Goods by Sea Act will be disregarded and the liability of the carrier will be determined under the act. In a typical case involving carriage between Indian and American ports under a bill of lading providing for application of Indian law, the American court declared that "It is clear enough as a matter of law that the responsibility of the carrier in this case is to be determined by the provisions of the (Carriage of Goods by Sea) Act." And in another case involving carriage from Brazil to New York, under a bill of lading which was actually made subject to the Carriage of Goods by Sea Act, the court said that the act "would anyhow have been applicable as a matter of law as the voyage was from a foreign port to the United States."  

Jurisdictional agreements. The issue of the validity of jurisdictional agreements inserted into bills of lading covered by the Carriage of Goods by Sea Act is somewhat confusing due to the peculiar views of the United States courts with regard to their admiralty jurisdiction. A brief analysis of the rules governing that jurisdiction is thus necessary.  

The admiralty jurisdiction of the United States courts is largely discretionary, and is exercised or declined according to considerations of convenience of courts and parties.  

51. The Steel Inventor, supra note 47. See also Knauth, op. cit. supra note 1, at 154. Cf. The Kensington, supra note 20, deciding the matter under the Harter Act. It should be noted that while there are some cases purporting to attach significance to the law selected by the parties in bills of lading covered by the Harter Act, in no case was foreign law actually applied. See The Ferneliff, supra note 34, where bills of lading issued in Japan for carriage of goods to the United States provided for application of Japanese law. There was language indicating that Japanese law was controlling; but, in absence of proof, the court indulged in the presumption that the law of Japan was identical with that of the United States. For other cases where foreign law was presumed to be identical with the forum law, see Franklin Fire Ins. Co. v. Royal Mail Steam Packet Co., 54 F.2d 807 (S.D.N.Y. 1931); The Miguel di Larrinaga, 217 Fed. 678 (S.D.N.Y. 1914); Blumenthal Import Corp. v. Broklebank, 148 F.2d 727 (3d Cir. 1945). Cf. E. Gerli and Co. v. Cunard S.S. Co., 48 F.2d 115 (2d Cir. 1931).  


53. The term "validity" of a jurisdiction clause is rather misleading. One might expect that a "valid" clause should be given effect always, and that the parties to such an agreement should be relegated to their selected forum. This, however, is not the case. The United States' courts sitting in admiralty may retain jurisdiction, though the clause itself is perfectly valid. It is therefore preferable to discuss in terms of actual result, namely, whether or not a jurisdictional clause inserted into a bill of lading will be given effect.  

tual stipulations granting exclusive jurisdiction to the courts of a foreign country are not binding upon the courts;55 “reasonable” jurisdictional agreements, however, may be enforced at the discretion of the court,60 by a decision declining to exercise jurisdiction.57 In such cases, it is apparent that considerations of convenience weigh heavily in the determination of the “reasonableness” of the agreement.58

The Carriage of Goods by Sea Act contains no provision relating to jurisdiction or to the validity of jurisdictional agreements.59 But if such agreements were to be generally enforceable, the carrier would be able to effect a change in the applicable law by selecting a forum, and thus, indirectly, succeed in limiting his liability under the act.60 It seems, therefore, that a


57 Specific performance of the agreement as such cannot be granted. Cf. Cerro de Pasco Copper Corp. v. Knut Knutsen, 187 F.2d 990 (2d Cir. 1951), note by the court: “It might be said that the court took jurisdiction and granted specific performance of Clause 12 of the bill on the ground that that provision was fair and not against public policy, all the facts considered.”

58 See Muller and Co. v. Swedish-American Line, Ltd., 224 F.2d 906 (2d Cir. 1955): “We come therefore to the consideration of the reasonableness of this particular agreement in the setting of this case. The ‘Oklahoma’ was not only Swedish owned . . . it was also constructed in that country. All the members of the ‘Oklahoma’s’ crew reside in Sweden.” See also St. Paul Fire and Marine Ins. Co. v. Republica de Venezuela, 105 F. Supp. 272 (S.D.N.Y. 1952); Sociedade Brasileira de Intercambio Comercial e Industrial v. Punta del Este, 135 F. Supp. 394 (S.D.N.Y. 1955); The Iquitos, 286 Fed. 383 (W.D. Wash. 1921); Musillo Ltda. v. The Bio Bio, 217 F. Supp. 13 (S.D.N.Y. 1955), aff’d, 227 F.2d 510 (2d Cir. 1955) (“the factors determinative of an inconvenient forum largely turn upon identical ones involved in the unreasonableness of a stipulation”).


60 The choice of forum is in effect a choice of law. See United States Merchants and Shippers Ins. Co. v. A/S Den Norske Afrika Og Australie Line, 65
jurisdictional clause inserted into a bill of lading covered by the Carriage of Goods by Sea Act should be given effect, apart from considerations of convenience, only where the foreign forum would apply to the controversy a law no more favorable to the carrier than that of the United States. And this is actually what the American courts have done under the doctrine that the jurisdictional clause must be "reasonable" to be enforced, though the real issue was often obscured by confused language failing to distinguish clearly between the validity of the stipulation under the Carriage of Goods by Sea Act and the exercise of discretion according to the rules of forum non conveniens.

In the leading case of Muller and Co. v. Swedish American Line, Ltd., a Swedish vessel carrying cargo from Sweden to Philadelphia was lost at sea, and the American consignee sued the carrier for damages. A clause in the bill of lading provided for the settlement of all disputes in Sweden, under Swedish law; and the defendant, relying on that clause, moved for a dismissal. The plaintiff argued that the Carriage of Goods by Sea Act was proprio vigore applicable to the contract of carriage, and that, under this act, the jurisdictional clause was invalid as "relieving the carrier or the ship from liability." The court, though agreeing that the contract was subject to the Carriage of Goods by Sea Act, granted the motion to dismiss.

The decision was based on the ground that the agreement was "reasonable" (under the Carriage of Goods by Sea Act) as not "necessarily relieving the carrier or the ship from liability" and on a finding that the courts of Sweden would offer a convenient forum for the controversy. "There was an undisputed showing," the court concluded, "that the Swedish courts apply the same measure of damages as American Maritime Courts, and that limitation proceedings under Swedish law will be no more restrictive than under American law on libellant's recovery. Further, there is no contention that the Swedish courts are not capable of adjudicating this case fairly and justly."
No such reasonableness was found to exist in the more recent case of Sociedade Brasileira de Intercambio Commercial e Industrial, Ltda. v. Punta del Este. In this case, wheat shipped from New Orleans to Santos, Brazil, reached its destination in a damaged condition, and the consignee (a Uruguayan corporation) sued the carrier (a New York corporation) to recover the loss. The vessel belonged to an agency of the Government of Uruguay which chartered it to another Uruguayan corporation, and the latter sub-chartered the same to the New York defendant. All charter-parties included a provision that any dispute was to be settled in the courts of Uruguay under the law of that country, and this provision was incorporated by reference into the bill of lading issued by the sub-charterer in New York. The same bill of lading, however, provided that the contract of affreightment should be subject to the (United States) Carriage of Goods by Sea Act.

The court, passing upon defendant's motion to dismiss, decided to retain jurisdiction. The court found that the reference to Uruguay law had been modified by the incorporation of the Carriage of Goods by Sea Act (an irrelevant fact since the act was applicable as a matter of law), and held the jurisdictional clause to be "unreasonable" in view of the (equally irrelevant) fact that the controversy was to be settled in a non-neutral forum. The truly determinative fact that, if the parties were to be relegated to the courts of Uruguay the carrier would succeed in "lessening" his liabilities in a contract clearly governed by the Carriage of Goods by Sea Act, was not mentioned.

64. In Muller and Co. v. Swedish-American Line, Ltd., 224 F.2d 806 (2d Cir. 1955), the parties were relegated to the courts of Sweden, certainly not a neutral forum. The court in Sociedade Brasileira de Intercambio Commercial e Industrial, Ltda. v. Punta del Este, 135 F. Supp. 394 (D.N.J. 1955) also declared that discretion to dismiss is exercised only where the jurisdictional agreement is coupled with a stipulation of the applicable law; while this is at best doubtful, in the instant case, there was express reference to the law of Uruguay. See also Murillo Ltda. v. The Bio Bio, 127 F. Supp. 13 (S.D.N.E. 1955), aff'd, 227 F.2d 519 (2d Cir. 1955); Cerro de Pasco Copper Corp. v. Knut Knutsen, 187 F.2d 990 (2d Cir. 1951); The Tricolor, 1 F. Supp. 934 (S.D.N.Y. 1932).
65. No case has been found where jurisdiction was declined in a controversy arising under the Carriage of Goods by Sea Act, in absence of an agreement conferring exclusive jurisdiction to the courts of a foreign country. If such a case ever arises, it is to be expected that the courts, among other considerations, will take into account the law which the foreign courts would apply to the case. It seems, therefore, that as to bills of lading covered by the Uniform Rules, jurisdiction will be exercised or declined, whether or not the bill of lading includes a jurisdictional agreement, (1) according to considerations of convenience; and (2) after an examination with respect to the law that the foreign court would apply to the case.
THE DOMAIN OF CONTRACTUAL FREEDOM: CHOICE OF LAW

While contracts of affreightment regulated by, and within the area of application of, the Harter Act and the Carriage of Goods by Sea Act are as a matter of law governed by these acts and no other choice of law may be made by courts or parties, contracts of affreightment outside the scope of these acts are governed by the conflicts rules which the federal courts apply in maritime cases.

The wide delimitation of the Harter Act and of the Carriage of Goods by Sea Act leaves little room for application of other law with regard to contracts which, though involving questions regulated by these acts, fall outside their area of application. In fact, application of other law is possible only in the rare case involving contracts for the carriage of goods between foreign ports. It is thus with regard to matters and contracts not regulated by either act, such as carriage under charter-party, or

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67. Both the Carriage of Goods by Sea Act and the Harter Act apply to the carriage of goods to or from the ports of the United States in foreign trade. See notes 34, 40, supra. The Carriage of Goods by Sea Act covers the time between loading and discharge; the Harter Act applies from the time the goods have been taken under the custody of the carrier until their delivery to the shipper or consignee. See Carriage of Goods by Sea Act, tit. I, § 1(e); Mackey v. The United States, 83 F. Supp. 14 (S.D.N.Y. 1948), aff'd, 197 F.2d 241 (2d Cir. 1952) (cargo shipped from Haiti to Louisiana, damaged while awaiting loading). The Carriage of Goods by Sea Act may be made applicable to the time preceding loading and following discharge, or to the domestic trade, by agreement of the parties. See Mackey v. The United States, supra. Neither act applies to the carriage of goods between the ports of foreign countries. See Galban Lobo Trading Co. S/A v. The Diponegoro, 108 F. Supp. 741 (S.D.N.Y. 1952) (Havana-Israel); Franklin Fire Ins. Co. v. Royal Mail Steam Packet Co., 54 F.2d 807 (S.D.N.Y. 1931) (Haiti-Antwerp); Petition of Isbrandtsen Co., 201 F.2d 231 (2d Cir. 1953) (Germany-Korea); Murillo Ltda. v. The Bio Bio, 127 F. Supp. 13 (S.D.N.Y. 1955), aff'd, 227 F.2d 519 (2d Cir. 1955) (Antwerp-Chile); The Fri, 154 Fed. 333 (2d Cir. 1907) (Colombia-Cuba). Cf. KNAUTH, op. cit. supra note 1, at 155, citing The Miguel di Larrinaga, 217 Fed. 678 (S.D.N.Y. 1914). In that case, a shipment of goods was made from Liverpool to Guantanamo, aboard a British vessel, under a bill of lading providing for the application of English law to the contract of carriage. The court, disregarding all these facts, held the Harter Act applicable by relying on a presumption that the law of the place of injury (Cuba) was the same as that of the United States.

68. See text at note 51 supra.

69. See Ehrenzweig-Fragistas-Yiannopoulos, op. cit. supra note 42, at 60 et seq.; Nolde, supra note 21, at 38; Stumberg, Commercial Paper and the Conflict of Laws, 6 Vand. L. Rev. 489 (1953).

70. See Petition of Isbrandtsen Co., 201 F.2d 231 (2d Cir. 1953); Franklin Ins. Co. v. Royal Mail Steam Packet Co., 54 F.2d 807 (S.D.N.Y. 1931); Cerro de Pasco Copper Corp. v. Knut Knutsen, 187 F.2d 990 (2d Cir. 1951). See also KNAUTH, op. cit. supra note 1, at 155. See note 67 supra.

71. Cf. note 66 supra. Neither act deals with questions relating to the form of the bill of lading, the capacity of the parties, and the construction of the con-
with regard to exempted shipments,\textsuperscript{72} that resort to conflicts rules is frequently made.\textsuperscript{73}

The validity of "negligence" clauses inserted into this category of contracts will primarily depend on the law selected by the parties.\textsuperscript{74} It is beyond the purpose of this paper to discuss the limits of the parties' "autonomy" to select the applicable law.\textsuperscript{75} It suffices, perhaps, to notice that the American courts will ordinarily give effect to such a stipulation inserted into a bill of lading outside the scope of either the Harter Act or the Carriage of Goods by Sea Act.\textsuperscript{76} And if the parties incorporate
into the contract the Brussels Convention as enacted in the United States, or in any other country, the American courts will give effect to the stipulation like any other contract provision.

In absence of stipulation as to the applicable law, the liability of the carrier, and the validity of exoneration clauses, will be determined according to the law of the place of contracting, or that of performance, as impliedly intended.

Finally, jurisdictional clauses granting exclusive jurisdiction from Minnesota to Montreal, Canada, aboard a Canadian vessel, included a clause incorporating the Canadian Water Carriage of Goods Act. The court said that as the vessel was plying between Canadian ports "the provisions of the Harter Act probably do not apply," and proceeded to give effect to a contractual exemption from liability under the law of Canada. It was pointed out, however, that "the Water Carriage of Goods Act of Canada has provisions similar to the Harter Act" and that the contractual exemption was valid under both laws. In The Aakre, 122 F.2d 469 (2d Cir. 1941), the Canadian Water Carriage of Goods Act was incorporated in a contract for the carriage of goods from St. John to American ports (semble). The issue was whether the ship was seaworthy, and this was decided, without discussion, under American law. The law of Canada does not seem to have been considered at all.


See Knauth, op. cit. supra note 1, at 155. Professor Knauth suggests, further, that the American courts, on comity grounds, will read the Brussels Convention as contractually incorporated in bills of lading issued in a country adhering to that Convention. This is doubtful. Cf. note 72 supra; Petition of Isbrandtsen Co., 201 F.2d 281 (2d Cir. 1953) (bill of lading issued in Germany, a signatory country, subject to the United States Carriage of Goods by Sea Act, as contractually incorporated).


Jurisdictional agreements were given effect in Cerro de Pasco Copper Corp. v. Knut Knutsen, 187 F.2d 990 (2d Cir. 1951) (shipment of goods from Peru to Antwerp under a bill of lading providing for the settlement of any dispute in Norway according to Norwegian law; decision based on the ground that the American forum was a forum non conveniens and that the jurisdictional clause was valid under the law of the place of contracting and the law of the place where the dispute was to be settled); The Tricolor, 1 F. Supp. 334 (S.D.N.Y. 1932) (shipment of goods from Hamburg to Shanghai under a bill of lading conferring jurisdiction on the courts of Norway and providing for the application of Norwegian law); Cerro de Pasco Copper Corp. v. The Alabama, 109 F. Supp. 856
tion to the courts of a foreign country, will be given effect according to considerations of convenience, and according to their validity under the law of the place of contracting and that of the place where the dispute is to be settled, rather than according to their "reasonableness" under the Carriage of Goods by Sea Act.

SUMMARY OF CONCLUSIONS

1. The American courts, without regard to the law governing the contract of affreightment, have in the past declined to enforce "unreasonable" clauses limiting the liability of the carrier for negligence, where performance was to be made in part or in whole in the United States.

2. Today, bills of lading covering transportation of goods between the ports of the United States are governed by the Harter Act, 1893; bills of lading covering transportation of goods between ports of the United States and ports of foreign countries are governed in part by the Carriage of Goods by Sea Act, 1936, and in part by the Harter Act. Both acts apply without regard to any other contact, and contrary contractual stipula-

(S.D.N.Y. 1952) (shipment of goods from Peru to Antwerp under a bill of lading providing for the settlement of disputes in France according to the law of the State of New York). Cf. St. Paul Fire and Marine Ins. Co. v. S.S. Republica de Venezuela, 105 F. Supp. 272 (S.D.N.Y. 1952) (shipment from Antwerp to Ecuador, on a Venezuelan vessel, under a bill of lading providing for the settlement of disputes in Amsterdam under Belgian law; jurisdiction retained partly on the ground of forum conveniens, and partly on the ground that the jurisdictional clause was invalid under both Dutch and Belgian law). See also The Iquitos, 286 Fed. 383 (W.D. Wash. 1921); The Muzillo Ltda. v. The Bio Bio, 127 F. Supp. 13 (S.D.N.Y. 1955), aff'd, 227 F.2d 519 (2d Cir. 1955).

83. See Murillo Ltda. v. The Bio Bio, 127 F. Supp. 13, 15 (S.D.N.Y. 1955) ("such provision is alleged to be valid under Swedish and Chilean law, and not claimed to be otherwise under the laws of Bolivia and Belgium"); Cerro do Pasco Copper Corp. v. Knut Kaatsen, 187 F.2d 900 (2d Cir. 1951); St. Paul Fire and Marine Ins. Co. v. S.S. Republica de Venezuela, 105 F. Supp. 272 (S.D.N.Y. 1952). No case was found where, in absence of agreement, jurisdiction was declined in a controversy arising under the Carriage of Goods by Sea Act. But jurisdiction was declined, even in absence of such an agreement, in Galban Lobo Trading Co. v. The Diponegoro, 108 F. Supp. 741 (S.D.N.Y. 1952), involving a shipment between foreign countries. Cf. Bengochea v. Dampskib Selskabet Orient, 1 F. Supp. 934 (S.D.N.Y. 1931) (shipment from Siam to Cuba, on a Danish vessel; jurisdiction retained).

tions aiming, directly or indirectly, at relieving the carrier from liability for negligence are invalid.

3. Bills of lading covering carriage of goods between the ports of foreign countries, whether signatory or not of the Brussels Convention, are outside the scope of either the Harter Act or the Carriage of Goods by Sea Act. Such bills of lading are governed by the law selected by the parties, and, in absence of agreement, by the law of the place of contracting or of performance; clauses limiting the liability of the carrier for negligence will be given effect in such cases according to the applicable law.

4. The only deviation from the system envisaged by the Brussels Convention is made by the United States in connection with bills of lading issued in a signatory country for the carriage of goods to a country other than the United States. Such bills of lading should be subject to the convention as a matter of law. But since such cases are not an ordinary occurrence, and since the parties may incorporate the Brussels Convention by contract the American practice does not seriously impair the achievement of international uniformity.