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CONFLICT OF LAW PROBLEMS IN ADMIRALTY†

by
*Alan M. Sinclair**

I. INTRODUCTION

MANY of the conflict problems which once existed in the bill of lading field have now disappeared. Total extinction of such problems is, however, not yet present, and complete uniformity of interpretation of such instruments is not at this time foreseeable. It becomes necessary then to investigate the present problems in this field and in doing so an attempt will be made not only to list the difficulties but also to extract certain of them for closer observation both from an historical and a future base.

Perhaps it is best to begin with a study of one clause of a bill of lading and carry that through in a more or less chronological process. Only one is selected for a number of reasons: It is a clause which has had more influence on the move toward uniformity than any other; it is one which has continuing importance today; and, finally, it is one which is also at the seat of most of the case law arising presently. The clause chosen is the one by which the carrier attempts to exempt himself from any liability arising from damage to cargo caused by his or his agents' negligence.

In the early days of maritime carriage the common carrier was made absolutely responsible for the safe handling of the cargo. Absolute is not really a correct term as certain exceptions were allowed; for example, he was not responsible for loss caused by an Act of God, restraint of princes, public enemies, inherent vice, and that type of damage caused by the cargo owner himself. Certain other contractual exceptions were early imposed by the draftsmen of bills of lading.¹ The culminating point was reached when these draftsmen went so far as to include a clause exempting the carrier from liability for damage to cargo when such damage was caused by the carrier's own negligence. As Gilmore and Black state, "[T]he position of the carrier became, roughly speaking, the reverse of the one he had occupied under the general maritime law. Instead of being absolutely liable, irrespective of negligence, he enjoyed an exemption from li-

† This Article is the second of a two-part series. The first Article is presented in 15 Sw. L.J. 1 (1961).

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¹ For a short discussion, see Gilmore & Black, *Admiralty* 120-21 (1957).

ability, regardless of negligence, as wide as his bargaining position enabled him to contract for."²

The carrier received the fullest support from the English courts in that they uniformly upheld the validity of the negligence clause.³ The Federal courts in the United States⁴ struck down such clauses, usually on the basis of public policy.

It is the contention of the writer that while it is certainly true that conflict problems have been materially reduced by the Carriage of Goods by Sea Act⁵ (Cogsa) in the United States and similar acts and treaties in other maritime nations, there is still a large segment of the conflict field which has not been touched at all. This area is formed by three separate but inter-related pieces. In each of these three it is contended that uniformity has had little or no effect and that there is left for aid only the "ordinary" conflict of law rules of the various jurisdictions involved. It is hoped that after the three areas are listed and a study made of the choice of law rules available, a method will suggest itself for a voluntary movement toward uniformity of rules in these three areas, if not to some form of uniform convention or legislation.

First, while it is true that many of the maritime nations of the world have either ratified the Brussels Convention or at least enacted legislation similar to it (and in some cases, for example the United States and England, both have been done)⁶ some countries have not done anything concrete toward making uniform maritime law as it pertains to bills of lading. These countries are fairly well scattered around the globe, but a large bloc appears in Latin America where twenty Republics have not as yet made a move.⁷ Thus, we have the first category of conflict of law problems which are still present. As some nations have the uniformity which is desirable and others have not, this is one place where conflict seeds can take root. If there is a shipment from France to Argentina, interpretation as to validity of a negligence clause in a bill of lading covering such shipment will probably vary a great deal depending on a number of factors, not

² *Id.* at 121-22.

³ See, e.g., *Blackburn v. Liverpool, Brazil & River Plate Steam Nav. Co.*, (1902) 1 K.B. 290; *The Cressington*, (1891) P. 152.

⁴ *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889). It should be noted in passing that some state courts, notably in New York, were not so strongly moved on policy bases, and allowed such exonerative clauses. See *Rubens v. Ludgate Hill S.S. Co.*, 65 Hun 625, 20 N.Y. Supp. 481 (Sup. Ct. 1892).

⁵ 49 Stat. 1207-13 (1936), 46 U.S.C.A. §§ 1300-15 (1958).

⁶ Thirty-three countries ratified the Brussels Convention; many of these subsequently introduced its principles into domestic legislation. A complete conspectus appears in *Knauth, Ocean Bills of Lading 453-95* (1953).

⁷ *Id.* at 496, contains a list of countries which have not adopted the Hague Rules and the Brussels Convention.

the least of which is the different effects such a clause has in these two countries.

But this is only one facet of this first category and there are three parts or subdivisions in all. The second comes from the fact that even if all the remaining maritime nations of the world were to adopt the Brussels Convention, conflicts would still be present for there are differences in what many of the countries have adopted. That is, none of the countries which have adopted the Convention has done so verbatim. There are differences, mostly minor, a few of major importance, among the so-called uniform nations.⁸ One of the gravest problems stems from the fact that while the Brussels Convention itself provides that its provisions are to apply to all outward shipments only,⁹ and most of the countries ratifying the Convention have generally gone along with this pattern, three of the countries involved (in their enacting legislation it is true, but it is just as dangerous there) have provided that the rules are to apply not only to outward shipments, but to all inward shipments as well. The United States is one of these three,¹⁰ and many problems in the conflict of law field are formed by this provision. When a shipment is inbound to the United States from England and the forum which has to determine the validity of a negligence clause sits in some third country, *e.g.*, Chile, then the question becomes very difficult. The reverse situation, shipment inbound to England from the United States, same forum, presents equally disturbing problems, since British legislation applies only to outward shipments. More will be seen of this later, however.

The third subdivision of this first category comes from the fact that while some countries have ratified the Brussels Convention (and some of these have enacting legislation as well) a few countries¹¹ have only the legislation. When this is combined with the provision in French law, *e.g.*, that their rules will apply to all shipments originating in France as well as to shipments inbound to France from a country which is a signatory to the Convention (which Canada, *e.g.*, is not) then, while Canada has the rules in legislative form, as far as France is concerned "ordinary" conflict rules will probably decide the valid-

⁸ For example, the limit of liability provisions differ. Great Britain's is £ 100, while the United States' is \$500.00. For other figures and interesting comment that because of the \$500.00 figure in the United States, all cases that can possibly be sued upon in the United States are done so, see Knauth, *Renvoi and Other Conflicts in Transportation Law*, 49 Colum. L. Rev. 1, 14 (1949). The £ 100 figure was raised in 1950 to £ 200 by the British Maritime Law Association Agreement. See Hardy-Ivany, *Bills of Lading, Current Legal Problems 1959*, 209, 213.

⁹ Article 10, Brussels Convention, provides that it is to apply to "bills of lading issued in any of the contracting states."

¹⁰ The other two are the Philippines and Belgium.

¹¹ Canada, for example. See *Water Carriage of Goods Act*, Can. Rev. Stat. c. 291 (1952).

ity, in a French forum, of this negligence clause in a bill of lading issued in Canada.¹²

In summary of this first category, it may be appreciated that although uniformity in interpretation of clauses in ocean bills of lading has been largely achieved, large gaps still exist which conflict of law rules are going to have to fill, at least until complete uniformity is advanced by way of universal, identical adoption of a convention such as the Brussels Convention by all maritime nations. Such adoption must likewise be in the same fashion in all adopting countries, *i.e.*, ratification by all, legislation by all, or both by all. Such agreement is understandably hard to come by.¹³

The second area from which conflict problems may arise today is from an expected source, *viz.*, the validity of a negligence clause as it pertains to deck cargo, live animals, and cargo carried under a charterparty as contrasted with a bill of lading. The charterparty area will not be discussed in detail in this Article and it is merely mentioned here as a source of conflict problems.

Section 1301 (c) of Cogsa makes it very clear that deck cargo is not subject to this legislation. The Brussels Convention is followed exactly in this respect.¹⁴ If the Convention does not touch deck cargo, then it is obvious that the conflict of law problems are still possible as much as they ever were in this area.¹⁵

In the case of live animals, an area which has always received special attention due mainly to the problems inherent in transportation, once again Cogsa does not apply.¹⁶ Those meeting at the Brussels Convention had not seen fit to include live animals due mainly to the difficulty in legislating uniformly for problems which could differ so radically in various parts of the world.¹⁷ Hence the parties are free

¹² This will be covered later in this work, but references may now be had to Knauth, *op. cit.* supra note 6, at 160.

¹³ See chart, Appendix, *infra* p. 268.

¹⁴ Section 1 (c).

¹⁵ In the United States, as Cogsa does not apply to deck cargo, then the law as it existed prior to 1936 evidently does apply. Prior to 1936, the law applicable in this country to bills of lading was the Harter Act and it did cover deck cargo. However, by section 1311 of Cogsa, 49 Stat. 1212 (1936), 46 U.S.C.A. § 1311 (1958) (section 12, Brussels Convention) the Harter Act is expressly preserved but only for that period of time "prior to the time when the goods are loaded on or after the time they are discharged from the ship." Such being the case, deck cargo is still under the influence of the Harter Act but only during the period of time which can be described as before and after "tackle to tackle." During the voyage, then, the Harter Act does not apply to deck cargo and we saw above that Cogsa does not apply. It appears, therefore, that in the United States at least this is an area open to contractual freedom between the shipper and the carrier. It is of course possible for the parties to stipulate for Cogsa application to this type of cargo during the voyage and, according to Knauth, *op. cit.* supra note 6, at 236, this is the practice.

¹⁶ 49 Stat. 1208 (1936), 46 U.S.C.A. § 1301 (c) (1958).

¹⁷ Knauth, *op. cit.* supra note 6, at 237.

to contract between themselves as to what terms the carriage of animals will be subjected. The clause against liability for negligence is one of the "tools" which a carrier can use in his contractual bidding.¹⁸ The important thing for this work is that this is simply another chink in the uniform wall through which conflict problems can come.

Finally, in the second area, the United States Cogsca does not apply to shipments between foreign ports; and legislation in other countries has similar provisions. For example, if there is a shipment from Argentina to England and the validity of a negligence clause in the bill of lading covering that shipment is in question in a New York court, Cogsca has no sway in such court on this matter and reference will have to be made to conflict of law rules to decide its validity.¹⁹ (Public policy also has its place here.) It is perhaps here that theoretically most of the cases can arise; this is particularly true if the forum is in a country, like England, which has fewer restrictive ideas on the favorability of such a clause.

The third area from which one may find conflict of law problems arising is in the situation where there is a stipulation in the bill of lading for governing law and the court of the forum is willing to accept this agreed upon law. To illustrate: If there is a shipment from one country to another and both have adopted the Brussels Convention, then it would appear that no choice of law problem is present. However, when there is added to this the stipulation that all questions arising on this bill are to be interpreted according to the law in the place of shipment or perhaps in a third country, difficulties begin to arise. In the latter case, should the forum, supposing it to be in the country of destination of the shipment, allow such freedom of contracting to prevail? If it does allow such autonomy, then it is evident that a choice of law rule is born. The court of the forum now can apply the *lex loci destinationis*, *lex loci contractus*, or the law of state X, the third selected jurisdiction. Even if the selection is confined to

¹⁸ "Live animals . . . are received and carried at shipper's risk of accident or mortality, and the carrier shall not be liable for any loss or damage thereto arising or resulting from any matters mentioned in . . . Carriage of Goods by Sea Act . . ." Carver, *Carriage of Goods by Sea 158* (1952).

¹⁹ See Robinson, *Admiralty 548* (1939). It should be noted, however, that it is possible to have an application of Cogsca in a completely foreign fact situation where there has been an incorporation of the statute into the bill of lading. Such was the case in *The Edmund Fanning*, 1953 Am. Mar. Cas. 86 (2d Cir.), where a bill of lading covering a shipment from Germany to Korea contained as one of its terms the United States Cogsca. The district court held that according to the express words of the statute ("carriage of goods by sea to or from ports of the United States") it "does not apply to the shipment in suit . . . because . . . not shipped to or from a United States port . . ." 1952 Am. Mar. Cas. 1147, 1168 (S.D. N.Y.). On appeal, the court found that there was no public policy which prohibited such incorporation and stated conclusively that Cogsca may be applied to such a shipment.

one of the two primarily involved states—place of shipment or place of destination—and the forum is in one and the forum selected by the parties in the bill is in the other, there are still problems. If the forum declines to hear the case and adverts to the choice of parties, then a conflict problem has arisen because even if the two states have adopted the provisions of the Brussels Convention, as it was pointed out earlier, the adopted provisions may differ in some details.

The obvious answer to this possible problem is to disallow any stipulation which selects a forum and a governing law. The merit of such a suggestion deserves separate consideration and this will be attempted later. It should be noted here that a grave danger can exist in allowing such a stipulation in at least one instance. A recent case is illustrative of this point.²⁰

A shipment of cocoa beans was consigned to a party in Philadelphia on board a Swedish freighter, the shipment originating in Sweden. The vessel was lost at sea and the consignee filed a bill in New York for the loss. A clause in the bill of lading (which had been issued in Sweden) read as follows: "Any claim against the carrier arising under this bill of lading shall be decided according to Swedish law . . . and in the Swedish courts, to the jurisdiction of which the carrier submits himself." To this stipulation the district court gave effect and declined to take jurisdiction of the case. The court of appeals agreed with the lower court "that the jurisdictional agreement was not unreasonable and that the adherence of the parties to that agreement . . . should be given effect."²¹

The criticism of the decision in the case stems largely from an interpretative view of Cogsa, and in particular to section 3(8) thereof. By this section, any "lessening [of] such liability otherwise than as provided in this Act, shall be null and void and of no effect." It was contended that referral of the case to Sweden would possibly lessen the liability of the carrier. Of even more force is the argument that it is difficult to escape from the plain meaning and the clear purpose of section 13 of Cogsa 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." (Emphasis added.) It is clear that under the decision in the *Muller* case the application, which would appear to be mandatory, of Cogsa, is set aside in favor of a law which the

²⁰ *Muller & Co. v. Swedish Am. Line, Ltd.*, 1955 Am. Mar. Cas. 1687, 1688 (2d Cir.). It is interesting to note here that the Australian Sea-Carriage of Goods Act, 1924, § 9, disallows any stipulation which would oust the jurisdiction of the Australian courts in a case of shipment into or out of Australia. See, e.g., *Wilson v. Compagnie des Messageries Maritimes*, (1954) 2 Lloyd's List L.R. 544.

²¹ *Muller & Co. v. Swedish Am. Line, Ltd.*, supra note 20, at 1690.

parties themselves have selected. It is true, as Gilmore and Black have pointed out,²³ that Sweden has enacted the Hague Rules, but these differ in at least some respects from the American version as contained in Cogsca and the possibility of a "lessening" of the carrier's liability is a very real one.

From this case, which will be examined later in connection with the more detailed study of autonomy, another example of the possibilities which still exist for conflicts to arise is apparent. Before a deeper investigation of the solution of these problems is attempted, a brief collection of these "openings" will serve as a refresher.

It can now be said that conflict of law problems in the bills of lading field can arise from the following sources.

(1) Some countries do not have any uniform laws in relation to bills of lading; any problem involving only those states will probably have a conflict of law question closely entailed.

(2) If the matter involves two countries which have adopted the provisions of the Brussels Convention, conflicts are still possible because of the differences in what has been adopted.

(3) Any matter involving a country from (1) and a country from (2) is an area in which conflict of law problems can find root.

(4) If the forum is France or Sweden, then as to inbound shipments from a country which has not ratified the Brussels Convention, but has only the enacting legislation, France will apply her conflict of law rules rather than her, or another's, version of the Brussels Convention.

(5) Where the cargo consists of live animals, or is carried on the deck, the uniformity of conventions is forsaken and conflicts rules are still in operation.

(6) When a case arises in one country concerning a shipment between two other countries, the Brussels Convention and its enactments in the various countries have no effect and conflict of law rules must supplant.

(7) In that area where autonomy is evidenced by stipulation in the bill of lading for forum or law, the possibility has at least been evidenced of conflict rules coming into action.

II. CHOICE OF LAW PROBLEMS

As it is evident that conflict of law rules are going to play a fairly important role in maritime shipments, it becomes necessary now to seek out the possible choices which have been made in the past and

²³ Gilmore & Black, *op. cit.* supra note 1, at 125 n.23.

will presumably be available in the future. It will be well to remember here that we are discussing the validity in varying fora of the negligence clause as it appears in bills of lading. In order to completely exhaust this subject, it is necessary to study the possible choice of law rules available to any court to determine the validity of such clauses, in an attempt to illustrate the array and to show the unification which is possible and necessary.

A. *Lex Loci Contractus*

There is no doubt that the *lex loci contractus* has received wide recognition as a choice of law rule to govern validity of contracts. Many courts and many writers have selected this as the applicable law in contractual cases;²³ it becomes necessary then to ascertain how valid a selection it is in bill of lading situations.

The Restatement of The Conflict of Laws makes no pretense to adopt anything but the *lex loci contractus* rule in water carriage cases. Section 338 thereof reads as follows: "The law of the place of contracting determines the validity of a contract limiting the carrier's liability."

Instances of application of this rule in railroad bill of lading cases²⁴ are numerous but application to water carriage is another matter.

Professor Beale takes a similar stand in his treatise that the law of the place of contracting is the proper choice to make in order to determine the validity of a contract of carriage.²⁵ He cites, with his

²³ Besides the Restatement and Professor Beale which are looked at later, it might be mentioned that Professor Rabel appears in this instance, at first glance, to favor the place of making rule: "[C]ontracts of carriers are ordinarily subjected to the law of the place where the contract is made and the transport begins." Rabel, *Conflict of Laws* 452 (1947). (It is interesting to note that at times some emphasis has been placed on this dualistic treatment—place of making and place where shipment begins. An intensive coverage is contained in Annot., 72 A.L.R. 255 (1931)). However, Rabel's rationale explains that place of contracting even in these cases is not chosen solely for the reason that it is the place of contracting. Rabel, *op. cit. supra*, at 460. In the most recent admiralty text, Gilmore and Black state that "In actions against the carrier for negligent stowage or care of the goods during transit, conflict of laws principles would lead to the law of the jurisdiction in which the bill was issued." Gilmore & Black, *op. cit. supra* note 1, at 113. Not all writers are as adamant as Beale nor all judges as sure as Learned Hand about the applicability of the *lex loci contractus* rule. We shall see some of the judicial opinions in the text, *infra*; it should be noted here, however, that in the latest edition of Dicey the editors make an important differentiation between contracts for the carriage of passengers and contracts for the carriage of cargo. With reference to the latter, Dicey does say that "the *lex loci contractus* is not, generally, as such the proper law of the contract." Dicey, *Conflict of Laws* 830 (1958). Finally, Professor Leflar's text on conflicts, of recent origin as well, disagrees quite vehemently with Professor Beale and the Restatement and states succinctly its (the Restatement's) main difficulty in that "the Restatement's solution was that most of the American states were already committed to positions inconsistent with it." Leflar, *Conflict of Laws* 235 (1959).

²⁴ See, e.g., *Sasinowski v. Boston & M.R.R.*, 74 F.2d 628, 631 (1st Cir. 1935).

²⁵ 2 Beale, *Conflict of Laws* 1187 (1935).

usual thoroughness, some thirty-seven cases²⁶ which he maintains support his thoughts on the place of contracting rule. Of this number, many are railroad cases which do not concern us here; a few likewise must be disregarded as they are telegraph cases; the remainder, the water carriage cases, make up a group of seven cases. Of this number four²⁷ are passenger liability suits which are not applicable here; the remaining three now require attention.

In the first, *The Miguel di Larrinaga*,²⁸ machinery was shipped from Liverpool, England to Cuba. The bill of lading contained a negligence clause and damage resulted from negligent action. The forum was in the United States. The libelant, conceding that by the law of England a negligence clause was valid, proposed that the law of Cuba did not allow such clauses; as the law of Cuba was not known, it should be presumed to be the same as that in the United States, as the forum, and that the court should therefore hold the clause invalid. The court decided that such a presumption could not be made by virtue of a decision of the United States Supreme Court²⁹ although Hough, J. did suggest that another presumption—that a contract valid where made is valid everywhere—would override the presumption of similarity of law proposed by the libelant. He then goes on to say in regard to this latter presumption: "If there were no other line of reasoning presented, I should hold that the presumption just referred to overrode that relied upon by libelant."³⁰ The "other line of reasoning" is the decision of the United States Supreme Court in the *Cuba R.R.* case.³¹ It is a little difficult to find in the latter decision a categorical statement adopting the *lex loci contractus* rule. This is enforced somewhat in the headnote, the first statement of which reads: "A contract valid where made is valid everywhere, unless contrary to the public policy of the place of performance; . . ."³² Nowhere in the case is there any justification for such a statement; no mention of public policy or place of performance is to be found. In any event, such a statement, or at least the first few words of it—which is all that Judge Hough does put forth—is, in the final analysis, pure dictum. One may argue that this case stands for the rule that

²⁶ Id. at 1187 n.6.

²⁷ *Secoulsky v. Oceanic Steam Nav. Co.*, 223 Mass. 465, 112 N.E. 151 (1916); *O'Regan v. Cunard S.S. Co.*, 160 Mass. 356, 35 N.E. 1070 (1894); *Fonseca v. Cunard S.S. Co.*, 153 Mass. 553, 27 N.E. 665 (1891); *Drozinski v. Hamburg-Am. Line*, 193 Mo. App. 60, 181 S.W. 1164 (1916). The last-mentioned case should not really be included in Professor Beale's list of cases which exemplify the *lex loci contractus* rule as it is an application by the court of the law of the forum.

²⁸ 217 Fed. 678 (S.D. N.Y. 1914).

²⁹ *Cuba R.R. v. Crosby*, 222 U.S. 473 (1912).

³⁰ 217 Fed. 678, 679 (S.D. N.Y. 1914).

³¹ *Cuba R.R. v. Crosby*, 222 U.S. 473 (1912).

³² *The Miguel di Larrinaga*, 217 Fed. 678 (S.D. N.Y. 1914).

the *lex loci contractus* is the correct choice of law rule to govern validity of carriers' contracts, but it is believed that something more substantial will have to be found to put the argument on a secure basis.

The second case³³ concerns a shipment of goods from Italy to the United States. The bill of lading contained a limitation of liability, but not a negligence clause. The forum was in the United States. A stipulation in the bill called for application of English law to settle all disputes arising thereunder. Learned Hand, J. in his famous "bootstrapping" analysis of the autonomous phrase quickly disposes of it. We will have more to say on this later.³⁴ What is important here is that Hand decides that the validity of the limitation of liability clause is to be determined by the law of the place of contracting. There is no doubt that this case stands for the proposition under which Professor Beale quotes it, that the *lex loci contractus* is the correct law to determine the validity of clauses in a bill of lading. There is however one important phrase of Learned Hand's in the final paragraph of the decision which has apparently been completely overlooked and which might provide a bar to its use as a precedent in a case which involved not a limitation of liability clause but a pure negligence clause. The statement is this: "We might indeed have to refuse to give effect to the clause . . . if we disapproved the result too much, but that question does not arise. The limitation, if made here, would have been valid."

The question now becomes acute: would a negligence clause, in Learned Hand's mind, be such as to give a result of which he would disapprove too much? There is no doubt that it would, for, as he says in the last few words of the quotation, the limitation of liability would be valid if made in the United States, but most certainly the negligence clause would not have been.³⁵ The result therefore is inescapable: if a negligence clause had been in question in the *Gerli* case, it would not have been upheld simply because of a rule that it was valid where made and that law must apply. Once again then it may at least be supposed that this case is extremely limited in its scope, and valueless as a precedent for upholding the validity of a negligence clause in the United States because the clause was valid where the bill was drawn.

The final of the three cases which are claimed to support the *lex loci contractus* rule in water carriage cases contains one statement

³³ *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115 (2d Cir. 1931).

³⁴ See pp. 246-47 *infra*.

³⁵ See *Rubens v. Ludgate Hill S.S. Co.*, 65 Hun 625, 20 N.Y. Supp. 481 (Sup. Ct. 1892).

which, it is thought, destroys any significance that might at first be attached to it as a place of contracting instance: "The rule upon the subject is well settled, and has been often recognized by this court, that contracts are to be construed according to the laws of the state where made, unless it is presumed from their tenor, that they were entered into with a view to the laws of some other state."³⁶

It is true that the court found here that the parties did not intend the application of any other law but the place of shipment. It should be added, however, that it is difficult to conceive just how a weighing was accomplished in this case in line with the court's above-quoted introduction; and second, one must still ask: how valuable is the decision in this case as a precedent for a future *lex loci contractus* ruling when one considers the rule of the court, unvarnished as it is, and then considers the decision, based as it is on facts. The rule is a multi-purpose one; it should not be narrowed to a single-purpose one.

Perhaps the above discussion may be described as somewhat pica-yune, but it is hoped that the necessity and validity of this analysis will be apparent in the ensuing pages. It should now be obvious that what is being attempted is a destruction of the rule which adopts the law of the place of contracting as the correct choice of law to govern the validity of these negligence clauses. It is in fact the thesis of this writer that the choice is not a valid one and is one that has never, in water carriage of goods cases, received any real support from the judiciary. To substantiate this claim one need only read carefully the following cases proposed as embodying the selection; there are many and necessarily only a few can be discussed. It is hoped, however, that those selected are representative.

It seems rather odd that in nearly all of the cases mentioned in the following accumulation, preference is first expressed for the law of the place of making but the case is then decided on some other ground. Almost without exception, lip-service is paid to the *lex loci contractus* rule but it is not followed in the decision. The following examples will more fully portray this picture.

The first group of cases has been loosely termed a "public policy" group and a quotation from an article by R. H. Graveson will evidence the reason for this: "On the vital question of the law applicable to exemption clauses American courts, both before and since this legislation [Cogsa], have decided quite simply on grounds of public policy, . . ."³⁷

³⁶ Hale v. New Jersey Steam Nav. Co., 15 Conn. 539 (1843).

³⁷ Graveson, *Bills of Lading and the Unification of Maritime Law in the English Courts, The Conflict of Laws and International Contracts* (Summer Institute—1949, University of Michigan Law School) 65 (1951).

It will be seen that this is not a completely valid statement, for not all cases of this type are decided in American courts on the grounds of public policy; the remark is, however, pertinent for it leads into one group of cases which has as the basis for decision, public policy.

Probably the leading decision is *Straus & Co. v. Canadian Pac. Ry.*³⁸ The defendant carrier contracted by bill of lading to carry a cargo of silk from Shanghai to New York via ship to Vancouver and rail from there to its destination. All carriage was done by vehicles of the defendant. Upon arrival in Vancouver, some of the silk was missing, presumably lost on the sea-voyage. Suit was brought in New York for conversion. The defendant relied on the presence in the bill of lading of the negligence clause. There was, as well, a stipulation in the bill for the application of English law.

The New York Court of Appeals begins its decision by the familiar ritual of saying that "the validity of a contract is determined by the law of the jurisdiction where made, . . ."³⁹ There follows a painstaking search for New York public policy to enable the court to avoid this rule. The search succeeds and the court holds that the public policy of New York is opposed to the negligence clause. Accordingly, enforcement is prohibited in New York. There are a few remarks one could make about this case, *e.g.*, why would New York public policy be endangered in an instance where a negligence clause affects only a water shipment on the high seas some four thousand miles from New York,⁴⁰ particularly when the court admits that the Harter Act cannot apply to this case as it is a shipment between two foreign ports—Shanghai and Vancouver.⁴¹

The second case is of almost equal importance and is more authoritative because it is a decision of the Supreme Court of the United States.⁴² Here a shipment from Antwerp to New York was damaged due to the negligence of the carrier; and, after being sued in the United States, the latter relied upon a negligence clause. Once again the Court agreed that "as a general rule, . . . the *lex loci gov-*

³⁸ 254 N.Y. 407, 173 N.E. 564 (1930), noted, 16 Cornell L.Q. 380 (1930).

³⁹ *Straus & Co. v. Canadian Pac. Ry.*, *supra* note 38, at 414.

⁴⁰ The explanation that the shipment ended in New York is a little difficult to grasp as a support for an application of public policy to a matter that occurred so far from New York's boundaries.

⁴¹ This was the reason given for the decision disallowing the negligence clause in the lower court. 1930 Am. Mar. Cas. 18. If the Harter Act does not apply—which, assuredly, it does not—and as it is frequently referred to as expositive of the public policy of the United States in admiralty matters, how can public policy be involved here? It would be interesting to switch railroads in this case and have the CNR carry this silk after receiving it from the CPR vessel, the loss still occurring on the high seas and the suit in the New York forum.

⁴² *The Kensington*, 183 U.S. 263 (1901).

erns, . . ."⁴³ but then, after indicating that intention of the parties might be important as well, the Court remarked that "both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught."⁴⁴

Similarly, one might mention cases like *The Guildhall*,⁴⁵ *The Glenmavis*,⁴⁶ *Lewisohn v. National S.S. Co.*,⁴⁷ and *The Trinacria*,⁴⁸ among many others, that refer first to the *lex loci contractus* rule and then decide the case, invalidating the negligence clause, on grounds of public policy. This category, it will be remembered, is simply one of many in which the courts, while mentioning the primacy of the rule of the law of the place of making, have based their decisions on some other choice. It is not here attempted to prove that the *lex loci contractus* choice may not be made, but rather that it has not been made; if this leads one to believe that such a choice will not be made in the future, then the thesis of the writer will be borne out.

The majority of water carriage contract cases which turn on choice of law questions reduce themselves to a question of intention; that is, the courts will usually choose as the applicable law that which the parties have intended. This is done by the courts either by saying that the place of contracting is the correct choice as this is the law the parties intend (quite a different thing from starting at the other end by choosing the *lex loci contractus* because it is the correct choice of law rule, standing alone); by choosing the law of the place of performance for the same reason, *viz.*, intent; the law of the flag; or, by selecting a law which has no connection whatever with the contract.

Perhaps the best known case dealing with intent in this section is *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*⁴⁹ Although the decision would be the same today (but for vastly different reasons due to the enactment of the Harter Act); nevertheless, the principle as a conflict of law rule has not changed. Here, the Supreme Court of the United States once again referred first to the *lex loci contractus* as being the place of first resort. And they decided the case on an application of the *lex loci contractus*. What the Court said, however, is what is important, for they did not simply say that the law

⁴³ *Id.* at 269.

⁴⁴ *The Kensington*, 183 U.S. 263, 269 (1901).

⁴⁵ 58 Fed. 796 (S.D. N.Y. 1893).

⁴⁶ 69 Fed. 472 (E.D. Pa. 1895).

⁴⁷ 56 Fed. 602 (E.D. N.Y. 1893).

⁴⁸ 42 Fed. 863 (S.D. N.Y. 1890).

⁴⁹ 129 U.S. 397 (1889).

of the place of making—the United States—controls. The Court also said that the general rule is that a contract is to be governed by the law of the place where it is made unless the parties at the time of making have a different intention.⁵⁰ It would be thoughtless in the light of the addition of the intent factor to assume anything except that this case is decided on one ground: the parties intended at the time of making the contract to be governed by the law at the place where they entered into it, and this intention controls.⁵¹ If such was not the case, why does the Supreme Court even consider intention? Why not simply apply the general rule (place of making) and be done with it?

Again, if the case stood alone, one could possibly be persuaded that the *lex loci contractus* rule is applied without more. The problem is that there are many other cases in which the courts have picked the law of the place of making the contract as the applicable law on the theory that this is what the parties had intended, and not because it was the place where the contract was made. Reference to any or all of the cases in the following footnote will reveal this to be true.⁵²

Occasionally, too, the court will choose as the applicable law that of the place of performance. Some space will be taken with this choice as a separate topic a little later,⁵³ but it should be mentioned here that it sometimes happens that the court will again preface its solution by rendering lip service to the *lex loci contractus* choice and go on to say that if the parties intend differently, then the court will pay heed to this and in so doing choose the law of the place of performance as the correct law. For example, in the early English case of *Robinson v. Bland*⁵⁴ in which Lord Mansfield initiated this theory, at least for England, he stated that the *lex loci contractus* can never be the governing law if the parties had an express view to the law of another country—here the place of performance. In *The Brantford City*,⁵⁵ with a shipment from Boston to England, the court

⁵⁰ Id. at 458.

⁵¹ Professor Beale would appear to argue that this is the true ground upon which the case was decided. 2 Beale, op. cit. supra note 25, at 1188 n.1.

⁵² *The Fri*, 154 Fed. 333 (2d Cir. 1907), cert. denied, 210 U.S. 431 (1908); *The Henry B. Hyde*, 90 Fed. 114 (9th Cir. 1898); *The Hamildoc*, 1950 Am. Mar. Cas. 1973 (Canada); *The Niagara*, 1944 Am. Mar. Cas. 1307 (Canada); *The Skarp*, 1932 Am. Mar. Cas. 1301 (Canada).

⁵³ See pp. 226-30 infra.

⁵⁴ 2 Burr. 1077, 97 Eng. Rep. 717 (K.B. 1760).

⁵⁵ 29 Fed. 373 (S.D. N.Y. 1886).

held along similar lines for the place of performance, using Story's words⁵⁶ to bolster their position.⁵⁷

Finally, there have been some cases in which courts have expressed initially the value of the *lex loci contractus* rule, and then resorted to the overriding value of intent of the parties and have found this intent to refer to some body of law which is neither place of making nor place of performance. Often, reference has been made to a place having no necessary connection whatsoever. Hence, in the famous *Vita Food* case,⁵⁸ although counsel urged application of the *lex loci contractus*,⁵⁹ the court found the contract to be governed by English law because the parties had stipulated for such law. According to Lord Wright, who delivered the judgment, such expressed intention is difficult to avoid.⁶⁰ This case will be considered further when the intention of the parties as a separate choice of law rule is analyzed; it is mentioned here only as an instance of where the urging of an application of the law of the place of making of the contract is bypassed.

There are, then, a number of places one can select to escape from the *lex loci contractus* rule. We have seen that the courts will sometimes resort to public policy and sometimes to intention. Often, as well, there are applications of the law of the flag and the law of the place of performance.⁶¹ A brief look at each of these categories will complete this section.

In a leading encyclopedia of English law,⁶² one finds an indication

⁵⁶ "The presumed intent of the parties, however, is the basis of the common rule making the law of the place of performance govern, instead of the law of the place of execution of the contract (Story, *Confl. Laws* § 280;). . . ." *The Brantford City*, supra note 55, at 387.

⁵⁷ The English companion case to *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889), is *In re Missouri S.S. Co.*, (1889) 42 Ch. D. 321, where the court found on the intention factor once again, but here instead of the place of making having been intended by the parties as in the *Liverpool Steam Co.* case, they found an intention on the part of the parties to be bound by the law of the place of performance. Putting aside the charge some make of predilection for the application of English law on the part of English courts, this case serves as an example of intention for the place of performance which the courts have been able to find.

⁵⁸ *Vita Food Products, Inc. v. Unus Shipping Co.*, (1939) A.C. 277 (P.C. N.S.).

⁵⁹ *Id.* at 281.

⁶⁰ *Vita Food Products, Inc. v. Unus Shipping Co.*, (1939) A.C. 277, 290 (P.C. N.S.).

⁶¹ Place of performance, that is, as a distinct choice of law rule and not place of performance because that is what the parties intended. It should be mentioned here that this section is concerned solely with one available choice of law rule—*lex loci contractus*—and while more detailed treatment of the law of the place of performance, the law intended by the parties, and the law of the flag as choice of law rules standing alone will be undertaken in the following sections, they are here being brought forth as examples only of those instances in which the court has before it the *lex loci contractus* problems and chooses to disregard it for some other available choices.

⁶² 1 *Encyclopedia of the Laws of England* 251-53 (1937).

of another place in which the *lex loci contractus* is set aside. It is there stated that:

In contracts of affreightment a different rule is followed from that in ordinary commercial contracts on this point. In the latter, the general rule is that the law of the place where the contract was made (*lex loci contractus*) governs the contract, or, if the contract is made in one country but is to be performed in another, the law of the place of performance decides its effect. With regard to contracts of sea carriage, on the other hand, if they contain nothing to show, either expressly or by implication, what law they intend to adopt, the established rule is that the law of the flag under which the ship sails determines the nature of the shipowner's liability.

In the light of this statement, three representative cases are now presented for observation; one is Canadian, one English, and the last, American.

In the Canadian case,⁶³ shipment originated in the United States to proceed to Canada on an American vessel. The forum was Canada. The court decided that the contract was to be interpreted according to the law of the United States. Mr. Justice Duff so decided because that was the law of the flag.⁶⁴ The remainder of the court reached the same decision but it is difficult to ascertain if they did so because it was the *lex loci contractus*, or because that is where the majority of the performance was to take place. It makes no difference, however, as all these places were in America. What is important in the decision is that the court found the intention of the parties controlling and in the absence of any other indications they must have intended to be governed by the law of the flag, "and not, as in other contracts, by the *lex loci contractus*."⁶⁵

In *Moore v. Harris*,⁶⁶ the Judicial Committee of the Privy Council decided that the contract covering a shipment of tea from England to Canada was to be governed by the law of England as it was made in England by the master of an English ship and the Council cited as authority the leading English case on law of the flag, *Lloyd v. Guibert*.⁶⁷

In the final case, *The Titania*,⁶⁸ shipment was made in England to the United States and the forum was in the latter country. The District Court for the Southern District of New York said this about the controlling law: "The shipment being made in England, and on

⁶³ *Richardson v. "Burlington"*, (1930) 4 D.L.R. 527.

⁶⁴ *Id.* at 528.

⁶⁵ *Richardson v. "Burlington"*, (1930) 4 D.L.R. 527.

⁶⁶ (1876) 1 A.C. 318 (P.C. Can.).

⁶⁷ 6 B. & S. 100, 122 Eng. Rep. 1134 (Q.B. 1865).

⁶⁸ 19 Fed. 101 (S.D. N.Y. 1883).

an English vessel, the law of the flag governs." *Lloyd v. Guibert*⁶⁹ was again given as a precedent; and thus one can assume that more reliance may be placed on the latter half of the statement than on the former, *i.e.*, that the law of the flag is the governing law and the place of shipment (which must be the place of making of the contract) is of no moment.

From these three cases one can conclude that here also is an avenue down which the courts can turn to escape the rigors of the *lex loci contractus* doctrine. Once again, it bears repeating that this is another instance in which the *lex loci contractus* rule was considered but not followed. A look at the final facet—place of performance—and a short summary is now in order.

The case of *Louis-Dreyfuss v. Paterson S.S. Ltd.*,⁷⁰ is in point for this discussion. There, a shipment of grain was sent from a port in the United States to a port in Canada for transshipment to another Canadian port. After transshipment, the vessel was stranded in Canadian waters with resulting damage to the cargo. The shipper brought suit in the United States and the real issue in the case was whether the court should apply Canadian or American law to determine liability.

Mr. Justice Hand began with the statement that it is a well-settled rule that the validity of a provision in a bill of lading which limits the carrier's common-law duty is to be determined by the law of the place where the contract was made. For this the learned Judge cited *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*,⁷¹ and the Restatement of the Conflict of Laws, section 338.⁷² He then continued by remarking that another well-settled rule provides that as to matters of performance, the law of the place of performance controls.

Now consider the problem of the place of a negligence clause in such a judgment. In the *Dreyfuss* case there was no such clause in the bill of lading, but this does not by any means make the case valueless in a negligence clause set of facts. Consider one more statement by Learned Hand in this case and then superimpose his statements on a negligence clause case. The statement is this: "All we need say here is that the same law which determines what liabilities shall arise upon nonperformance, must determine any excuses for

⁶⁹ 6 B. & S. 100, 122 Eng. Rep. 1134 (Q.B. 1865).

⁷⁰ 43 F.2d 824 (2d Cir. 1930).

⁷¹ 129 U.S. 397 (1889).

⁷² See p. 214 *supra*.

nonperformance, which are no more than exceptions to those liabilities."⁷³

If we imagine for a moment the same fact situation as in the *Dreyfuss* case but with a negligence clause in the bill of lading, what effect would these three statements of Mr. Justice Hand's have? First, if the announced rule that the *lex loci contractus* determines the validity of a negligence clause were applied, the clause would be held invalid; the contract being made in the United States, that law would so decide. Second, applying the rule that the law of the place of performance controls as to matters of performance, we must ask if the negligence clause can be considered to fall within the performance category. It is here that Judge Hand's third statement comes into play, for one must deduce from it that as a negligence clause is certainly an excuse for nonperformance, the law of the place of performance must bring it into play and rule on its validity. One writer disagrees with Judge Hand in this respect and claims that it is a *non sequitur* to say that since the law of the place of performance governs as to matters of performance, it must also determine what excuses nonperformance.⁷⁴ The present writer cannot agree with this claim of a *non sequitur* and proposes instead that in this matter at least Judge Hand is correct, *i.e.*, the same law which determines liability for nonperformance should as well determine any excuse for nonperformance; the two concepts are too closely linked to separate, and even as a practical matter separation would be unfortunate.

What picture does the superimposition of Judge Hand's statements present? One hesitates to portray confusion but it is almost inescapable that in the reasoning of the case an apparent dichotomy is revealed. On the one hand, a rule is presented for a negligence clause (which, of course, is dictum) that adopts the *lex loci contractus*; on the other, a rule is presented for this case (which does not have within its facts a negligence clause) that adopts the *lex loci solutionis*. This, standing alone, is not too difficult; what is obscure is just why, if there had been a negligence clause, Mr. Justice Hand would have used the *lex loci contractus*, and since there was not, why he used the law of the place of performance, because he states very plainly that an excuse for nonperformance is to be subjected to the law of the place of performance. Certainly a negligence clause is nothing but an excuse for nonperformance.

One can only conclude that here it is doubtful if the *lex loci*

⁷³ *Louis-Dreyfuss v. Paterson S.S. Ltd.*, 43 F.2d 824, 826 (2d Cir. 1930).

⁷⁴ Note, 26 Ill. L. Rev. 441 (1931).

contractus would have been the answer, if the *Dreyfuss* case had had within its facts a negligence clause. One can not state categorically that if there had been such a clause, Mr. Justice Hand would have used the law of the place of performance to hold it valid; such is too shaky a base on which to build. It is a case, however, which disturbs somewhat the rigidity of the *lex loci contractus* rule in some quarters, and perhaps it may serve as an indication of another instance in which that choice of law rule is not truly the correct one. This conclusion is emphasized when one considers a later case which relied on the *Dreyfuss* case in its holding. In *Bank of California v. International Mercantile Marine Co.*,⁷⁵ a case concerning a shipment of goods from the United States to Germany, the court decided that a clause in a bill of lading relating to misdelivery (not a negligence clause, but one analogous thereto) was a clause having to do with nonperformance and hence was to be determined by the law of the place of performance, Germany. The court relied exclusively on the *Dreyfuss* case.⁷⁶ It should also be noted, to align this case with the topic under discussion (instances in which a bow is made to *lex loci contractus* but a decision is based on *lex loci solutionis*), that the court first mentioned that, "Questions of interpretation or initial validity of the terms of the bill of lading are governed by the law of the place where the bill of lading is issued, but questions relating to the performance or breach and its effect are governed by the law of the place of performance."⁷⁷

In summary, it has been shown that while many references have been made to the *lex loci contractus* as the controlling law in many cases, in none has there been any actual adoption of such law on the sole basis that that is where the contract was made. Such being the case, might it not be posited that in water carriage cases where a bill of lading having a negligence clause is up for study, some other choice of law rule must be chosen if we are to reach the desired end, *i.e.*, a measure of uniformity in maritime commerce? A word should be added with respect to the well-worn criticisms of the place of making as a choice of law rule, *e.g.*, that it is accidental at times and at other times difficult to find. There are so many well-known critiques that they need no elucidation and reference to words written some eighty years ago by one of the finest Continental writers on private international law, Savigny,⁷⁸ is sufficient.

⁷⁵ 64 F.2d 97 (2d Cir.), cert. denied, 290 U.S. 649 (1933).

⁷⁶ *Id.* at 98.

⁷⁷ *Bank of California v. International Mercantile Marine Co.*, 64 F.2d 97, 98 (2d Cir.), cert. denied, 290 U.S. 649 (1933).

⁷⁸ The section is too lengthy to quote here but reference to the following citation will prove helpful. Savigny, *Private International Law* 198 (1869).

It is frequently too easy to fall back on the set patterns of available choice of law rules, although there is no doubt but that some of these—*lex loci contractus* included—are valuable in some areas of the law. In the field of admiralty law, however, where strides have been made toward uniformity in such a large part, we should not be lax and allow application because of facility; continuity and uniformity combined with rationality and logic are too important and necessary to brush aside. In this connection, Professor Rabel's words become even more apt as he remarks, "[W]e definitely have to abandon the ancient scholastic tests, such as the law of the place of contracting or the law of the place of performance."⁷⁹

B. *Lex Loci Solutionis*

As Rabel has indicated that he feels the law of the place of performance is not a satisfactory choice of law rule along with the law of the place of making, this becomes a proper place in which to investigate the former as a possible choice in cases where a negligence clause is included in a bill of lading and its validity is being questioned. We ask then: What part has the *lex loci solutionis* played and of what value will it be in our search for uniformity?

There can be no question here that the law of the place of performance has been used many times to decide upon the validity and interpretation of contracts generally.⁸⁰ One of the first proponents of the place of performance rule was Story and his rule has already been observed.⁸¹ It should be noted that Story's rule is that first resort is to be had to the place of making but if performance is to be had in another place, the contract is to be governed by the law of the place of performance. His rule is in some respects a subsidiary one,⁸² but in its major aspect it is a fundamental rule. That is, if a particular fact situation is presented—a contract is concluded in X country to be performed in Y country—Story would then say that the contract is to be governed by the law of the place of performance. The really important words of Story, however, are frequently omitted in statements of this familiar doctrine. These words are contained within section 280 of his work and should be here noted: "But where the contract is either expressly or tacitly to be performed in any other place, there the general rule is, *in conformity to the presumed intention of the parties . . .*" then the law of that place, as the place of performance, controls. (Emphasis

⁷⁹ Rabel, *Conflict of Laws* 127, 130 (1947).

⁸⁰ *Ibid.*

⁸¹ See pp. 220-21 *supra* and note 56 *supra*.

⁸² Rabel, *op. cit. supra* note 79, at 463.

added.) Then is it more important that the place of performance be chosen as the governing law because it is a different place from that where the contract was concluded, or that the place of performance be chosen because that, presumably, is in accordance with the intent of the parties? There should be no doubt of the overwhelming logic in favor of the latter. If such is the case, and this is the contention of this writer, then could we not say here (as we did in the preceding discussion of the *lex loci contractus* rule) that while an application of the *lex loci solutionis* may be made, what is really being used by the courts is not a choice on geographical grounds, but a choice based purely on intention? It is one thing to select the place of performance because that is where the contract is to be performed; it is another to select it as the place the parties intended. If we can find then, in the actual decisions of the courts, that they are using the *lex loci solutionis* from the intention base and not from a geographical base, we must agree with Rabel in his admonition to abandon the scholastic tests of law of the place of contracting and law of the place of performance.

Leaving aside the familiar arguments that the law of the place of performance is imperfect in instances where there is more than one place of performance, or where none is stated or even known at the time the contract is concluded,⁸³ and concentrating on the proposed thesis (that place of performance when it is chosen in maritime cases is chosen only because the parties have so intended) a few representative cases will be discussed.

An intensive search has been made in the law reports of England, Canada, and the United States and from this search one distinguishing feature emerges: The number of cases which have been decided in which the *lex loci solutionis* was used as a choice of applicable law in water carriage of goods instances is exceedingly small. While there are quite a few cases which have been decided using the law of the place of performance,⁸⁴ on the question of water carriage cases which are restricted to cargo as distinguished from passenger cases, the number becomes hardly worthy of note. In fact, only four cases have been found which applied the law of the place of performance, and only two of these were concerned with the validity of a negligence clause.

In a classic case, *In re Missouri S.S. Co.*,⁸⁵ shipment was made from Massachusetts to England on a British vessel. The contract, made

⁸³ See Wolff, *Private International Law* 433 (2d ed. 1950).

⁸⁴ 2 Beale, *Conflict of Laws* 1086-174, 1188, 1267 (1935).

⁸⁵ (1889) 42 Ch. D. 321.

in Boston between an American and a British company, contained the familiar negligence clause which was valid in England but invalid in Massachusetts. The cargo having been lost by virtue of the negligence of the carrier's agents, suit was brought in England and the negligence clause entered the picture as the controlling factor. The Court of Appeal decided that the law to be applied was English law partly, it is true, because "England was the place to which the goods were to be brought and the place at which the final completion of the contract was to take place; . . ."⁸⁶ but mainly because this was one of many factors which indicated an intention on the part of the parties to be bound by English law. Thus, although one may say that this case upholds the validity of the negligence clause on an application of the *lex loci solutionis*, the true meaning of the case is that a contract, as to its validity, is to be governed by that law which the parties intend. No other interpretation is possible. It is true that many English cases⁸⁷ have applied such reasoning to contract cases and this is merely illustrative of the class: it does stand alone, however, in its unique position placed as it is alongside the *Liverpool* case which we examined earlier.⁸⁸ The writer has not found any case however (and this is what the *Missouri* case illustrates so well by illuminating the true judicial attitude in England) which applied the *lex loci solutionis* simply because there was a place of performance different from the place of contracting; rather that law was applied because such was intended by the parties. The prime consideration then is intent and not place; subjective and not objective. We will see that this is particularly apparent in English law, and while intention has not had extensive application in the United States, a place for it does exist as will be seen by a brief reference to the three cases mentioned earlier.

Toward the end of the twentieth century, a shipment of cattle was made from Baltimore to Liverpool, England and a stipulation was contained in the bill of lading for English law⁸⁹ and, once again, a negligence clause was included. This time the forum was in the United States, but the result was the same as in the *Missouri* decision, *viz.*, the law of England was chosen as the applicable law.⁹⁰ This time, however, we have a case much more illustrative of the point to be made, *i.e.*, here, the court quoted Story and his rule 280,

⁸⁶ *Id.* at 431.

⁸⁷ *E.g.*, *Hamlyn & Co. v. Talisker Distillery*, (1894) A.C. 202 (Scot.); *The Njegas*, (1936) P. 90; *Kremezi v. Ridway*, (1949) 1 All E.R. 662 (K. B.).

⁸⁸ See pp. 219-20 *supra*.

⁸⁹ Which, if the forum had been in England, would no doubt have been decisive.

⁹⁰ *The Oranmore*, 24 Fed. 922, 927 (D. Md. 1885).

and used the following words from a Supreme Court case as a guide: "The law of the place where the contract is made is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere, in which case it is to be governed according to the law where it is to be executed."⁹¹ The case was finally decided by choosing the applicable law based on the intent of the parties.⁹²

The final two cases which must be considered are closely connected, one following from the other. Both were mentioned earlier⁹³ in the discussion of the *lex loci contractus* rule and both have chosen the law of the place of performance as the applicable law to govern excuses for nonperformance. As the *Bank of California* case follows the *Louis-Dreyfuss* case, it is thought that if the latter can be explained, the former will likewise occupy the same position.

It will be remembered that an apparent dichotomy was revealed in Learned Hand's judgment in the *Dreyfuss* case where he, in dictum, declared that if a negligence clause had been included in the bill of lading, such would fall under the aegis of the *lex loci contractus*, but as none was involved the *lex loci solutionis* was applied since the case was concerned with an excuse for nonperformance.

Is it possible to find in Mr. Justice Hand's opinion any indication that he selected the law of the place of performance on the basis of some real or presumed intent of the parties, so that the thesis of the present writer may be continued and reinforced? The answer is no, and the Justice puts this to rest quickly, but he does admit that selection of the *lex loci solutionis* by the parties has been made in other cases.⁹⁴ While one may accept the dictum of Learned Hand that a negligence clause will be controlled as to its validity by the *lex loci contractus*, difficulty is encountered if it is conceded that a negligence clause is an excuse for nonperformance, for Mr. Justice Hand would, apparently, then say this is for the *lex loci solutionis*. We are left then with a case which impedes the theory of intention,

⁹¹ Ibid. Quoted from *Cox v. United States*, 31 U.S. (6 Pet.) 172, 203 (1832).

⁹² "It seems, however, quite generally conceded that the question is to be determined by arriving at the intent of the parties to the contract, where that is possible." *The Oranmore*, 24 Fed. 922, 927 (D. Md. 1885).

⁹³ *Bank of California v. International Mercantile Marine Co.*, 64 F.2d 97 (2d Cir.), cert. denied, 290 U.S. 649 (1933); *Louis-Dreyfuss v. Paterson S.S., Ltd.*, 43 F.2d 824 (2d Cir. 1930).

⁹⁴ "Courts which have insisted that the parties must be found in some way to have selected foreign law to control their rights, have so reasoned as to the law of the place of performance. We think that the imputation of any such intent is a fiction . . . But the parties cannot select the law which shall control, . . ." *Louis-Dreyfuss v. Paterson S.S., Ltd.*, supra note 93, at 827. Cf. however a subsequent case which cites the *Dreyfuss* case and then goes on to decide the case on intent. See *Chinchilla v. Foreign Tankship Corp.*, 1949 Am. Mar. Cas. 2104, 2108.

but because of the difficulty presented by the reasoning in this opinion, the fact that it is dictum, and the presence of the much larger class of cases which have not seen fit to follow the reasoning of the judgment,⁹⁵ the case is not overly persuasive.

With the caveat of the *Louis-Dreyfuss* case in mind one can quickly dispose of the law of the place of performance as a choice of law rule available in these cases, for the *lex loci solutionis* is not a choice which has proved popular in water carriage of goods cases. It bears mentioning, as well, that in the minds of some writers, *lex loci solutionis* is not a popular choice in any case.⁹⁶ The present writer cannot go quite that far, but in the very limited sphere under study—water carriage of goods cases involving bills of lading—he is convinced that no place exists for the law of the place of performance as a choice of law rule to determine the validity of negligence clauses.

C. Law Of The Flag⁹⁷

While the two choices already considered are general choice of law rules open to any type of contractual agreement, the choice of the law of the flag is, of course, peculiar to admiralty matters. It would seem to follow that if any one choice of law rule is to predominate, this would be it. It has many apparent advantages, e.g., certainty and predictability, that the two previous choice of law rules did not have; and, as for its acceptance as a choice of applicable law, while it has not received the widespread attention of *lex loci contractus* or *lex loci solutionis*, it nevertheless puts in an appearance in a number of cases. However, the seemingly all-pervading influence of the intention factor has made its presence felt, and the task again is to determine whether the law of the flag can stand alone, whether it can be objectively applied simply because it is the law of the flag, or whether it has been and will be subjectively applied because that is what the parties intended. A consideration of the cases reveals the answer in no obscure fashion.

The leading English case is *Lloyd v. Guibert*.⁹⁸ Although it is a charterparty case, the principle remains the same where a bill of lading is in issue, and accordingly the case provides an acceptable

⁹⁵ In a following section, dealing with cases in which the courts have applied that law which the parties intended, appear many instances wherein the opportunity could have been seized to favor the decision in the *Louis-Dreyfuss* case; aside from the *Bank of California v. International Mercantile Marine Co.*, 64 F.2d 97 (2d Cir.), cert. denied, 290 U.S. 649 (1933), (which, remember, was not a negligence clause case, either) there is none.

⁹⁶ See particularly, Morris, *The Eclipse of the Lex Loci Solutionis—A Fallacy Exploded*, 6 Vand. L. Rev. 505 (1952).

⁹⁷ For a discussion on the meaning of the term "law of the flag" see Dicey, *Conflict of Laws* 822-23 (1958).

⁹⁸ (1865) L.R. 1 Q.B. 115.

introduction. A shipment was to be made on a French vessel from Haiti to England. Damaged by high seas, the vessel was forced to put into Fayal, a Portuguese port, and, in order to effectuate repairs, the master borrowed money on a bottomry bond, executed on ship, cargo, and freight. In England, after the vessel arrived, the ship and freight could not bear the burden of the bond, and the cargo owned by the plaintiff was called in. The plaintiff then claimed indemnification. Under French law he had no chance of recovery because the liability there for a shipowner ended with the freight and the vessel. Under Portuguese or English law indemnity in such an instance was permitted. Which law was to apply? Both the Queens Bench Division and the Exchequer Chamber decided upon the law of France as it was the law of the flag. Thus, on the decision standing alone, one can say that the law of the flag is a choice of law rule which may be used in bill of lading cases to decide upon the validity of clauses in such bills. This, to this writer, is not an irrational extension of the rule in *Lloyd v. Guibert*. Closer investigation of the reasoning behind the choice of law of the flag reveals some interesting thoughts by the learned judges; Willes, J. in particular provides the real *ratio decidendi* when he observes that "the rights of the parties to a contract are to be judged by that law by which they intended, or rather by which they may justly be presumed, to have bound themselves. We must apply this test successively to the various laws which have been suggested as applicable."⁹⁹ Willes, J. then caps the decision by laying down what he refers to as a "general rule," that "where the contract of affreightment does not provide otherwise . . . the law of the ship should govern [and this is] not only in accordance with the probable intention of the parties, but also most convenient to those engaged in commerce."¹⁰⁰

A distinction is suggested by the facts in *Lloyd v. Guibert*. As that case deals with the authority of a master in a foreign port to pledge the ship, and is concerned with the governing law of such a transaction, those cases which fall into approximately the same fact pattern may be placed in one category, while those which deal with the validity of clauses in a bill of lading may be placed in another. The reason behind this division will become apparent shortly. To glance quickly at three cases coming after *Lloyd v. Guibert* and in the first category, *i.e.*, having similar facts to that case, we find that in 1869, a shipment was enroute from the United States to England; the vessel put in at Bermuda for repairs and, once again, a bottomry

⁹⁹ Id. at 123.

¹⁰⁰ *Lloyd v. Guibert*, (1865) L.R. 1 Q.B. 115.

bond was involved.¹⁰¹ The court applied the law of the flag on the same basis—intention—as did the court in *Lloyd v. Guibert*. Similarly, in *The Gaetano and Maria*,¹⁰² shipment was on an Italian vessel to England, bottomry in Portugal, and the law of the flag was applied for the same reason. Also, in *The August*,¹⁰³ involving a shipment from Singapore to England on a German vessel, when the master sold the cargo of pepper in an intermediate port it was decided that he was acting correctly and in accordance with the law of the flag and no liability resulted.

This category, headed by *Lloyd v. Guibert*, in which masters' authority is being questioned, is typified by that decision, applying as it does the law of the flag. The rationale behind such an application should not be put aside, however; it forms the real "reason for deciding" the case.

In the second category, which is much more pertinent to this work since it involves cases wherein some clause in the bill of lading is in question and deals with the problems of applicable law, a number of cases form the background for a different manner of thinking. One of the earliest cases,¹⁰⁴ involving an insurance clause in a bill of lading covering a shipment from England to Canada, provides an analogous situation to a negligence clause set of facts and there the English court decided that "the bill of lading, having been made in England by the master of an English ship, is a contract to be governed and interpreted by English law. . . ."¹⁰⁵ While it is true that intention does not expressly enter into the court's decision, the citation of *Lloyd v. Guibert* as the case upon which the court relied in reaching such a decision is thought to be important. Two cases in 1883 take us further along the road to final formulation of a thesis. One¹⁰⁶ is an insurance clause case as was *Moore v. Harris* and, using *Lloyd v. Guibert*, reaches the same position as *Moore v. Harris*. It is included here because it is an American case and provides a more complete picture of the reasoning of the times. The second¹⁰⁷ is again an English case but is more concerned with the immediate problem, for it concerns a bill of lading that does contain a negligence clause and is one of the strongest cases in the chain. A claim was advanced that the law of the flag should be applied to determine the validity of this

¹⁰¹ *Droege & Co. v. Stuart & Simpson*, (1869) L.R. 2 P.C. 505.

¹⁰² (1882) 7 P.D. 137.

¹⁰³ (1891) P. 328.

¹⁰⁴ *Moore v. Harris*, (1876) 1 A.C. 318 (P.C. Can.).

¹⁰⁵ *Id.* at 331.

¹⁰⁶ *The Titania*, 19 Fed. 101 (S.D. N.Y. 1883).

¹⁰⁷ *Chartered Mercantile Bank of India v. Netherlands India St. Nav. Co.*, (1883) 10 Q.B.D. 521.

clause, but the court denied this and in so doing directed itself solely to a search for the intention of the parties.¹⁰⁸ It will be noticed from the quotation taken from the decision, set forth in the footnote below, that the place given to the law of the flag is that of a presumption; and if looking at the circumstances surrounding the case one can ascertain sufficient intention to have some other law apply, then the presumption will be rebutted. It is then apparent that if the search for the facts does not reveal such an intention, the presumption will prevail and the law of the flag will be the governing law. Is it now possible to say that intention must be found to rebut the prima facie presumption of the law of the flag and if none appears, application of that law will follow? If the affirmative is forthcoming, then it can be claimed that the law of the flag is being applied objectively and not because the parties intend such, contrary to the thesis of the writer. Investigation of subsequent cases is revealing on this point.

In an American case of 1886,¹⁰⁹ the court expressly repudiated the law of the flag as controlling the validity of a negligence clause in a bill of lading saying such a theory is "but a concise phrase to express a simple fact, namely, the law of the country to which the ship belongs, and whose flag she bears. . . ."¹¹⁰ Basing the choice of applicable law on another ground, the court remarked that "the most frequent and controlling reasons are the actual or presumed intent of the parties. . . ."¹¹¹ Notice that there is no mention of a presumption for the law of the flag, but simply a resolution based on intention. Similarly, an English decision¹¹² a few years later held that while the flag of the vessel was a fact to be taken into account, to reach intention, reliance must be placed on all facts taken together.¹¹³ It is interesting to note here that the lower court had decided that the law of the flag should be the presumed law unless the parties had intended otherwise, as in the *Chartered Mercantile Bank* case. A con-

¹⁰⁸ Id. at 529:

"It is true the bill of lading was given by the captain of a ship which . . . carried the Dutch flag; and it was suggested that on that account the contract must be considered as a Dutch contract . . . it seems to me that the contract is nevertheless English. It may be true in one sense to say that where the ship carries the flag of a particular country, prima facie the contract made by the captain of that ship is a contract made according to the law of the country whose flag the ship carries. But that is not conclusive. The question what the contract is, and by what rule it is to be construed, is a question of the intention of the parties, and one must look at all the circumstances and gather from them what was the intention of the parties."

¹⁰⁹ *The Brantford City*, 29 Fed. 373 (S.D. N.Y. 1886).

¹¹⁰ Id. at 383.

¹¹¹ *The Brantford City*, 29 Fed. 373, 384 (S.D. N.Y. 1886).

¹¹² *The Industrie*, (1894) P. 58.

¹¹³ Id. at 73.

tinuance is had then of the analysis of *The Brantford City* case, *viz.*, intention is to be looked at from the beginning without the intervention of a presumption in favor of the law of the flag.

This analysis is furthered in a case which takes us into the twentieth century;¹¹⁴ although counsel urged application of the law of the flag to clauses in a charter-party,¹¹⁵ the court decided English law was the correct choice solely because of the intention of the parties, which once again was gathered from the facts presented.

Mention should be made of the analysis of a noted author. The rule as stated by the editors of Dicey may be summarized thusly: The proper law of the contract of affreightment is controlling as to validity of the contract, and if one can ascertain from the surrounding circumstances what the intention of the parties was, this is the proper law; lacking such finding, "the law of the flag is the proper law of the contract."¹¹⁶ The comment to this rule proves most enlightening, for it states that the law of the flag as the proper law in the absence of intention to the contrary does not appear in "any modern decision . . . as the decisive factor in selecting the law applicable to a contract made before the commencement of the voyage. . . ."¹¹⁷ Close attention to the last few words is cautioned, for the editors do regard contracts made by the master as subject to the initially postulated rule. That is, in cases which fall into the first category set up herein, the law of the flag can be used of its own force unless intention of the contracting parties can be found to the contrary. Thus, if a master burdens his vessel and freight and the cargo of the shipper with a bottomry bond at some intermediate stage of the voyage for example, according to Dicey's rule this kind of case may be subject to the presumption of the application of the law of the flag.¹¹⁸ With this thesis the present writer has no real quarrel, and agrees wholeheartedly with Dicey that in all other cases the law of the flag not only in modern cases has not had any application by itself, but as a guide for the future it is not an acceptable choice. Only intention yields the applicable law.

A brief look now at a few modern cases and it will be seen how this thesis fares. While the English case of *The Torni*¹¹⁹ has been criticized and has probably been overruled on other grounds than

¹¹⁴ *Aktienelskap August Freuchen v. Steel Hansen*, (1919) 1 Lloyd's List L.R. 393.

¹¹⁵ *Id.* at 396 (which would have been Norwegian law).

¹¹⁶ Dicey, *op. cit.* *supra* note 97, at 823.

¹¹⁷ *Id.* at 825.

¹¹⁸ On this point, see as well, Graveson, *The Conflict of Laws* 199 (3d ed. 1955); Scrutton, *Charterparties* 25 (1955); Wolff, *Private International Law* 435 (2d ed. 1950).

¹¹⁹ (1932) P. 27.

those in which we are here interested,¹²⁰ it is a case where intention was the deciding factor and even here, just one year after *The Adriatic*, we find the court saying, "No one has suggested here that the law of the flag should govern the contract."¹²¹ One should not be too hasty in concluding that in new cases arising the law of the flag will have no significance; this is too broad a generalization and the thesis of this writer does not extend that far. A 1936 case¹²² points the way and contains perhaps the best possible conclusion on the place of the law of the flag. It was there decided that in those instances where the master must enter into contracts during the course of the voyage, the law of the flag should prevail. As concerns the contract of affreightment on the other hand, no presumption as to the law of the flag applies, and intention is the decisive factor. Once again, however, caution must be injected for even in the cases of this second category, the law of the flag is not lost sight of altogether. It does enter into the mass of facts from which the court may extract intention when such is not expressed and must therefore be implied. Consequently, in a very recent case,¹²³ the court said that intention decides the governing law and, if expressed, controls; if not expressed, intention must be presumed from the terms of the contract and the relevant surrounding circumstances. "In coming to its conclusion the court will be guided by rules which indicate that particular facts or conditions lead to a prima facie inference . . . as to the intention of the parties to apply a particular law: for example, . . . the country under whose flag the ship, in which the goods are contracted to be carried, sails."¹²⁴ This thinking was continued by an English court the following year.¹²⁵

Thus, insofar as the question of the choice of law to determine validity of clauses in bills of lading is concerned, the law of the flag has descended the scale from a rule standing alone to be applied of itself, to the later position of a presumption which was open to rebuttal in the face of a contrary intention, and finally to its current status as one of the factors to be taken into account in those instances where the parties have expressed no intention and a gathering process

¹²⁰ *Vita Food Products, Inc. v. Unus Shipping Co.*, (1939) A.C. 277, 299-300 (P.C. N.S.). See, as well, Case Note, 3 *Modern L. Rev.* 62 (1939); Note, 5 *Camb. L.J.* 100 (1935).

¹²¹ (1932) P. 39.

¹²² *The Njegos*, (1936) P. 90.

¹²³ *The Metamorphosis*, (1953) 1 *Weekly L.R.* 543.

¹²⁴ *Id.* at 547. See, as well, *Kadel Chajkin v. Mitchell Gotts & Co.*, (1948) 64 *T.L.R.* 89 (K.B.).

¹²⁵ *The Assunzione*, (1954) P. 150.

is used to imply such. We can not dismiss it altogether but neither can we use it in any other manner.¹²⁶

D. Law Upholding As Valid

A small number of cases have been decided on the basis that the correct choice of law rule to govern validity of contracts is that law which will hold the contract valid.¹²⁷ Thus, if a contract is made in one state to be performed in another, and one state holds the contract valid and the other would declare it invalid, under this rule the correct choice would be the former. Thus, in *Pritchard v. Norton*,¹²⁸ although it is primarily a place of performance case, buttressing for the selection of this place was made on the ground that that law would make it valid, and the parties, when they entered into the contract, must have done so with this in mind. The first facet of this holding is, of course, quite obvious: standing behind and in fact supporting such a rule is the presumed intention of the parties. The rule has always had such reasoning behind it. As intention is the key, the position of this choice of law rule approximates that of the preceding ones, *i.e.*, one can say that although choice of governing law has been made by a court and that place is the *lex loci solutionis* or perhaps the law of the flag, it remains true that the choice is teleological rather than geographical. A few more words ought to be said, however, as the theory has received some attention and some support.

First, it should be stated that the rule as it first existed (in *Pritchard v. Norton* and others)¹²⁹ is insupportable in the light of Professor Dicey's scathing denunciation that, "If you look to the intention of the parties, you are bound to presume that they meant to contract with reference to the law which makes the contract valid. Hence, where there is a question between two possible laws

¹²⁶ Professor Kahn-Freund writing, in 1939, a note on the Vita Food case, put it this way: "The gradual elimination of the law of the flag and its replacement by the law which the parties may be deemed to have intended to govern their maritime contract works in the same direction." 3 Modern L. Rev. 61, 62 (1939). Cases in the United States on this point are relatively few but a 1949 decision involving articles and wages indicates that the law of the flag in this country is in the same position. *Chinchilla v. Foreign Tankship Corp.*, 1949 Am. Mar. Cas. 2104. There the court remarked: "If the 'law of the flag' applies in rigor to all cases, Panama law would govern; but we can hardly say that it does. (Cites cases.) And while parties to a transaction do not have complete autonomy in the choice of law that governs that transaction (cites cases), circumstances may indicate that for some purpose they refer to the law of a sovereign other than the one which would normally govern as controlling in a limited way their respective rights and duties; and those indications will be respected."

¹²⁷ For a list of American decisions so holding, see Recent Decision, 40 Colum. L. Rev. 521 n.23 (1940).

¹²⁸ 106 U.S. (16 Otto) 124 (1882).

¹²⁹ Notably, *Jones v. Oceanic Steam Nav. Co.*, (1924) 2 K.B. 730 and *British South Africa Co. v. DeBeers Consol. Mines, Ltd.*, (1910) 2 Ch. 502.

under one of which a contract is, and under the other of which a contract is not, valid, the contract must always be held valid. But this result is absurd. . . .¹³⁰

Perhaps the leading exponent of this choice of law rule, Professor Lorenzen, has been largely responsible for the continuance of the rule today, sparse as the applications of it are. Writing in the early 1930's, Lorenzen thought that a court when confronted with a contract action which involved a choice of law problem should hold the contract valid and enforceable "if the local law of any state with which the contract has a substantial connection be satisfied."¹³¹ To this he inserted two provisos: one, that some stringent policy of the place of contracting did not prohibit execution of such a contract and, two, that performance at the place of performance was not illegal. It will be noted that such a reliance on "substantial connection" would absolve Lorenzen of the absurdity charge laid by Dicey, for if the law of the place holding valid must also be substantially connected with the contract, the element of objectivity enters and provides a stabilizing factor. While Lorenzen did not mean that the law of the place holding valid and which is substantially connected is the applicable law because presumably that was what the parties intended, he did agree that the same result would come about if the presumed intention factor was the supporting base.¹³²

We can safely say today that Lorenzen's admonition to use the law with which the contract was substantially connected, and which would hold the contract valid as a distinct alternative to the intention theory, has had no acceptance. None of the cases, both before and after Lorenzen wrote, decides choice of law on this basis; those few

¹³⁰ Dicey, *Conflict of Laws* 964-65 (1932). This is not the latest edition of Dicey, but the happenings between 1932 and the latest issue (1958) have had influence on the editors of this work. Such will be seen shortly.

¹³¹ Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws* 30 *Yale L.J.* 655, 673 (1921). This is the second in a series of three articles on the subject by Professor Lorenzen. The others are in 30 *Yale L.J.* 565 (1921) and 31 *Yale L.J.* 53 (1922).

¹³² *Ibid.* The writings of two skilled conflict of laws men have adopted the second of these alternatives and placed the intent factor first. Professor Stumberg agreed with Lorenzen that any law with which the contract had a substantial connection and would uphold the validity of the contract should be the choice (he could not agree to the first proviso and maintained that the second one—no illegality at the place of performance—was all that was needed) but note why: "To apply the law which will uphold the contract, if the contract has some bona fide substantial connection with the place of that law, would, it is believed, in carrying out the purposes which the parties had in view in their negotiations, better serve business convenience by making their acts legally, that which they purport to be; i.e., an enforceable promise." Stumberg, *Conflict of Laws* 240 (1951). Intention then is at the root of Stumberg's choice. Similarly, Professor Rabel, after surveying the field, announced that "In its nature, distinctly emphasized by the English writers, the selection of the validating law has been dependent upon the assumed intention of the parties." 2 Rabel, *The Conflict of Laws* 477 (1950).

that do adopt the law upholding the contract as valid as the applicable law do so because this is taken to be in line with the presumed intention of the parties.¹³³ Thus, the answer to the choice of law problem in questions involving negligence clauses in bills of lading does not lie here.

E. *Law Of The Place Of Breach*

Some courts and a few writers have declared that the correct choice of law to govern validity of a limitation of liability or an exemption from liability in a bill of lading is the law of that place where the injury occurred or damages were suffered. A closer look at these declarations must be had in our survey of the possible choices available.

Professor Beale, in dealing with the choice of the law of the place of performance, observed that "some courts have considered that both the carriage and delivery are parts of the performance of a contract of carriage, that this performance regularly governs the validity of a contract . . . , the law of the place of that particular part of the performance which was occurring when the breach occurred, that is, the law of the place of injury or loss governs the validity of a limitation of liability."¹³⁴ According to this idea, the performance is split into as many parts as there are jurisdictions through which the carriage travels, and if a breach resulting in injury or damage occurs in one of these, that law determines the validity of, for example, a negligence clause in the bill of lading covering the shipment. While it is possible to place the applicable law in a place of performance category or a place of injury category under this plan, it is perhaps correct to say that, in the light of the cases that Professor Beale cites as authority for his statement, the place of injury was paramount. Let us look at these cases.

With the exception of two, with which we will deal in a moment, all are domestic railroad cases and selection of one is thought sufficient. In *Hughes v. Pennsylvania R.R.*,¹³⁵ a contract was entered into in New York for carriage of a horse by rail to Pennsylvania. The bill contained a limitation of liability provision which was valid according to New York law but invalid in Pennsylvania. Injury

¹³³ A glance at any of these representative cases will show this to be true. *Peninsular & Oriental Steam Nav. Co. v. Shand*, 3 Moore N.S. 272, 16 Eng. Rep. 103 (P.C. 1865); *In re Missouri S.S. Co.*, (1889) 58 L.J. Ch. 721, (on these two cases see Graveson, *op. cit. supra* note 118, at 13-14); and more recently, *N.V. Handel Maatschappij J. Smits v. English Exports (London) Ltd.*, (1955) 2 Lloyd's List L.R. 317. A great many United States cases on this point are usury cases; e.g., see *Arnold v. Potter*, 22 Iowa 194 (1867), where the court said "men are not presumed by the law to act in folly or dishonestly, but rather that they intended in good faith that their acts shall be valid and what they purport to be."

¹³⁴ 2 Beale, *The Conflict of Laws* 1189 (1935).

¹³⁵ 202 Pa. 222, 51 Atl. 990 (1902), *aff'd*, 191 U.S. 477 (1903).

occurred in Pennsylvania. The court chose the law of Pennsylvania as the law to govern the validity of the stipulation because that was the place of injury. In so choosing, the court left no doubt as to its reasoning: "Where a contract containing a stipulation limiting liability for negligence is made in one state, but with a view to its performance by transportation through or into one or more other states, we see no reason why it should not be construed in accordance with the law of the state where its negligent breach, causing injury, occurs."¹³⁶

In the two maritime cases which Beale cites as authority for the above quotation, not quite so clear an authority is forthcoming. In the first one,¹³⁷ shipment was made from Genoa to New York on an English vessel under a bill of lading which exempted the carrier from liability for damage negligently caused by "leakage, stowage, or peril of the seas." The court, in the United States, concluded that the damage was the result of the final exception, peril of the sea due to the heavy weather encountered on the passage. Unless the stowage was negligent there was no possibility of liability for this, and the court concluded that from the evidence presented all possible care in the stowage had been taken. It did remark, in dictum, that if there was negligence in the stowage, this was an event which occurred in Genoa and there the exception in the bill was valid and no recovery could be had on that ground in any case. From this judgment, Professor Beale concludes that the law of the place of injury determines the validity of the negligence clause. Is this a correct conclusion? It is true that if there was negligent stowage it occurred in Genoa, but the court finds the damage was inflicted on the high seas and this surely must have been the place of injury, *i.e.*, the place where the final act took place. Accordingly, if any law was to be chosen as the law of the place of injury it would have to be the law of the flag, England. It is true that by English law the exculpatory clause was valid as it was by Italian law, but the point which Beale attempts to make is that Italian law is the correct choice to be applied to determine validity of this clause. There are, it is suggested, two things which one can question about the use made of this decision by Beale: First, the part of the case on which he relies is pure dictum, and, second, his choice of Italy as the place where the injury occurred is probably not correct. One must admit, however, that the court does seem to lean toward place of injury as the governing law and it is possible, as a last resort, to use the case

¹³⁶ 202 Pa. at 228-29, 51 Atl. at 992.

¹³⁷ *The Trinacria*, 42 Fed. 863 (S.D. N.Y. 1890).

as a lead into a place of injury thesis. The second admiralty case which Beale cites as authority will disclose this reasoning.

A cargo of wine was shipped from the city of Cognac in France to Havre by rail and thence by steamer to the United States. A negligence clause was included in the bill of lading which was issued at Cognac and was evidently intended to cover the entire shipment. Somewhere on the land transit one of the casks was damaged. The court, once again in the United States, decided that if the assumption is made that the bill of lading covered the entire shipment—Cognac to New York—then it must follow that the negligence clause applies to the whole carriage. The injury occurred in France, not on the high seas, and the negligence clause was valid in France. The court came to the conclusion that as to acts of negligence occurring in France, the law of France must prevail and "as no cause of action arises according to the law of the jurisdiction within which the injury occurred, none . . . can be recognized here. Such was the view expressed in the case of the *Trinacria*. . . ."¹³⁸

There is not much doubt in this case that the decision of the case is support for Professor Beale's statement. The court quite clearly has upheld the validity of the negligence clause by choosing as the governing law, the place of injury. If one construes these two cases very broadly, it can be concluded that if damage to goods occurs on land before the ship is at sea, then the law of that place will determine the validity of any negligence clause which may be included in the covering bill of lading, as that place is the place of injury. This reasoning can not be safely taken further to include damage caused by negligence of the carrier on the high seas. Both of these cases expressly state¹³⁹ that they are not dealing with instances where damage is incurred on the high seas; therefore, we can conclude that as to such an event, no ruling is forthcoming from these two cases. The rule can not be dismissed entirely, however, without further investigation, for Professor Beale is not alone in his contention.¹⁴⁰ We

¹³⁸ *Baetjer v. La Compagnie Generale Transatlantique*, 59 Fed. 789 (S.D. N.Y. 1894).

¹³⁹ "It is a wholly different question whether the courts of this country should sustain contracts or stipulations, as regards acts performed and designed to be performed, either on the high seas or within the exclusive jurisdiction of this country. . . ." *The Trinacria*, 42 Fed. 863, 864 (S.D. N.Y. 1890).

"To acts of negligence and consequent damage occurring, not on the high seas, but within foreign territory, the law of that jurisdiction must . . . prevail." *Baetjer v. La Compagnie Generale Transatlantique*, 59 Fed. 789 (S.D. N.Y. 1894).

¹⁴⁰ Professor Graveson remarked that "according to the Restatement the limitation of liability for maritime torts (*which may well arise in relation to the obligation under a bill of lading*) depends on the *lex fori*." (Emphasis added.) Graveson, *Bills of Lading and the Unification of Maritime Law in the English Courts*, *The Conflict of Laws and International Contracts* (Summer Institute—1949, University of Michigan Law School) 57, 65 (1951).

must ask then: How correct is an application of the law of the place of injury to determine validity of a clause in a bill of lading?

First, the cases which deal with the liability of a carrier to its passengers must be set aside. It might be mentioned, however, that the choice of the place of injury is not open to nearly as much criticism in passenger as it is in cargo cases, chiefly because of matters of policy.¹⁴¹ Restricting this study to cargo cases, however, and setting aside the railroad cases which are of little aid in pursuit of a uniform rule for maritime law, what we have to pursue so far is the choice of the place of injury. The criticism which appears immediately is that somehow, somewhere, a shift has been made from a basis *ex contractu* to one *ex delicto*. For in applying the law of the place of injury, one is applying a rule of tort law. Should this be? If one agrees that where the carrier is sued by the shipper in an action for damages alleging the negligence of the carrier, that this must remain a delictual matter, it is then possible to bring in the place of injury as the applicable law. If this is allowed and a shipment originates in Boston and is destined to call at Halifax, Nova Scotia, St. John's, Newfoundland, Glasgow, Scotland and Southhampton, England before final off-loading in Hamburg, Germany, suppose an act of negligence occurs first in the mid-Atlantic. What law should apply? The only possible choice is the law of the flag, as that is the closest one can come to a place of injury. Accordingly, the validity of the negligence clause is now determined according to the law of Liberia, as this is a Liberian freighter.

If negligent action on the part of the crew causes damage in any of the ports of call, the law of the flag need not be brought in, as fictions have a place only in otherwise non-explainable cases. So we have either Canadian, Scottish, or English law to apply depending on the locale. There is no difficulty in choosing the law, as the place of injury is evident. Do we then conclude that the ultimate has been reached? If we do, we are forgetting the parties back in Massachusetts who by this time are liable to be somewhat bewildered.

Can one in all fairness say that the carrier has been fairly dealt with under this choice? He has included in his contract a clause which he has no idea will be upheld as valid or invalid. (While the negligence clause in a bill issued in Boston would be invalid by *Cogsa* in a court in the United States, one should not forget that it may not be a negligence clause which is under discussion or, of even more importance, that the shipment originated, not in Boston

¹⁴¹ See Dicey, *op. cit. supra* note 97, at 831; Graveson, *op. cit. supra* note 118; Hutchinson, *Carriers* 220 (1906); Williston, *Contracts* § 1113 (1936).

but Buenos Aires and did contain a negligence clause.) Is it not only equitable to give him the benefit of knowing before the shipment is made whether the clauses in the bill of lading will be upheld so that he may either insure or increase the freight?¹⁴² After the damage has been occasioned it is too late for him to do either; knowledge beforehand is therefore essential, and any application of the then unknown place of injury is hazardous indeed to his position.

It is suggested, on the other hand, that to treat the matter on a contractual rather than a delictual basis will be much more satisfying to all parties. When the court is confronted with a damage suit brought by the plaintiff shipper on a tortious base and the defense is raised by the defendant carrier of a contractual clause which will exempt him from liability, it is thought that the court should not continue to decide the validity of this excuse for nonperformance on a delictual ground. Realistically, it is apparent that the entire obligation rests on a contractual base. If it were not for the contract of carriage there would be no obligation; the obligation only comes from the agreement, and damage to the cargo which may give rise to liability can only be based on that contract. Hence, the validity of the clause, it is thought, must also be classed as a contractual and not as a delictual matter. The mere bringing of the suit in tort by the shipper does not change the fundamental obligation assumed by the parties in the contract. The carrier owes no duty to the shipper except under that contract, and the writer can not agree that the rights and obligations assumed under that contract can be increased or decreased by a change in the form of action which the plaintiff may use. The obligation, it bears repeating, is purely contractual; to switch to a delictual base to decide the validity of a clause in that contract, it is submitted, is entirely erroneous. If the matter is continued as a question of validity of contract, the place of injury has no place and as a choice of law rule to decide validity of a negligence clause in a bill of lading it must be discarded.¹⁴³

F. *Law Of The Forum*

In the famous case of *Robinson v. Bland*,¹⁴⁴ which has survived chiefly because of the opening wedge of autonomy driven by Lord

¹⁴² See Morris, *supra* note 96, at 507.

¹⁴³ 3 Rabel, *The Conflict of Laws* 244-45 (1950), has this to say of the use of the place of injury to decide validity of clauses in a bill of lading: "This view ought to be entirely abandoned; it is due to a confusion between contract and tort." And again at 257; "Another connecting factor no longer seriously to be considered is the place where the goods are lost, destroyed or damaged. This local connection enjoyed some favor in American and other courts, but has nothing to recommend it with respect to a voyage contractually assumed by one carrier on one vessel. Only by confusion of tort and contract could such a view originate in actions sounding in contract."

¹⁴⁴ 2 Burr. 1077, 97 Eng. Rep. 717 (K.B. 1760).

Mansfield, there is a remark by Mr. Justice Denison which requires passing attention. He states that "the plaintiff has appealed to the laws of England, by bringing his action here; and ought to be determined by them."¹⁴⁵ A clear indication by the Justice that his opinion was fixed on the law of the forum as the applicable law in any conflict of law problem is thus portrayed. If a person sues in the court of Z, it makes no difference what the facts are, the law of Z applies. How appealing this is to anyone who has been at all immersed in any choice of law problem; but how shallow a choice it is soon becomes evident when one considers that by choosing the forum the plaintiff can choose the decision and this, of course, is the *raison d'être* for a "system" of conflict of laws. It is patently obvious that the law of the forum will not suffice¹⁴⁶ as a choice of law rule simply for that reason.

It may be said with some certainty that the law of the forum has not found any acceptance as a choice of law rule, standing alone. In other words, it is not available to the court as a choice of law rule, for example, to decide on the validity of the negligence clause. Accordingly, we need not worry about it in our pursuit of a uniform choice of law rule.

III. INTRODUCTION TO THE FINAL TWO AVAILABLE CHOICE OF LAW RULES

Up to this point, a study has been made of the first six of the eight possible choice of law rules which are submitted as available to a court in deciding upon the validity of a negligence clause in an ocean bill of lading. One should keep in mind the limited spheres within which validity of such clauses can be questioned, for this facet of the topic will become of more importance in these final two choice of law rules. It should also be remembered that it is the submission of the writer that none of the choices previously considered is suitable, for varying reasons. Only two possibilities remain; either a completely new rule is to be invented or a selection made from the remaining two.

The two remaining choice of law rules are treated apart from the others for two reasons: the first is that they can best be handled together as they meet at certain points and at others they merge. There is some transference back and forth; and while the basic propositions underlying each are quite radically different, they are at times confused by some and too easily distinguished by others.

¹⁴⁵ Id. at 720.

¹⁴⁶ See *Quarrier v. Colston*, 1 Ph. 146, 41 Eng. Rep. 587 (Ch. 1842).

The second reason that separate treatment is believed necessary lies in the nature of the choices themselves; they are necessarily somewhat nebulous and, at times, rather difficult to grasp. It is felt however, that this adds to rather than detracts from their usefulness.

What is meant by "autonomy" as a choice of law rule? Autonomy contemplates that law which the parties to the contract agree upon expressly, tacitly, or impliedly¹⁴⁷ as the law to be applicable to and to govern their contract. With this in mind, it becomes necessary once again to look into history to see how this has fared as a choice of law rule in the particular area under discussion, and, of necessity, its periphery, to best provide a forecast for the future. There is no paucity of material—primary and secondary—for this task, as it truly may be called "the most intricate question of Private International Law."¹⁴⁸

While there is some doubt as to the origins of the theory of autonomy,¹⁴⁹ there is none as to its wide use until the present. Just how broad has been the use will become evident presently. To begin the discussion, selection of the first of the three divisions of autonomy outlined in the definition, that of express agreement as to applicable law, will serve as an introduction to the topic.

A. *Express Selection Of Applicable Law By The Parties*

Cases in England, Canada,¹⁵⁰ and the United States illustrate the first proposition, *viz.*, that the parties are free to select the law which they wish to govern their contracts. If one could make this simple statement and leave it, practically all of the problems in this field would disappear. However, no case has ever been decided solely by application of this first proposition standing alone; courts have either at one end restricted it slightly by qualifying remarks,¹⁵¹ or have almost destroyed it completely by too-heavy burdens.¹⁵² It will be the task of this section to illustrate the boundaries by means of

¹⁴⁷ Definitions of these three forms will appear shortly.

¹⁴⁸ Szaszy, *Choice of Law By the Parties to a Contract*, 20 *The Grotius Society* 156 (1935).

¹⁴⁹ Dumoulin, the French lawyer of the sixteenth century, is most often looked upon as the originator of the theory. Beale, *What Law Governs the Validity of a Contract*, 23 *Harv. L. Rev.* 1, 7 (1909); Nussbaum, *Conflict Theories of Contracts*, 51 *Yale L.J.* 893, 895 (1942); Wolff, *Choice of Law in International Contracts*, 49 *Jurid. Rev.* 110, 114 (1937); Yntema, "Autonomy" in *Choice of Law*, 1 *Am. J. Comp. L.* 341, 342 (1952).

¹⁵⁰ This part will concentrate on cases in the United States and England. Reference to any of the following Canadian cases will illustrate the position there. *Vipond v. Furness, Withy & Co.*, (1917) 35 *D.L.R.* 278; *The Canada Sugar Ref. Co. v. Furness, Withy & Co.*, (1905) 27 *Qué. C.S.* 502; *Mathys v. The Manchester Liners*, (1904) 25 *Qué C.S.* 426.

¹⁵¹ E.g., see *Duskin v. Pennsylvania-Cent. Airlines Corp.*, 167 *F.2d* 727 (6th Cir.), cert. denied, 335 *U.S.* 829 (1948).

¹⁵² E.g., *Hal Roach Studios, Inc. v. Film Classics, Inc.*, 156 *F.2d* 596 (2d Cir. 1946).

judicial opinions and some few theoretical thoughts by writers on the subject. A later section will be used to forecast.

Certainly the most famous case on express selection of applicable law by the parties is that of *Vita Food Products, Inc. v. Unus Shipping Co.*¹⁵³ Here, a cargo of fish was shipped from Newfoundland (at that time a separate Dominion) to the United States on a vessel registered in the Province of Nova Scotia, Canada. Through inadvertence a bill of lading of ancient origin was selected by the carrier, one which did not conform to the Newfoundland version of the Brussels Convention, as required by that legislation, and one which, in fact, contained a negligence clause. In addition, another clause provided that "this contract shall be governed by English law." The fish were damaged as a result of negligence on the part of the carrier's agents and suit was initiated in Nova Scotia to recover for the loss. The carrier relied on the negligence clause and, in the final appeal to the Privy Council, it was decided that the carrier was exonerated by the clause; it was valid according to the stipulated English law. In so holding, the Privy Council at last brought into clear focus the scope of party autonomy. In the leading English case¹⁵⁴ on the subject prior to the *Vita Food* decision, Lord Atkin, in speaking of that instance where an expressed intention is evident, remarked that "their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive."¹⁵⁵ Lord Wright, in the *Vita Food* case, relies upon this statement and, in applying it in his decision of the case, apparently settles the matter in a most succinct fashion. The objection had evidently been advanced that the statement by Lord Atkin had been too broad and that some qualification should be imposed. Lord Wright now proceeds to state his views and it is here that the new departure is begun. He states that "where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy."¹⁵⁶

If the writer may presume to paraphrase for the sake of clarity and emphasis, it is clear that following this case, if two parties expressly stipulate for the application of the law of X, and this is

¹⁵³ (1939) A.C. 277 (P.C. N.S.).

¹⁵⁴ *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft*, (1937) A.C. 500 (Eng.).

¹⁵⁵ *Id.* at 529.

¹⁵⁶ *Vita Food Products, Inc. v. Unus Shipping Co.*, (1939) A.C. 277 (P.C. N.S.).

done in good faith, and nothing in such a selection is illegal or contrary to public policy, then this is a valid step and one which will be upheld and applied. There are no other qualifications or restrictions.

One can say that there are two poles around which there are two theories of autonomy, one which would allow complete freedom of selection of the governing law, and the other allowing no autonomy at all. As was said earlier, no court has ever gone so far as the former, nor has any writer, and probably no court today would be willing to go as far as the latter. Somewhere in between lies the answer. From the *Vita Food* decision we get a statement of the first proposition with the qualifying limitations imposed by Lord Wright. These will be ignored temporarily, and an investigation will be made of other courts' reactions to express stipulations, other writers' theses, and then a survey will be possible of the list of limitations and it will be an easier task to extract each proposed restriction and study it not only by itself but aligned alongside its fellows. We have then, three limitations imposed by the *Vita Food* decision, *viz.*, good faith, legality, and no infringement of public policy. There are quite a few more and it is in order now to investigate them.

Writing in 1937, Martin Wolff, when dealing with the problem of express selection of law by the parties, made this statement: "To sum up: the parties may subject their contract to any system of law with which it is internally connected. They cannot make a system of law with which the contract has no connection the proper law of the contract. If they nevertheless do just that, the true proper law must be ascertained as if no law has been agreed. . . ."¹⁵⁷

In a well-known autonomy case in 1937, we find the following conclusion: "the right of parties to a contract to have their reciprocal duties and obligations under that contract governed by the law of some particular jurisdiction is limited to the selection or stipulation by them of the law of a jurisdiction which has a real relation to the contract."¹⁵⁸

There are a number of statements paralleling these and they will be studied in more detail later;¹⁵⁹ these two are sufficient to bring to light a further limitation on the absolute freedom of parties to a contract to select the law which they desire to govern their contract, *i.e.*, the limitation which we may call "substantial connection."

The next restriction on complete freedom is also a common holding.

¹⁵⁷ Wolff, *supra* note 149, at 121.

¹⁵⁸ *Owens v. Hagenbeck-Wallace Shows Co.*, 58 R.L. 162, 174, 192 Atl. 158, 164 (1937).

¹⁵⁹ See pp. 257-60.

One of the leading exponents of this criticism is Professor Beale¹⁶⁰ who would disallow completely under his territorial theory any autonomy at all. It was his opinion that allowing parties to choose what law would govern their acts amounted to giving them legislative powers.¹⁶¹ Judge Learned Hand continued this feeling in a famous statement in a maritime case when he remarked, "But an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one's bootstraps."¹⁶²

Once again, more of these statements will be arrayed a little later, the problem being simply illustrated at the present; it is obvious of course that if a charge of legislating is upheld we have not a limiting but rather an extinguishing of the express stipulation for governing law. This, then, is the opposite pole and as we are trying to find a place between the poles, this will not be of much service. Before the place is found however, the "legislating" charge will have to be dismissed and that will be attempted later as well; once again, it is listed as illustrative of the problems that have to be faced.

A more recent attempted limitation on autonomy, by the writers at least, is in a particular type of agreement, *i.e.*, that which is known as the adhesion contract. Perhaps the leading exponent of this limitation, Professor Ehrenzweig, defines such contracts as "agreements in which one party's participation consists in his mere 'adherence,' unwilling and often unknowing, to a document drafted unilaterally and insisted upon by what is usually a powerful enterprise."¹⁶³ In his opinion, in the area of transportation contracts, with which we are here intimately concerned, not one case has upheld stipulation for governing law to the disadvantage of the adherent.¹⁶⁴ He concludes that in the special area of adhesion contracts, the autonomy doctrine is put aside and a new theory is used which deals with adhesion alone to help the otherwise helpless adherent. Some judicial opinion follows the same vein,¹⁶⁵ and hence another limitation is added to the list.

Finally, to complete the list of limitations, some restrictions must be noted which are beyond dispute and are here accepted as being

¹⁶⁰ Beale, it is respectfully submitted, destroys some of the value of his thoughts by an apparently unnecessary attack on Lord Mansfield and other "transplanters" of the civil law. See Beale, *supra*, note 149, at 8.

¹⁶¹ "The fundamental objection to this in point of theory is that it involves permission to the parties to do a legislative act. It practically makes a legislative body of any two persons who choose to get together and contract." Beale, *supra*, note 149.

¹⁶² *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115, 117 (2d Cir. 1931).

¹⁶³ Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 *Colum. L. Rev.* 1072, 1075 (1953).

¹⁶⁴ *Id.* at 1085-86.

¹⁶⁵ See, e.g., *Railroad Co. v. Lockwood*, 84 U.S. (17 Wall.) 357 (1873).

binding without further argument. Heading this list is the limitation on party autonomy that matters which are considered procedural are for the *lex fori* alone and the parties can not displace these by stipulation in the contract. Similarly, in some well-defined areas, statutory provisions have lifted the power of stipulation from the hands of the parties, the best known example occurring in the law of insurance.¹⁶⁶ In a few instances, the applicable law to govern the form of the contract and capacity of the parties may be beyond the reach of the parties' power.¹⁶⁷

Accepting this last category as limitations on complete autonomy, we are left with the following: If we adopt all of the other restrictions as being valid, only this can be said: parties to a contract can stipulate for governing law if such a stipulation is (1) bona fide, (2) legal, (3) not against public policy, (4) for the law of a place which has a reasonable connection with the contract, and (5) not a contract of adhesion. When this definition is compounded with the additional burdens of the requirements that the matter be neither procedural nor have to do with form or capacity, and is not within the ambit of the "standardized contracts," and finally, that the stipulation is not such that the parties may be called "legislators," intention of the parties as a choice of law rule to govern the validity of negligence clauses in bills of lading, so that more uniformity may be achieved in this field, begins to lose its initial appeal. Accordingly, the solution is clear: some of the problems must be solved or another choice must be made. Before moving on, it would be only fair to investigate the intention theory with some of the limitations removed, for it may be the answer. Let us then attempt to dispose of some of the limitations to see if some formula less encumbered is possible.

If we can dispose of the legislation charge, then at least we can move away from the "territorial" pole. Along with Beale, Professor Lorenzen was a critic of autonomy on the same basis; that is, that the parties become a legislature if allowed to stipulate for applicable law.¹⁶⁸ Dean Falconbridge was almost as adamant in his holding that "we cannot let them go far afield so as to make applicable the law of any foreign country which happens to be favorable to their views as to the conditions of a valid contract, and so as to substitute by

¹⁶⁶ I am indebted for this group in the main to Professor Yntema's article, *supra* note 149, at 353.

¹⁶⁷ *Ibid.*

¹⁶⁸ Lorenzen, *supra* note 131, at 658.

a quasi-legislative act some foreign law for the law which otherwise ought to govern the contract."¹⁶⁹

There are two things which can be said of the charge of legislating; one is essentially theoretical, the other practical. In the theoretical area, one must ask: When the parties stipulate for applicable law, what are they really doing? Only two answers are possible. One is that they are in fact making law by selecting law and if such is true, the legislating charge is a valid one and intention as a choice of law rule must be dropped. While one, with Kelsen, may agree that individuals do create norms by their private transactions by virtue of a higher norm in the hierarchy,¹⁷⁰ in the area of making law by simply declaring law, the legislature has preempted the field completely. The second answer is that the parties, when they stipulate, are not themselves making law, and they are not deciding on the validity of the contract by simply stating what law they wish to govern it; they are simply choosing *which* law shall govern their contract. When parties in their contract say "this is a valid contract" this is, true, a law-making attempt; but when they do not by any effort attempt to say whether or not this is a valid contract, but simply choose some law to rule on validity, it is difficult to see how this latter can be classed as a law-making, legislative function.¹⁷¹

The practical facet of the argument against the legislative charge is that, if allowed, a stipulation for governing law aids a court in its search for the correct choice of law rule. This is an accepted procedure in other instances; in the "pliable" rules field of sales law no question of legislating has, to the writer's knowledge, been advanced. Interpretative clauses to aid in resolving ambiguities are frequently viewed with appreciation by the judiciary without thought of endangering the separation of powers. Why not approach the express stipulation in at least a true light and allow the parties the benefit of the doubt until some proof to the contrary is forthcoming; if they have included a stipulation for the law of a particular jurisdiction, is this any more of a law-making procedure than an interpretation section in a contract or other document? Those who adhere to the strict territorial doctrine of the conflict of laws must so hold, but we need not all blindly follow.¹⁷² As

¹⁶⁹ Falconbridge, *Contract and Conveyance in Conflict of Laws*, 81 U. Pa. L. Rev. 661, 671-72 (1933).

¹⁷⁰ Kelsen, *General Theory of Law and State* 137 (1949).

¹⁷¹ See Wolff, *supra* note 149, at 114.

¹⁷² "Instead of viewing the parties as usurping the legislative function, it seems more realistic to regard them as relieving the courts of the problem of resolving a question of conflict of laws." Harlan, J. in *Siegelman v. Cunard White Star, Ltd.* 221 F.2d 189, 195 (2d Cir. 1955).

Professor Beale's thesis of *lex loci contractus* as the correct choice of law rule to govern validity of contracts was contrary to the situation as it existed in the United States,¹⁷³ so it may be argued that his and others' charge of legislating is contra to the stream of judicial opinion in a large measure. Judge Hand's criticism in the *Gerli* case stands practically alone, and Beale himself admitted that "the prevailing tendency of the American cases is to regard the intention of the parties as controlling. . . ."¹⁷⁴ As such is the case, *i.e.*, as intention is the leading idea upon which courts are to rely, can any one suggest a better indication of intention than an *express* stipulation for governing law?

Now consider the purported limitation in the area of so-called "adhesion contracts." It has been recognized for some time that the powers and abilities of one or the other of the two parties to a shipping contract outweigh considerably the capabilities of their opposite numbers. In England, the "Brittania rules the waves" theme was more than mere sentiment, for the carrier was all-powerful. The reverse situation of course existed in the United States. Much of this has now changed, due partly to shifts in economies and partly to shifting emphases. The fact still remains however that one does not go too far in saying that the shipping companies, particularly the larger ones, do a fair amount of controlling even yet; this is evidenced fairly well by some standardized forms of bills of lading now in use in the industry and the inclusion therein of rather similar clauses. This "plan" was recognized as early as 1889,¹⁷⁵ and according to Gilmore and Black, in 1957, "the 'contracts,' of course, are dictated by them, and are in fact adopted simultaneously by wide segments of the trade."¹⁷⁶

It is submitted that to the question of whether the fact of commercial inequality is a proper footing upon which disallowance of express stipulations for governing law may be based, more than one answer, as Professor Ehrenzweig's foreclosure proposal, is possible. In other words, the present writer can not agree with this learned theorist that in adhesion cases, autonomy is to be supplanted. Thus, if we divide the ocean contract cases as is done herein, that is into

¹⁷³ See pp. 214-26 *supra*.

¹⁷⁴ Beale, *supra* note 149, at 11.

¹⁷⁵ "Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all of its twenty-eight lengthy paragraphs, . . . this lack of equality of bargaining power has long been recognized in our law; and stipulations for unreasonable exemption of the carrier have not been allowed to stand." *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 441 (1889).

¹⁷⁶ Gilmore & Black, *Admiralty* 155 (1957).

cargo and passenger compartments, more clarity may be introduced. In the cargo situation, any clause in a bill of lading of the nature of a negligence clause which covers a shipment entering or leaving the United States is void because of the provisions of Cogsca. In this segment, then, the adhesion theory—like the autonomy theory—has no place. If the shipment is one which does not fall within the reach of Cogsca, as a foreign shipment, then while it is true that here Professor Ehrenzweig's thesis can apply it is thought better to adopt a less rigid attitude to these cases and handle them on an individual basis first. Then, if overwhelming inequality that has influenced inclusion of favorable-to-the-carrier clauses is found, it is at least appealing (particularly from the standpoint of flexibility) to rule on these clauses with tools already available, *viz.*, the rules as to undue influence, duress,¹⁷⁷ and public policy.¹⁷⁸

Mention should be made of Professor Ehrenzweig's inclusion of the passenger ticket cases in his general adhesion rule. He states here as well that no case has ever been decided adversely to the adherent by allowing a stipulation for governing law to be applied. When he wrote this article (in 1953) this was probably true, at least in the United States. In 1957, the United States Court of Appeals for the Second Circuit did not follow and upheld a stipulation for English law to the decided disadvantage of the adherent.¹⁷⁹

The next purported limitation of autonomy is that of the over-worked, "old reliable" fall-back, public policy. While a good many cases have been decided on a public policy basis, it has apparently been too appealing to some and the situation is now a little out of hand. What, for example, did Lord Wright in the *Vita Food* case mean by saying that the stipulation was valid and would be upheld if "there was no reason for avoiding the choice on the ground of public policy"?¹⁸⁰ Obviously, the central question must be: "whose public policy"? While the answer is to the writer an obvious one—the forum's—it has been loosely handled at times and hence the difficulty. Professor Cook, for example, took the position that if the public policy of *any* state with which the contract was factually

¹⁷⁷ "The choice of some unknown law may have been imposed upon one party to the transaction by the other, especially where the latter is occupying an economically or otherwise dominant position. That danger may be guarded against, however, by the application of rules against duress, undue influence, or similar abuses, as they may be found in every civilized legal system," Rheinstein, Book Review, 15 U. Chi. L. Rev. 478, 487 (1948).

¹⁷⁸ 2 Rabel, *op. cit. supra* 132, at 409; Yntema, Contract and the Conflict of Laws: "Autonomy" in Choice of Law in the United States, 1 N.Y.L.F. 46 (1955).

¹⁷⁹ *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955). The dissenting opinion of Justice Frank adopts pretty well the position of Professor Ehrenzweig on the adhesion theory. See 221 F.2d at 205.

¹⁸⁰ *Vita Food Products, Inc. v. Unus Shipping Co.*, (1939) A.C. 277 (P.C. N.S.).

connected was violated, then the forum ought to deny validity to such a clause.¹⁸¹ Let us apply this to a hypothetical fact situation. A shipment covered by a bill of lading containing a negligence clause and a stipulation for the law of Argentina, leaves New York bound for England. Damage is occasioned the cargo by negligent acts. Suit is brought in Buenos Aires. Can we say here with Professor Cook that the public policy against negligence clauses in either or both England and the United States should have any effect in the courts of Argentina? Add to this the thought that the negligence clause is a valid provision in Argentina; is it now logical to say that the public policy of these two foreign states will influence Argentine courts? Herein, obviously, lies the danger in the easy tendency to extend the tool of public policy outside its true ambit. It is thought, therefore, that public policy as a limitation on autonomy should in the first instance be restricted to the public policy of the forum. Application of the public policy of the forum must next be considered.

In any shipment which leaves the United States or enters the United States, public policy will not be in issue; the mandatory rules of Cogsa take care of the field completely. In those countries of the world, like England, where the legislative provisions apply to outward shipments only, public policy has no place when such a situation is under consideration in that state. It would seem then that in defining public policy and its applicability, if the forum's rules from Cogsa-like provisions are violated, public policy is not a determinative factor; if no such provision is violated, then the public policy of *the forum* can be applied. This has to be considered more carefully, however. If not, in a case involving a shipment from Genoa to Montevideo, negligence clause in the bill of lading, forum in the United States (Cogsa not applying), the public policy of the United States could be held to be infringed and the clause held invalid. This should not result, however, in a situation where the only connection with the United States is the place of suit. American courts in the past have recognized this and held that in completely foreign shipments, where the carriage and the contract have no connection with the United States, U. S. public policy will not deny validity to such clauses simply because such provisions are invalid in cases where the United States is somehow connected.¹⁸²

¹⁸¹ Cook, "Contracts" and the Conflict of Laws: "Intention" of the Parties, 34 Ill. L. Rev. 423, 428-29 (1939).

¹⁸² The Miguel di Larrinaga, 217 Fed. 678 (S.D. N.Y. 1914); The Fri, 154 Fed. 333 (2d Cir. 1907), cert. denied, 210 U.S. 431 (1908); and in the Vita Food case itself, while Lord Wright set forth the public policy requirement for an express stipulation he found no English public policy against upholding the stipulation for English law in this case

How does this picture of public policy affect autonomy? It is submitted that in only one way can it possibly enter the picture, *viz.*, if in a bill of lading covering a shipment of goods from the United States to Great Britain, a stipulation is included for Argentine law, then here the public policy of the United States could (in a U. S. forum) preclude allowance of such a stipulation. But even here there is no need of public policy since the provisions of Cogsca can handle the situation very nicely.¹⁸³ The same can be said of any country which has this type of legislation. If, in fact, a shipment originates in a country which has no Brussels Convention type laws and that country is the forum, and it has some public policy which tends to invalidate exculpatory clauses, here it is possible for public policy to prohibit the escape from the rigors of this policy by stipulating for some other law where the negligence clause, for example, is not frowned upon. It is submitted that this is the only place for limiting the autonomy of the parties by the application of public policy.

Taking a further proposed limitation again from the *Vita Food* case, investigation must now be had into one of the other two requirements set forth therein by Lord Wright, *i.e.*, that the intention of the parties be "legal." A great deal of the problem connected with this provision stems from the fact that it is, to the present writer at least, somewhat difficult to discern just how intention—a state of mind—can be legal or illegal. If Lord Wright had said the transaction or the inclusion by the parties of the stipulation for English law must by itself be legal, then immediately discussion could ensue on this basis. However, such is not the case. If one agrees that intention can be neither legal nor illegal, then the proposition comes to this: in selecting the law of some other jurisdiction, the parties must not be attempting to evade some law of the place of making or of the place of performance. To the writer this fraud *à la loi* idea is fully contained within the first requirement set up by Lord Wright, *viz.*, that the parties be bona fide; if this is true, then no further investigation of the "legal" requirement is necessary. However, it may be argued that by some clause in the bill of lading—perhaps a negligence clause—the parties have unwittingly included a provision which is illegal at the place of making or at the place of performance, and as the bona fide requirement will not cover

involving, to England, a completely foreign shipment. See, as well, *Varnish v. Kheti*, (1949) 82 Lloyd's List L.R. 525.

¹⁸³ It was under this type of fact situation that *Wm. H. Muller & Co. v. Swedish Am. Line, Ltd.*, 224 F.2d 806 (2d Cir.), cert denied, 350 U.S. 903 (1955), was decided. This case, and the present writer's opinion of it will be stated shortly.

this, some other condition must take care of it. If this reasoning is accepted—and it is the submission of the writer that it should not be—then it is the same as saying that if a contract is invalid or illegal at the place of contracting, it will be illegal everywhere, regardless of the forum chosen; or if it is illegal by the *lex loci solutionis*, it will be illegal everywhere. It is surprising to see the degree of acceptance of either or both of these statements. Thus, Greer, L. J. in *The Torni*, in speaking of the decision in *In re Missouri S.S. Co.*,¹⁸⁴ remarked that if a contract is illegal at the place of making then an English court would recognize the invalidity and hold the contract invalid.¹⁸⁵ Again, in another English case, Scrutton, L. J. said that if a contract was illegal at the place of performance, it would be held illegal in an English court.¹⁸⁶ Morris, in writing a casenote on *The Torni*, agreed with the above statement by Lord Justice Greer and said, "In general no contract . . . which is illegal by the *lex loci contractus* will be enforced by an English court."¹⁸⁷ Finally, Dean Falconbridge continues this thesis by saying, "Illegality by the law of the place of contracting would seem to be a sufficient ground of invalidity."¹⁸⁸

The writer respectfully submits that these are statements which, if they are not begging the question, are clearly erroneous. It is the writer's opinion as well that validity of a contract is a question first of choice of law: what law determines the validity of this contract? To add an addendum to this proposition that illegality at the place of contracting destroys any possibility of subsequent enforcement *anywhere* also destroys any chance of ever having a uniform choice of law rule in any aspect of the contractual field. An example will perhaps portray this more clearly. Assume a shipment goes from Montreal to Hamburg, and that a negligence clause and stipulation for English law is included in the bill of lading. The forum is England. If the statements of Greer L. J., Falconbridge, and others are accepted, the English court will immediately say that this clause is invalid or illegal at the place of making and therefore it is invalid or illegal here. Is this correct procedure? Certainly not. It would seem more correct for the court to say: What is the proper law of this contract, for by *that* law the validity or legality of it is to be determined, not by the application of some stereotyped rule. One can, it appears, make a categorical statement in this regard that

¹⁸⁴ (1889) 42 Ch. D. 321.

¹⁸⁵ *The Torni*, (1932) P. 78, 88.

¹⁸⁶ *Ralli Bros. v. Compania Naviera Sota y Aznar*, (1920) 2 K.B. 287, 304.

¹⁸⁷ Note, 5 Camb. L.J. 100, 101 (1933-35).

¹⁸⁸ Case & Comment, 19 Can. B. Rev. 217, 218 (1941).

invalidity or illegality of the contract at the place of contracting is a completely immaterial factor for a court sitting anywhere. It is obvious that if one desires uniformity, a choice of law rule to determine validity of contracts should not be supplanted by rules such as proposed by the men listed above.

It was mentioned above that in some minds the rule as to the *lex loci solutionis* might be applied here as a primary factor with *lex loci contractus*, so that if a contract is illegal at the place of performance it will not be enforced anywhere. While Lord Wright, in an earlier case, remarked that the assertion that an English court would not enforce a contract where such was forbidden at the place of performance was a "well-known proposition,"¹⁸⁹ the same argument can be advanced here as was in the *lex loci contractus* case: if such analysis is applied, it amounts to a complete disregard, in England, of the proper law of the contract and, in other countries, to a similar fate for the hoped-for uniform choice of law rule. It is therefore submitted that one has to make a stand somewhere, and the appeal of the uniform "proper" law outweighs considerably any maze of rules which attempt to cover single situations.¹⁹⁰

Where does this leave us then in the autonomy picture? Is the restriction of legality imposed by Lord Wright truly such? If one agrees that what is in the minds of the parties can be neither legal nor illegal and that illegality at the place of contracting or place of performance is immaterial,¹⁹¹ then the conclusion clearly follows that the purported condition to autonomy is not a limitation at all.

The third limitation imposed by Lord Wright in the *Vita Food* case is that the intention of the parties in choosing a particular law to govern their contract be "bona fide." Intention of the parties can be in good or bad faith, but how can the parties be in bad faith in choosing the law of a particular state to govern the validity of their contract? It is submitted that there are two possibilities. One is that the parties chose the law of X simply to evade the law which would otherwise be applicable; and the second is that they have chosen a law which has no connection with the contract other than by this choice.

The first possibility, the attempted evasion of otherwise applicable law, is similar to the French doctrine of *fraude à la loi*, i.e., the

¹⁸⁹ *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft*, (1937) A.C. 500 (Eng).

¹⁹⁰ See Cheshire, *Private International Law* 234-38 (5th ed. 1957); 2 Rabel, *Conflict of Laws* 398 (1950).

¹⁹¹ Unless, of course, those places are also the seat of the "proper" law in which case it is submitted that it would be more correct to apply the "proper" law than the *lex loci contractus* or the *lex loci solutionis*.

principle that if the facts of the case are connected with a system of law by way of evasion, then that foreign law will not be applied.¹⁹² The second possibility, lack of connection, is also closely related to the French doctrine for one can readily perceive how if a contract is connected with the chosen place, *e.g.*, place of performance, then purposeful evasion of the *lex loci contractus* is more difficult to establish. The problem seems to resolve itself into this: can the parties select a law, which has no connection with their contract, as the controlling and governing law; and, further, can they do so for the avowed purpose of evading the otherwise applicable law? At first glance, it would appear reasonable to say that bad faith is in the minds of the parties if evasion is of uppermost concern. Will this first impression continue however and, even more important, should it continue? It is submitted that once selection of an unconnected state is made in a contract, such as a bill of lading, and this document contains a negligence clause, void at the place of issue, then the forum should be wary of the selection, but not presumptuous. Investigation of the minds of the parties is certainly in order, for a conclusion on the apparent facts without such delving would be unfair. To illustrate: suppose a shipment from New York to Liverpool, England in which the covering bill of lading contains both a negligence clause and a stipulation for Argentine law. The English forum¹⁹³ can take one of two positions with respect to this stipulation: (1) it can say the Argentine law was chosen *solely* to evade the provisions of Cogsa, (*a fraude à la loi* situation) and refuse to uphold the stipulation;¹⁹⁴ or, (2) it can say the parties chose this law for some reason other than evasion, and uphold it.

It may be argued that the choice made by the parties was not done with *any* intention in mind, *i.e.*, that it was a purely arbitrary selection. While Professor Gutteridge says this is automatically indicative of bad faith and therefore should not be upheld,¹⁹⁵ the present writer tends to have more respect for the business judgment of those who carry and those who ship goods, and it is difficult to imagine

¹⁹² Kahn-Freund believes that in fact this restriction by Lord Wright "seems to introduce into English law for the first time the French notion of *fraud a la loi*." Case Note, 3 *Modern L. Rev.* 61, 63 (1939).

¹⁹³ The forum in the United States would have no problem whatsoever, as will be seen toward the end of this section.

¹⁹⁴ It is essential to remember here that the mere fact, standing alone, of no connection with Argentine law would not *ipso facto* make the English court, under Lord Wright's formula, refuse to uphold the stipulation. You will remember he also concluded in that case that "Connection with English law is not as a matter of principle essential" to the validity of the stipulation. *Vita Food Products, Inc. v. Unus Shipping Co.*, (1939) A.C. 277, 290 (P.C. N.S.).

¹⁹⁵ Gutteridge, Case Note, 55 *L.Q. Rev.* 323, 325 (1939): "It is difficult to conceive of any case in which a purely arbitrary choice of law can be said to be made in good faith."

such a business transaction being based on mere whim. Accordingly, some intention is probably behind this selection and the two possible reasons listed above are the only ones available. It can be concluded then that if the two parties at the time of contracting agreed upon the law of a state for some purpose other than evasion, (e.g., for business convenience or economy) this would not be bad faith. This, however, is as far as one can go with the nebulous topic of intention. Accordingly, the following interpretation of "bona fide" as a limitation on party autonomy is proposed by the writer: selection of a law with which the contract is or is not connected is an act done in good faith if it is done with the intention to pursue business convenience or economy, or for any other reason which removes the parties from pure arbitrariness. Thus, even if the parties have chosen the law of a state which has no other connection with their contract, and even if this law is chosen to evade the law of the place of making or some other law, this is not necessarily mala fide; such a selection, while incidentally being evasive, may be done primarily for business convenience.¹⁹⁶

The idea of a connection with the place stipulated by the parties leads us into the next purported limitation on party autonomy, *i.e.*, that which requires that the place the parties expressly intended to govern their contract must have some substantial connection with the contract itself. That this is not a uniformly accepted rule is evidenced by the clear words of Lord Wright in the *Vita Food* case,¹⁹⁷ setting aside the connection requirement. Nevertheless, many courts¹⁹⁸ and writers¹⁹⁹ have proposed this as a valid and necessary limitation, and it can safely be said that it is the leading impediment in the path of complete autonomy. The question which must be answered is this: Is the statement by Martin Wolff quoted earlier, which absolutely requires substantial connection in order to have a valid stipulation for governing law, to be accepted, qualified, or rejected?

The two poles of this argument are well represented by Westlake and Cheshire who base their theories as to the proper law on a purely objective, substantial connection footing. (Cheshire, in fact, limited the value of express stipulations to that one instance where the facts are such that a balance is struck between two countries—substantial

¹⁹⁶ "Something more than the desire to escape imperative provisions will be necessary under English law to make an intention mala fide, some morally impeachable or some anomalous and unreasonable choice of law is probably required. Where some 'sound idea of business convenience and common sense' . . . may be behind the choice of law English courts will uphold the choice, even if there is no internal connexion between the contract and the selected system." Wolff, *Private International Law* 419 (1950).

¹⁹⁷ See note 194 *supra*.

¹⁹⁸ See note 220 *infra*.

¹⁹⁹ See note 219 *infra*.

connection therefore is equal with both—so that then, and only then, can an express declaration of intention by the parties come in to resolve the problem.²⁰⁰) At the opposite pole is the view represented by the dictum of Lord Wright in the *Vita Food* case when he declared that connection with English law was not essential for the validity of a stipulation for that law.²⁰¹ So we must accept one of these diametrically opposed views or find some solution part way between the two.

As many writers²⁰² and many courts²⁰³ have quite adamantly clung to the "substantial connection" theory while other theorists²⁰⁴ and courts²⁰⁵ have been willing to exempt the requirement, might it not be reasonable to assume that some if not all of the difficulty lies in the definitions which these "sides" would apply to the phrase "substantial connection"?

It is possible that what is meant by this phrase is that the stipulated law must be somehow factually connected with the contract. That is, it must be the place where the contract was entered into, or the place of performance, the place where payment is to be made, perhaps the country of the flag of the vessel, the nationality of the parties, and so on. It is assumed that it is this type of connection which the proponents of the requirement of substantial connection have in mind. Therefore, is this the only type of connection that is possible? It is submitted that the answer is negative, and that a solution to this problem can be had, which should prove satisfactory to both "sides," and, of even more importance, very possibly to those most interested and involved, the contracting parties.

It was stated earlier²⁰⁶ that, while Professor Gutteridge was of the opinion that a completely arbitrary choice by the parties was open

²⁰⁰ Cheshire, *Private International Law* 256 (2d ed. 1938). This is the second edition of this fine work; no such inclination on the part of the learned writer was found in the present—fifth—edition; this may be set down as a direct result of the decision in the *Vita Food* case. It should be noted, however, that in the fifth edition, Professor Cheshire does admit that in the arbitration agreements, connection is not essential (p. 215) and that express stipulation can be helpful in matters of interpretation (p. 238).

²⁰¹ See note 194 supra.

²⁰² Cook, supra note 181, at 429; Cook, "Contracts" and the Conflict of Laws, 32 Ill. L. Rev. 899, 916 (1938); Falconbridge, Bills of Lading: Proper Law and Renvoi, 18 Can. B. Rev. 77, 94 (1940); Falconbridge, supra note 169; Parker, Free Will in Conflict of Laws, 6 Tul. L. Rev. 454, 458-59 (1932), are exemplary of this school.

²⁰³ *Brierly v. Commercial Credit Co.*, 43 F.2d 724 (E.D. Pa. 1929); *Owens v. Hagenbeck-Wallace Shows Co.*, 58 R.I. 162, 192 Atl. 158 (1937); *In re Claim by Herbert Wagg & Co. Ltd.*, (1956) Ch. 323; *Boissevain v. Weil*, (1949) 1 K.B. 482.

²⁰⁴ Note, Conflict of Laws: "Party Autonomy" in Contracts, 57 Colum. L. Rev. 553, 576 (1957); Note, Intention of the Parties—The Requirement of Substantial Connection, 10 La. L. Rev. 346, 356 (1950).

²⁰⁵ *Vita Food Products, Inc. v. Unus Shipping Co.*, (1939) A.C. 277 (P.C.N.S.); *Duskin v. Pennsylvania Cent. Airlines Corp.*, 167 F.2d 727, 730 (6th Cir.), cert. denied, 335 U.S. 829 (1948), noted, 16 U. Chi. L. Rev. 157 (1948).

²⁰⁶ See pp. 256-57 supra.

to a charge of bad faith, it nevertheless would be difficult to conceive of an instance in which absolute arbitrariness was present, taking into account the important fact that business acumen would probably prevent such from happening. Accordingly, when selection of applicable law is made expressly by the parties before any problems do arise, it is fair to conclude that they did so with some intent or purpose in mind. For example, it is a "common feature of international commerce"²⁰⁷ for the parties to agree to submission to arbitration in a country which is completely foreign to the parties and their contract. Such agreements have never been seriously questioned as to validity,²⁰⁸ even where there is no *other* connection with the designated place. Here at the very least there is an analogous situation to that at hand. If two parties in Manitoba agree to ship and carry grain from the lakehead to Italy through the seaway and in the bill of lading stipulate for arbitration of all disputes arising thereunder in London (a common practice) then the mere fact of lack of *other* connection with England will be ruled immaterial. It therefore becomes difficult to see why, if the same parties under similar circumstances stipulate for the application of English law to any problems arising, it should now be a prerequisite to have some *other*, factual connection with England. Further, even if the analogy between the arbitration situation and that of the agreement for governing law can be avoided—which, to the writer, would be a rather difficult task—the fact remains that if the parties in good faith²⁰⁹ desire their contract to be controlled and governed by English law for a matter of business convenience, a connection has been established. This is, in short, the submission of the writer; when two rational businessmen expressly select a law which is to at least one of them "connected" with the contract (perhaps the trade association—as in corn or cotton—does almost its entire business there) no caprice or arbitrariness is shown. This, to the writer, is "substantial connection." There are many possibilities for selection of an otherwise unconnected law, *e.g.*, the head office of one of the parties is there, or the courts of that jurisdiction are more experienced in matters connected with this type of business and can therefore expedite claims in a more or less predictable fashion. The reasons are myriad and one can readily see that this compromise between absolutely free autonomy and that which requires factual, objective connection is tailored to business convenience without sacrifice of

²⁰⁷ Cheshire, *op. cit.* supra note 190, at 215.

²⁰⁸ See cases cited, *ibid.* See also 2 Rabel, *op. cit.* supra note 190.

²⁰⁹ This has been discussed supra p. 257.

legal principles. When there is added to this the reminder as stated earlier, that the parties be bona fide, then this criterion of business convenience which fills the substantial connection requirement is submitted as the sensible approach to party autonomy by express stipulation.

This is admittedly the crucial question in the express stipulation category and one should summarize this last proposition thus: At any time that the parties stipulate for some particular law to govern their agreement, this stipulation must have some connection with their transaction either factually, as the place of making, or because it is for a place which is to them as business people convenient, viewed from the standpoint of business practice. That seemingly rare instance wherein an apparently arbitrary choice is made can then be handled on a lack of good faith basis.

To summarize the express stipulation situation then we can conclude the following: within the prescribed limits,²¹⁰ a stipulation by the parties for governing law as a matter of business convenience should be upheld if not contrary to the public policy of the forum.

B. *The Scope Of Autonomy Where The Intention Is Not Expressed*

Where there is a fact situation involving a choice of law rule and no expressed intention for some law has been made by the parties, it would appear that the court has open to it four possible avenues.

1. *The Formal, Stereotyped Rules*

These we have already dealt with in the preceding discussion and have disposed of each as being of no value in a search for uniformity of application of a choice of law rule.

2. *The Presumed Intent From Formal Rules*

A number of years ago, an English court, in a shipping case,²¹¹ held that "the law of the place where the contract is made is prima facie that which the parties intended. . . ." A large number of cases on both sides of the Atlantic have been decided on similar grounds.²¹² Similarly, a number of cases have held the law of the place of performance to govern as that is the presumed intent of the parties,²¹³

²¹⁰ That is, outside the area of capacity, form, and procedural matters, outside the statutory controlled preempted area, in matters of essential validity.

²¹¹ *Chartered Mercantile Bank of India v. Netherlands India Steam Nav. Co.*, (1882) 9 Q.B.D. 118, 122.

²¹² *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 459 (1889); *Potter v. The Majestic*, 60 Fed. 624 (2d Cir. 1894); *British South Africa Co. v. DeBeers Consol. Mines*, (1910) 1 Ch. 354; *Peninsular & Oriental Steam Nav. Co. v. Shand*, 3 Moore N.S. 272, 16 Eng. Rep. 103 (P.C. 1865); *Jacobs v. Credit Lyonnais*, (1884) 12 Q.B.D. 589. See also *Wharton, Conflict of Laws 1059-63* (1905); *Parker*, supra note 202, at 454.

²¹³ *Hall v. Cordell*, 142 U.S. 116, 120 (1891); *Pritchard v. Norton*, 106 U.S. 124 (1882); *Jacob v. Credit Lyonnais*, supra note 212.

and for the same reason, the law of the flag²¹⁴ and the law of the place which holds the agreement valid.²¹⁵

While these may be labelled as "intent" or "autonomy" cases because the word "intent" is used descriptively, it is submitted that these cases and the category they represent are simply a division of the preceding group for the courts are deciding the cases by application of the formal, stereotyped rules of *lex loci contractus* and others and then dressing the decisions up in the clothes of intent. After all, if a court states that it is applying the law of the place where the contract was made or where it is to be performed because that is presumably what the parties intended, while we may now say that this is autonomy it most assuredly is an approach that leaves much to be desired. It is thought that much more clarity could be injected if a court was simply to say in the first instance that the law intended by the parties is the law of X and not so secondarily following a presumption; resort to the formal rules is superfluous and can only lead to confusion.²¹⁶

3. *The Implied Intent of the Parties*

A number of cases have held that, in the absence of expressed intent, the correct law to govern the validity of a contract is that which is intended by the parties, and in so doing have chosen the law of a place which was in the minds of the parties but was simply not expressed by them. How is such a finding possible? What criteria do the courts look for to indicate intention? The answer appears to be fairly uniform. Gathering the pertinent facts, the court ascertains the place with which the contract has the closest connection—the place of the most number of points of contact—and then proceeds to settle upon the law of that place as the law which will govern the validity of the contract in question. One must be careful not to conclude, however, that such a choice is made in every case for the same reason. There are really two fundamental reasons which courts have advanced and they establish the necessity of this and the next category at which we will look. To explain further: once the court

²¹⁴ *In re Missouri S.S. Co.*, (1889) 42 Ch. D. 321, 328.

²¹⁵ *Pritchard v. Norton*, 142 U.S. 116 (1891); see cases cited in 40 Colum. L. Rev. 521 n.23 (1940).

²¹⁶ "It is doubtful . . . whether any useful purpose is served by the traditional practice of regarding certain facts, such as the *locus contractus*, the *locus solutionis* or, in the case of a contract of affreightment, the nationality of the flag, as presumptive evidence of the governing law. To enter upon the search with a presumption is only too often to set out upon a false trail. It may tend to divert attention from the necessity to consider every single pointer." Cheshire, *op. cit. supra* note 190, at 211. And, in *The Assunzione*, (1954) 2 Weekly L.R. 234, the shipper invoked the presumption of the *lex loci contractus* and the carrier the law of the flag; both were dismissed by the court in favor of the points of contact of the contract.

has gathered in the facts which it considers important it then selects the jurisdiction considered to be most closely connected with the contract. This jurisdiction has the greatest number of points of contact and therefore is selected as the governing law. It is what they do next that is important, theoretically, at least, for it is here that authority is split. One group maintains that once the law has been selected, the court must then declare that, as this is the seat of the contract, it is the place that the parties must have intended to govern their transaction. For sake of convenience, we can label this a subjective approach. The alternate group maintains, once the selection of the law is made, that this is the law that a reasonable man would have intended; accordingly, this is the law the parties concerned ought to have intended. This is termed an objective approach and will be discussed in the following section.

While there is a problem in the express intent area of substantial connection, obviously no such problem exists in the implied intention situation where the basis is placed on points of contact. Aside from one instance then, there would appear to be no real obstacle in the path of this subjective approach. That exception is in the instance where one could say that the parties tacitly intended a particular law to apply. This could arise where the parties have dealt in this business before and have always had problems settled by application of a particular body of law; or perhaps the parties have not had dealings with each other before but the particular trade they are now engaged in makes a practice of subjecting differences to a particular jurisdiction or law. In these two instances one might say that although the majority of the points of contact is with place X, it is the practice or custom of the parties to submit to the law of place Y. If this is accepted, then one might conceivably say that here the parties have tacitly implied that it is their intention to submit to the law of Y. If the objection is again advanced that there is no other factual connection with Y, then one could argue along the same lines as was done in the express intent section, *i.e.*, that "business convenience" is a sufficient connection.

If one advocates an intention theory for choice of law in the absence of an expressed intention, he could say that a court is to survey the facts, choose the law with which the transaction is most closely connected, and conclude that that is the law the parties must have had in mind for solution of any possible differences. This would seem to properly follow from an acceptance of the theory used in the express intention cases and as there it was concluded that it is within the powers of the parties to select the applicable law, uni-

formity requires a similar line of thought in cases where no express selection has been made. Again, if it is conceded in the express cases—as it seems it must be—that it is within the province of the parties to select law, then the same must follow in this category.

One can then place all of the cases in one fairly neat package with three compartments: (1) Express intent; (2) Tacit intent; and (3) Implied intent.

All three necessarily involve the public policy of the forum, but once this is set aside, the only requirement is connection with the intended law through some business convenience factor.

4. *The Presumed Intent of the Parties Arising From Points of Contact*

As was mentioned in the preceding section, it is possible, once the points of contact have been assessed, to conclude that the law which “stands out” is that law which a reasonable man would have selected (and therefore which these parties should have selected).

This objective approach does not pretend to delve into the minds of the parties concerned, but remains aloof and apart. It is obvious that the conclusion as to applicable law will be exactly the same as in the subjective approach, so one may immediately ask: where is the problem? To be sure the problem is purely academic and theoretical for it is true that a “subjective” court and an “objective” court will arrive at the same conclusion and the same result in the case, but for different reasons. Should we continue to distinguish the two, or should we just forget the distinction as it does not make any real difference anyway?

Let us look at a recent decision²¹⁷ in an admiralty matter to see what happens. A charterparty in the English language was negotiated in France between a Frenchman and an Italian. The major portion of the freight for a shipment from France to Italy on an Italian vessel was to be paid in Italian currency in Italy. From these facts, the Court of Appeal in England was able to conclude that just and reasonable men would have intended Italian law to apply and therefore that this was the “probable intention of the parties.”²¹⁸ When confronted with the proposition that the intent of the parties should be pursued subjectively, asking what they “would” have intended rather than what they “ought” to have intended, Birkett, L. J. remarked that there was an aura of “unreality”²¹⁹ about a subjective approach as one party would certainly intend French law and the other, Italian. To him, the objective, reasonable man criterion was

²¹⁷ *The Assunzione*, supra note 216.

²¹⁸ *The Assunzione*, (1954) 2 Weekly L.R. 234.

²¹⁹ *Ibid.*

alone acceptable. Professor Kahn-Freund, in writing on this case,²²⁰ observed that as the "proper law" was found by looking at the connecting factors, it made little difference whether the court did so by pretending the actual parties intended this, or that reasonable parties would have intended it. His conclusion was therefore that the "battle between the 'objectivists' and the 'subjectivists' [is] a fight in the clouds."²²¹ Professor Kahn-Freund then would dismiss the theoretical difference as it is unimportant to the decision of a case in any event.²²²

It is agreed that there is no difference in result and the present writer agrees as well that perhaps it would be good if the theoretical opposites—subjective and objective—were dismissed as irrelevant. This is the most acceptable base and logically follows from an application of a "localization"²²³ theory. If courts would decide a choice of law problem where there is no expression of intent on a *purely* objective basis—as is the starting point and the foundation for either the so-called "subjective" or "objective" approaches—no problems of a theoretical nature would arise. It is only when an explanation is attempted of *why* this was done that difficulties arise. As the practice is so prevalent for courts to rest their decision on either the intent of the parties involved or on the presumed intent of the reasonable man, it becomes necessary, however, to depart from simplicity and adhere to practice. Accordingly, as it appears that the "would" and the "ought" are here to stay, some discussion should follow on which is preferable.

One major reason is advanced why the implied intent—the "would" category—is a better choice. While some may doubtless find reasons just as convincing for upholding the reasonable man thesis, the choice of the former is made by the writer to maintain continuity and in an attempt to return maritime law to some semblance of uniformity. Hence, it is thought that as party autonomy is advanced as the best available solution to choice of law problems, this idea should pervade the entire field of maritime contracts and not be restricted to mere expressed intent. If this is accepted, then where no expression is extant, the court may find the correct law by an objective process and explain their find in a more uniform fashion by declaring that this is the law these parties intended; they simply failed to express that intent.

²²⁰ Case Note, 17 *Modern L. Rev.* 255 (1954).

²²¹ *Id.* at 259.

²²² See also Wolff, *op. cit. supra* note 196, at 131-32.

²²³ Cheshire, *op. cit. supra* note 190.

IV. CONCLUSION

Will an adoption of autonomy solve the many problems which still remain in the bill of lading—maritime law field? The reply must be in the affirmative when two things are taken into consideration. The first is the assumption that the nations of the world will use the autonomy theory in deciding upon a choice of law rule. While some restrictions exist,²²⁴ it is a theory which "is followed 'with astonishing unanimity' by courts of leading European and Latin-American countries."²²⁵ It may safely be forecast that the "selling job" has largely been accomplished and the market is receptive.²²⁶ Some difficulties do indeed remain, for until it is demonstrated by acceptance over a lengthy period of time in near-universal fashion, some courts will tend to use other methods to seek uniformity.²²⁷ It is not difficult to see, however, that the autonomy answer is the only one which has sufficient potential to engender uniformity and accordingly must be pursued.²²⁸

The second thought which must be considered arises from a case to which we had occasion to refer earlier in this work, *Wm. H. Muller & Co. v. Swedish-Am. Line, Ltd.*²²⁹ There, a court in the United States gave effect to an express stipulation for the application of Swedish law in Sweden in a bill of lading which covered a shipment from Sweden to the United States. While this, it is true, is in complete alignment with the thesis of autonomy supported by the writer, it is submitted that the decision is not only erroneous, but can lead to dangerous results.²³⁰ Let us take an example to illustrate. Suppose a

²²⁴ See 2 Rabel, *op. cit. supra* note 190, at 368-76.

²²⁵ Cook, *supra* note 202, at 900.

²²⁶ See Yntema, "Autonomy" in *Choice of Law*, 1 *Am. J. Comp. L.* 341, 350-52 (1952).

²²⁷ See, for example, the case of *The Alhena* remarked upon in an article by J. Offerhaus, *Netherlands Maritime Law and the Conflict of Laws*, *Arkiv for Sjorett* 20 (1952).

²²⁸ Perhaps passing mention should be made to the somewhat unfortunate manner in which Lord Wright handled the decision in the *Vita Food* case. He made one statement which can only be classed as a *lapsus calami* on his part when he remarked that there was no reason "for refusing to give effect to the express selection of English law as the proper law in the bill of lading. Hence, English rules relating to the conflict of laws must be applied to determine how the bills of lading are affected by the failure to comply with s. 3 of the Act." (1939) *A.C.* 277, 292 (P.C. N.S.) Dean Falconbridge correctly, it is submitted, concluded that this was somewhat strange, that English *conflict* rules would apply, following the selection of English law by the proper law theory. The present writer agrees entirely with Dean Falconbridge that this can lead very easily to a *renvoi* situation and that surely the Privy Council did not intend such a result. See Falconbridge, *Bills of Lading: Proper Law and Renvoi*, 18 *Can. B. Rev.* 77, 84-86 (1940). That a reference to English law is to English internal or municipal law only, is suggested as being the only possible interpretation that one should place on a stipulation for that law. On this point see also Morris and Cheshire, *The Proper Law of a Contract in the Conflict of Laws*, 56 *L.Q. Rev.* 320, 333-35 (1940).

²²⁹ 224 F.2d 806 (2d Cir), cert. denied, 350 U.S. 903 (1955).

²³⁰ See Gilmore & Black, *Admiralty* 125 n.23 (1957).

shipment of goods from New York to England with the covering bill of lading containing a negligence clause and a stipulation for Argentine law. Following negligent damage to the goods, the shipper sues the carrier in a New York court. If the autonomy theory is carried to its extent, then the court in New York is to apply the law of Argentina. Essentially this is what one must conclude from the decision in the *Muller* case. The same would hold true in the case of an incoming shipment to the United States from any other country with the bill stipulating for the law of any country other than the United States. It is in these types of cases that the autonomy theory can *not* be applied. If it is, there is a direct violation of the provisions of Cogsa. According to this statute, "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 chapter."²³¹ From this, it can only be concluded that in a United States forum, when any of the possible conflict problems arise involving a possible choice of law, the provisions of Cogsa will step in and no choice of law problem then exists. To allow such a stipulation in a shipment to or from the United States, in a United States forum, is erroneous. Of course, the same holds true of any country which has similar legislation or has ratified the Brussels Convention. In other words, the autonomy doctrine is confined to its only possible position, that is, to cover cases where uniformity has not been made possible by multilateral agreements.

To forestall any misapplication however, the following caveat must be noticed with great care: because in a situation like that in the *Muller* case the United States forum should disregard the stipulation for governing law, it should not be supposed that the parties must now or should now omit from their bills of lading, stipulations for applicable law. This would be a grave error and would result in more complicated problems. Even though the stipulation should have no weight in a court in the United States,²³² there is absolutely no assurance to either party that that is where the eventual forum will be. Accordingly, the plan is this: in every shipment of goods covered by a bill of lading, the parties should stipulate for some law to govern any possible dispute that may subsequently arise. If the forum turns out to be in a place where the provisions of Cogsa and similar legislation apply *to that shipment* (in the United States to inward *and* outward shipments; in England, for example, to outward shipments only) then the stipula-

²³¹ 49 Stat. 1207 (1936), 46 U.S.C.A. § 1300 (1958).

²³² See *Sociedade Brasileira De Intercambio Comercial E Industrial, Ltda. v. The S.S. Punta Del Este*, 1955 Am. Mar. Cas. 2288.

tion is of no effect. If, however, the forum is in a third country, then if that country accepts the theory of autonomy, the chosen law will be applied with some measure of predictability. If the stipulation is not included, then predictability is gone and the validity of the negligence or any other clause in a bill of lading will be in doubt until such time as a forum is chosen. The stipulation for governing law is a safety-valve which allows the parties a greater measure of knowledge of the validity of their contractual provisions. If they stipulate for some law they are at least on much firmer ground than if the choice is left completely in the hands of some unknown forum. To the writer this is the only practical answer to near-uniformity in the absence of a complete covering of the field by convention adopted by all countries concerned.

Finally, we come to the place where we can make the following statement: If the parties to a bill of lading stipulate for applicable law, this should be allowed to stand in any forum: (1) If not within the ambit of convention or legislation; (2) If not contrary to the public policy of the forum; and (3) If done for business convenience. If the parties do not expressly select a law to govern their contract, then the court should survey the points of contact, "localize" it, and then proceed to apply this law as that which the parties impliedly intended.

*Appendix**

SHIPMENT	FORUM	APPLICABLE LAW	RESULT
U.S.A. to FRANCE ¹	U.S.A.	U.S. Cogsa applies ²	Invalid
	France	Brussels Convention applies ³	Invalid
	X State	Conflict of law rule applies ⁴	-----
FRANCE to U.S.A.		Same as above	
U.S.A. to ENGLAND ⁵	U.S.A.	U.S. Cogsa applies ²	Invalid
	England	Conflict of law rule applies ⁶	-----
	X State	Conflict of law rule applies ⁷	-----
ENGLAND to U.S.A.	U.S.A.	U.S. Cogsa rule applies ²	Invalid
	England	English Carriage of Goods Act applies ⁸	Invalid
	X State	Conflict of law rule applies ⁹	-----
CANADA to FRANCE ¹⁰	Canada	Canadian Carriage of Goods by Water Act ¹¹	Invalid
	France	Perhaps French public policy ¹²	-----
	X State	Conflict of law rule applies ¹³	-----
FRANCE to CANADA	France	Brussels Convention applies ³	Invalid
	Canada	Conflict of law rule applies ¹⁴	-----
	X State	Conflict of law rule applies ¹⁵	-----
U.S.A. to ARGENTINA ¹⁶	U.S.A.	U.S. Cogsa applies ²	Invalid
	Argentina	Conflict of law rule applies ¹⁷	-----
	X State	Conflict of law rule applies ¹⁸	-----
ARGENTINA to U.S.A.	Argentina	Conflict of law rule applies ¹⁹	-----
	U.S.A.	U.S. Cogsa applies ²	Invalid
	X State	Conflict of law rule applies ²⁰	-----
FRANCE to ARGENTINA	France	Brussels Convention applies ²¹	Invalid
	Argentina	Conflict of law rule applies ²²	-----
	X State	Conflict of law rule applies ²³	-----
ARGENTINA to FRANCE	Argentina	Conflict of law rule applies ²⁴	-----
	France	Law of April 2, 1936 applies ²⁵	Invalid
	X State	Conflict of law rule applies ²⁶	-----
ARGENTINA to JAPAN ²⁷	Argentina	Conflict of law rule applies ²⁸	-----
	Japan	Conflict of law rule applies ²⁹	-----
	X State	Conflict of law rule applies ³⁰	-----
JAPAN to ARGENTINA		Same as above	

Footnotes to Appendix

* In the chart, it is suggested that a negligence clause has been inserted by a carrier in a bill of lading covering the shipments.

¹ The United States is exemplary of those countries which have legislation dealing with shipments both inward and outward. The other two are the Philippines and Belgium. France, in this instance, is typical of the thirty-three States which have ratified the Brussels Convention.

² 49 Stat. 1207 (1936), 46 U.S.C.A. § 1300 (1958).

³ France, like the United States, has both ratified the Brussels Convention (1936) and passed enacting legislation (Act of April 2, 1936). It is probable that the Convention applies to all shipments issued in any of the contracting States (except perhaps in France itself, i.e., between French ports). The legislation, on the other hand, is not nearly as clear in its area of applicability. Yiannopoulos believes, and he is apparently well supported by French jurisprudence, that the Act of April 2, 1936, applies to incoming shipments from nonsignatory (to the Brussels Convention) States. Yiannopoulos, *Bills of Lading and the Conflict of Laws: Validity of "Negligence" Clauses in France*, 7 *Am. J. Comp. L.* 516, 530 (1958).

⁴ If, in this case, the forum was in Argentina, a country which has not adopted the Brussels Convention nor has it any similar domestic legislation, a nice question of choice of law is presented. Presumably, a choice could be made of place of contracting, place of performance, law of the flag, law of the forum, law of the place of injury, law chosen by the parties, proper law of the contract, and perhaps others. Public policy is of some moment in various countries as well. Hence, it is impossible to forecast the validity of the negligence clause unless first the forum is set and then the jurisprudence and doctrine of that jurisdiction is such as to render a prognosis effective. For an example see note 17 *infra*.

⁵ England is chosen as an example of a country which has ratified the Brussels Convention and has domestic legislation which applies only to shipments leaving England.

⁶ As English legislation applies only to outward shipments, an inbound one is not subjected to it. Hence, the interpretation of a bill of lading is subject, as to the validity of its clauses, to the conflicts rules of England. Scrutton takes the view that in such a case, bills of lading "will be governed by the law by which the parties intend to be bound, . . ." Scrutton, *Charterparties* 21, 455 (1955). That is, the negligence clause will be interpreted as any other in the bill and if valid according to the applicable law, it will be upheld.

⁷ If the forum is in Canada, for example, then if the Canadian court decides that the applicable law is the place of contracting (United States) the clause will be held invalid. If, however, they decide on one of another group of available choices, then it is possible for them to uphold the validity of the clause.

⁸ The Carriage of Goods by Sea Act, 1924, 14 & 15 Geo. 5, c. 22, § 1.

⁹ It is much more probable here that the clause will be held invalid as both the *lex loci contractus* and the *lex loci destinationis*, if either is selected as the governing law, would deny validity to the clause.

¹⁰ Canada is selected because it has domestic legislation along the Brussels Convention lines, but has never ratified the Convention. This has peculiar significance in respect to France, as was explained earlier.

¹¹ Water Carriage of Goods Act, *Can. Rev. Stat. c. 291* (1952). Section 2 states that the rules "shall have effect in relation to and in connection with the carriage of goods by water in ships carrying goods from any port in Canada to any other port whether in or outside Canada."

¹² Great doubt exists here as to the validity of a negligence clause in such a case. Knauth suggests that "French . . . courts will . . . deal with Canadian bills of lading according to their apparent tenor, even though the parties, in issuing the bill of lading, violated the law and policy of the country of issue." Knauth, *Ocean Bills of Lading*, 160 (1953). Yiannopoulos, on the other hand, suggests that the public policy of France is such as to deny validity to such a clause. He cites a French case of the Court of Cassation which apparently is in conjunction with this feeling. Yiannopoulos, *op. cit. supra* note 3, at 529-30.

¹³ It is submitted that even if the forum was in a country, the United States, for example, or any other that has *Cogsa*-like legislation, it has no application to this case as it is a shipment between foreign ports. See Knauth, *op. cit. supra* note 12, at 155.

¹⁴ See note 11 *supra*.

¹⁵ See note 13 *supra*.

¹⁶ Argentina represents those countries which have neither ratified the Brussels Convention nor enacted domestic legislation pursuant thereto.

¹⁷ A quotation from a comparative study of the Bustamante Code, the Montevideo Convention, and the Restatement of the Conflict of Laws made by the Inter-American Judicial Committee in 1954 is applicable here as it relates to the Argentine position on choice of law. Article 25 of the 1940 Treaty on Navigation contained the following: "Contracts of charter-party, and of transport of merchandise or persons, concerned with effecting such transportation between ports of one and the same State, are governed by the laws of that State, regardless of nationality of the vessel involved . . ." Article 26 had this to say: "When the contracts above-mentioned are to be executed in one of the States, they are governed by the law in force in that State, regardless of the place where they were concluded or the nationality of the vessel . . ." At the Hague Conference of 1928, Argentina made the following reservation, which is the quotation referred to above.

"It makes specific reservation of the application of the law of the flag to questions relating to maritime law, especially as regards the charter party and its legal effect, as it considers that these should be subject to the law and jurisdiction of the country of the port of destination.

"This principle was successfully upheld by the Argentine branch of the International Law Association, at its 31st Session and is now one of the Buenos Aires Rules."

¹⁸ Even if this forum was in a country having legislation similar to the United States *Cogsa*, it would not apply as it is a shipment between foreign ports. A forum in a non-uniform country is completely free as well to make its own choice as to applicable law.

¹⁹ See note 17 *supra*.

²⁰ See note 18 *supra*.

²¹ See note 3 *supra*.

²² As indicated in note 17 *supra*, the clause will probably be valid according to an Argentine court.

²³ See note 18 *supra*.

²⁴ See note 17 *supra*. As the law of the destination is favored in Argentina, and as French courts are evidently willing to use the Law of April 2, 1936, to disallow the negligence clause in incoming shipments basing their decisions on public policy, Argentina may be willing to give effect to this French jurisprudence. This is pure conjecture, however.

²⁵ This, at least, is the opinion of Yiannopoulos. See note 12 *supra* and note the following quotation from this writer: "the law of April 2, 1936 applies *proprio vigore* as forum law not only to bills of lading issued in France and not covered by the Brussels Convention, but also to bills of lading issued in countries not adhering to the Brussels Convention for the carriage of goods to French ports." Yiannopoulos, *op. cit. supra* note 3, at 530.

²⁶ See note 18 *supra*.

²⁷ These countries are selected as examples of nations which have no connection with the Brussels Convention, either by ratification or by adoption of domestic legislation.

²⁸ See note 17 *supra*.

²⁹ See note 4 *supra*.

³⁰ See note 18 *supra*.