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RELAÇÕES INTERNACIONAIS PRIVADAS

LAW APPLICABLE TO CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS (Article 29 of the Turkish PILA)[1]

LEI APLICÁVEL AOS CONTRATOS DE TRANSPORTE INTERNACIONAL DE MERCADORIAS (Artigo 29 da Lei de Direito Internacional Privado da Turquia)

Prof. Dr. Nuray EKŞİ

Resumo: O artigo apresenta panorama legislativo e reflexões sobre o transporte internacional de mercadorias na Turquia, através de detalhado estudo sobre as normas de direito internacional privado que regulamentam a matéria, em particular o art. 29 da Lei de Direito internacional Privado e Processual da Turquia.

Palavras-Chave: Contrato de transporte internacional. Lei aplicável. Turquia.

Abstract: This article deals with some important topics in relation to the international carriage of goods in Turkey via a detailed analysis of statutory provisions on private international law specially addressing article 29 of Turkish Private International Law and Procedural Law Act.

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1 The author wishes to thank William K. Sheehy, Adjunct Professor, Yeditepe University Law School, for his invaluable language correction of the earlier draft of this paper.

Keywords: Contracts. International carriage of goods. Turkey.

SUMMARY: I — Article 29 of Turkish PILA: ascertain lex causae; II — cases not covered by Article 29; III — Problems in connection with article 29; IV — Temporal scope of application of article 29; V — Conclusion.

I. Ascertaining the *Lex Causae* of Contracts for the Carriage of Goods under Article 29 of the Turkish PILA

1. The Conflict of Laws Rule in Article 29 of the Turkish PILA

Article 29 of the new *Turkish Private International Law and Procedural Law Act* (hereinafter referred to as "PILA"), which has been in force since 12 December 2007,[2] deals with the law applicable to international contracts for the carriage of goods. The Explanatory Memorandum relating to Article 29 of PILA states that, in light of the peculiarities of contracts for the carriage of goods that are concluded in international commercial practice, it was deemed appropriate to insert a special Article in the new code.

Paragraph (1) of Article 29 of PILA accepts the principle of party autonomy and provides that disputes arising out of a contract for the carriage of goods shall be governed by the law chosen by the parties and that in the absence of such a choice, a contract for carriage of goods shall be subject to the law of the country with which the contract is most closely connected. As to determining what country has the closest connection to a transaction, paragraph (2) of Article 29 establishes a rebuttable presumption that a contract for the carriage of goods is presumed to have the closest connection with the country in which, at the time of the contract was concluded, the carrier had its

2 PILA numbered 2675, which entered into force in 1982, was abolished by Article 64(1) of Turkish Private International Law and Procedural Law Act numbered 5718, which was published in the Official Gazette dated 12 December 2007 and numbered 26728.

principal place of business. In short, in the absence of a choice by the parties, the law of the carrier's principal place of business is to be applied. However, the presumption that the applicable law is determined by the location of the carrier's principal place of business is a rebuttable presumption. The law of the country where the carrier had, at the time of the contract was made, his principal place of business shall be applicable provided that such place is also the place of loading or unloading of cargo or the principal place of business of the consignor.

If none of these connecting factors is present, paragraph (2) of Article 29 of PILA is not applicable to the transport of goods contract and the presumption under which it is assumed that the carriage of goods contract is most closely connected with the country where the carrier has his place of business is rebutted. If the presumption of paragraph (2) of Article 29 is rebutted, paragraph (3) of PILA's Article 29 provides that *lex causae* shall be ascertained by the laws of another country if it appears from the circumstances as a whole that the carriage of goods contract is more closely connected with that other country.

Because paragraph (2) of Article 29 of PILA focuses on the time the contract was concluded, subsequent changes in a carrier's principal place of business have no impact on the applicable law. The Explanatory Memorandum accompanying PILA points out that this prevents changes in the principal place of business of the carrier being made with a malicious intent. The places of loading and discharge refer to the locations agreed upon by the parties at the time when the contract is concluded. The actual place of loading or discharge is not taken into consideration as a decisive factor for ascertaining applicable law.

2. The Scope of *Lex Causae*

Basically, all disputes regarding a carriage of goods contract are subject to the law chosen by the parties or, in default of choice of

a governing law, the law that is most closely connected with the contract. Thus, the formation, interpretation, and performance of the contract, the contract's existence and material validity, the transfer of risks of loss or damage to goods breach of contract, the consequences of the invalidity of a contract; and the termination of the contract are all governed by the law ascertained by PILA's Article 29.

3. Matters Excluded from the Scope of *Lex Causae*

a. Legal Capacity of the Parties to Contracts for the Carriage of Goods

Questions of legal capacity are excluded from the scope of Article 29, and the provisions in respect of capacity are set out in PILA's Article 9, which provides that the national laws of the parties govern legal capacity. This rule of Article 9 is, however, not applicable in situations where a natural person has no capacity under his national law, but has capacity under the law of the country in which the contract was concluded.

In reality, parties to contracts for the carriage of goods are mostly companies. The capacity of a company is subject to the laws of the country in which its administrative centre, determined in the articles of incorporation, is located. However, if the actual administrative centre of the company is situated in Turkey, then Turkish law can be applicable to questions of the company's capacity [PILA's Article 9(4)].

b. Formal Validity of Contracts for the Carriage of Goods

PILA's Article 7 contains general rules relating to the formal validity of contracts and provides that a contract is valid if it satisfies the formal requirements of the law which governs it (*lex causae*) or

of the law of the country where the contract is concluded (*LRA- Locus Regit Actum*). This means that PILA's Article 7 offers two alternatives for determining the validity of a contract: if the contract is considered invalid under the law that governs the contract, as an alternative, recourse can be had to the law of the country where the contract has been concluded to determine contract validity.

c. Manner of Performance and Measures for the Protection of Goods

PILA's Article 33 states that consideration shall be given to the law of the country in which the performance takes place with respect to the manner of performance, the steps to be taken in the event of defective performance or if protective measures are required relating to goods. The Explanatory Memorandum accompanying PILA, points out that, considering the problems that occur in the commercial world, Article 33 was inserted as a special provision to provide that the manner of performance, inspection of goods, protective measures to be taken to secure the goods are all subject to the law of the country in which the goods are actually delivered or the protective measures are taken.

Generally, the performance of a contract is governed by the *lex causae*. However as a result of Article 33, only the above-described matters are to be subject to the law of the country in which performance takes place. This result is reached not only pursuant to PILA but also under the laws of other countries and several international conventions.[3] On the other hand, the concept of "manner of performance" has no clear and definite meaning. There is no uniform definition that is accepted by doctrine. Article 33 of PILA does not contain any clue as to the precise meaning of "manner of performance." To

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3 EKŞİ, Nuray. *Sözlemeden Dodan Borçlara Uygulanacak Hukuku Hakkynda Roma Konvansiyonu*, [The Rome Convention on the Law Applicable to Contractual Obligations]. Istanbul, 2004, p. 138.

determine the meaning of "manner of performance", regard must be given to the *lex fori*. In general, the term may cover any of the following: checking quality; measuring; weighing; counting; inspection by the consignee; acts to be done upon the rejection of delivery of the goods by the consignee; and the formal requirements and other matters relating to payment of the price. The reason why the law of the place of performance applies to the above-mentioned matters is that these kinds of acts should be done immediately and in accordance with the procedures required by local law. PILA's Article 33 says that the court may take into account the law of the place of performance. Therefore, a court is not required to apply the law of the country in which performance takes place, but it has discretion to apply, or not apply, this law in whole or in part, taking into account the circumstances of the case as a whole.[4]

d. Limitation Periods

PILA contains a specific rule providing that limitation periods are to be governed by *lex causae*. Because Article 8 of PILA makes a reference to the applicable law determined by Article 29, limitation periods and substantive matters are subject to the *lex causae* despite the fact that limitation period is regulated by Article 8. As a result of the reference made by Article 8 to Article 29 the *lex cusae*, that means the proper law of a contract, is also applicable to such questions as: duration of prescriptions and limitation of actions; or suspension of the running of a statute of limitations.

e. Contracts for the Carriage of Goods Made Through Representatives or Agents

A representative or agent may make contracts for the interna-

4 EKŞİ, Nuray. Roma Konvansiyonu [Rome Convention], p. 139.

tional carriage of goods. The law of the country referred to in Article 30 of PILA must resolve whether the representative or agent has been empowered to conclude a contract on behalf of its client.

4. Matters Preventing the Application of the *Lex Causae*

a. Public Policy

In private international law, public policy sometimes precludes the application of foreign law. As a general rule, the law ascertained in accordance with conflict of laws rules is applicable to acts or transactions having a foreign element. However, in exceptional circumstances, public policy may prevent the application of a foreign law.[5] According to PILA's Article 5, application of the law of a foreign country may be refused if such application is manifestly incompatible with the public policy of the forum. If it is necessary for reasons of public policy, the court may substitute Turkish law for otherwise applicable foreign law.

b. Mandatory Rules

Savigny and *Mancini* accepted the existence of the mandatory nature of some rules and the rules of positive ordre public.[6] *Savigny* defined mandatory rules (zwingendes Recht) as the rules that find an area of application regardless of the rules normally governing conflict of laws.[7] *Franceskais, Graulich* and *Winter* formulated the modern

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5 EKŞİ, Nuray. Roma Konvansiyonu [Rome Convention], p. 144.

6 OVERBECK, E. Alfred von. *The Fate of Two Remarkable Provisions of the Swiss Statute on Private International Law*. I(1999) Yearbook of Private International Law, Edt. Petar arèeviæ/Paul Volken, p. 120.

7 MOSS, Giuditta Cordero. *International Commercial Arbitration, Party Autonomy and Mandatory Rules*. Oslo, 1999, pp. 103-4.

doctrine in this area.[8] According to *Franceskais,* the fundamental policies of the state concerning economic or political or social principles govern transactions having foreign elements regardless of the rules normally governing conflict of laws analysis.[9] Initially, only mandatory rules of the *lex fori* were considered and the judge applied the law determined in accordance with the *lex fori's* conflict of laws rules only for issues outside the area of the mandatory rules. Later on, the area of the mandatory rules was expanded to cover the mandatory rules of third countries.[10]

From the private international law point of view, there is no common description of mandatory rules that are accepted by all States.[11] Referring to this concept, a number of phrases such as "law of immediate application", "overriding statutes", "lois d'application immédiate", "selbstgerechte Sachnormen", "Zwingende Vorschriften", "Eingriffsnormen" are used.[12] Whatever phrase is used for this con-

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8 von OVERBECK, E. Alfred von, p. 120.

9 SAYMAN, Yücel. *Devletler Hususî Hukukunda Evlenmenin Kurulu¤u, [The Marriage in Private International Law].* Istanbul, 1982, pp. 2-3 (fn. 2 with reference to Franceskakis*).*

10 MOSS, Giuditta Cordero, pp. 103-104.

11 The terms "overriding status""mandatory rules", "law of immediate application", "directly application", "lois d'application immediate" are, as alternative, being used for this concept. AL DIAMOND, Harmonisation of Private International Law, 199(1986). IV Recueil des cours, p. 288.

12 Previously, the term "Eingriffsnormen" was used in the German doctrine. However, recently, the term "international zwingenden Normen" is being used more often. Along with that, both terms have the same meaning. "Eingriffsnormen" caused different implications in the relevant academic discussions for the last ten years. Whereas the academic discussions focused on foreign mandatory rules (ausländischer Eingriffsnormen) in the 1980s, in the 1990s, attention was paid to the laws of the forum (Bestimmungen des Forumstaates) without consideration of the mandatory rules of the applicable law to the substance of the contract (JUNKER, Abbo. Empfiehlt es sich, Art. 7 EVÜ zu revidieren oder aufgrund der bisherigen Erfahrungen zu präzisieren? 20 (2000)2 IPRax, p. 66). The reason of the different implication (der Grund für die diese Akzentverschiebung) in international private and procedural law practice (Praxis des Internationalen Privat-und Verfahrenrecht) is the consideration of practical experience in adoption of Article 7(2) of the Rome Convention within the reform of German international private law in 1986. "Heimwertsstreben auf neuen Wegen" is used as a tool in Article 34 of the EGBGB (JUNKER, p. 66).

cept, those rules have a different meaning and an area of application in private international law that differs from what would be the case in respect of matters governed solely by national laws. In other words, not all imperative rules of national law are accepted as applicable to private international law matters.

These rules exist not only in commercial or contractual relations for the protection of workers, consumers, investors, tenants, representatives, franchisees, *et al*., but also in family law for the protection of children.[13] Instead of defining terms, it is better, taking account of their nature and purpose, to determine whether the mandatory rules will be applicable or not.[14]

A distinction should be made between mandatory rules and public policy. Public policy has a preventive role that precludes the application of foreign law. When the court considers that a rule of applicable foreign law ascertained in accordance with the forum's conflict of laws rules is contrary to public policy, then it can refuse to apply such rule. In contrast with public policy related analyses, mandatory rules are directly applicable without reference to the usual conflict of laws analysis because the mere existence of mandatory rules is sufficient grounds for the court to ignore its own conflict of laws rules.[15]

PILA has two Articles relating to mandatory rules: Articles 6 and 31. Article 6 covers mandatory rules of the forum, and Article 31 concerns the mandatory rules of a third country regarding the contract in issue. Articles 6 and 31[16] represent the first time that mandato-

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13 BONOMI, Andrea. *Mandatory Rules in Private International Law The Quest for Uniformity Decisions in a Global Environment.* I(1999) Yearbook of Private International Law, pp. 232-3.

14 BONOMI, Andrea, p. 233.

15 JHC MORRIS, The Conflict of Laws, Edt. David McClean/Kisch/BEEVERS, 6th ed, London 2005, p. 360; EKŞİ, Nuray, Roma Konvansiyonu [Rome Convention], p. 156.

16 In view of the fact that Article 6 of the PILA was added following debates held at the Ministry of Justice, an explanatory report of this Article does not exist. The Explanatory Memorandum

ry rules have been dealt with in PILA. Despite the fact that the new PILA, numbered 5718, is the fist law to deal with mandatory rules, consideration was given to such rules in Turkish doctrine prior to the new PILA. Mandatory rules were initially analysed by *Sayman*[17] in his 1982 book. In addition, prior to the new PILA, "mandatory rules" or "directly applicable rules" have long been analysed and regarded by implication as a general part of Turkey's PILA. However, attention has not been given to these rules by the Turkish courts and problems as to mandatory rules have been evaluated in the framework of public policy analyses.[18] In respect of contracts for the carriage of goods, regard should also be paid to Articles 6 and 31, which deal with mandatory rules. Even if the foreign law governs the contract of carriage, effect may be given *ex officio* to the mandatory rules of Turkish law concerning the transportation of goods. Article 31 of PILA grants a harder duty to the court than Article 6. Under Article 31, the court may give an effect to the mandatory rules of the law of another country with which the contract has a close connection. In considering whether to give effect to these mandatory rules, regard must be given to their

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of Article 31 of the PILA states the need for this new provision as follows: The mandatory rules of the chosen law or the law of the forum shall be applied without hesitation. Although there is no general description of these rules, their nature results in the waiver of conflict of laws rules and even the choice of law. These rules are accepted to be "relating to the general public interest" applied irrespective of the foreign element found in the relevant relationship and they reflect the public policy in the political, social and economic fields. It is accepted by several international private law legislations including the Rome I Regulation of the European Union concerning the contracts referred to in the general legal ground that such mandatory rules of a third state may be taken into account provided that they have a close connection to the contract. Article 31 of the Draft PILA does not require the application of the mandatory rules of a third state but provides a notable opportunity to give them an effect in order to prevent any problems that might arise due to their non-application.

17 *See* SAYMAN, 2-3 *et seq.*

18 The General Assembly of Civil Chambers of Court of Cassation, E. 1989/10-316, K. 1989/411, T. 7.6.1989 (*in*) EKŞİ, Nuray. *Milletlerarasy Nitelikli Davalara Ylikin Mahkeme Kararlary [Collection of Judgments Relating to Disputes Having International Element]*. Istanbul, 2007, pp. 97-100; Court of Cassation, 11th Civil Chamber, E. 2000/5461, K. 2000/6449, T. 6.7.2000: EKŞİ, Nuray. *Milletlerarasy Nitelikli Davalara Ylikin Mahkeme Kararlary [Collection of Judgments Relating to Disputes Having International Element]*, p. 100/103.

nature and purpose and to the consequences of their application or non-application.

Article 31 of PILA applies only in disputes arising out of contracts. In other words, it does not apply in matters relating to persons, family law, inheritance law and the law of property. In these matters, the mandatory rules of the country with which the situation has a close connection are not taken into account. Contrary to Article 31 of Turkey's PILA, in several countries, for example under Article 19 of Switzerland's PILA, effect is given to the mandatory rules of a third country in all spheres of private law.

II. Situations Where Article 29 of PILA is not Applicable

1. International Conventions Relating to the Carriage of Goods

a. International Conventions on Carriage of Goods as Ratified by Turkey

An international treaty gains legal enforceability after various stages. After having been executed by two or more signatory states, the text, on which an agreement has been reached, is recognized as final and conclusive. However, at that moment, the treaty or convention does not have any binding effect on the signatory states. It has to be ratified by the authorised bodies of the respective signatory states.[19] Under Turkish law, an international treaty is effective only after necessary procedures are followed in accordance with Article 90/V of the *Constitution*, and *Law No. 244 on the Conclusion, Enforceability, and Publishing of International Treaties and Authorization of the Council of Ministers in order to Conclude Certain Treaties*.

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19 NOMER, Ergin. *Devletler Hususî Hukuku (Nomer/anly 2008) [Private International Law], 16th edition*. Istanbul, 2008, p. 71.

According to Article 90/V of the Constitution, international treaties, which have been brought into force pursuant to relevant procedures, have the status of a national law. According to Article 2 of Law No. 244, approval by a specific law is required[20] in order to ratify or accede to an international treaty.[21]

So, in principle, international treaties must be implemented into national law by enactment of a law. In other words, only international treaties that are implemented into national law pursuant to the procedures provided for in Article 90 of the Constitution and Article 2 of Law No. 244 become binding on the Republic of Turkey.[22] Turkish courts ignore international treaties which are not so incorporated into Turkish law.

Approval of international treaties by a law and subsequent publication in the Official Gazette pursuant to a decree of the Council of Ministers are not of course independently effective to establish a

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20 For certain cases where treaties do not require adoption by the Grand National Assembly of Turkey of a law approving the ratification or accession *see* Article 2/II-III-IV of the Act numbered 244.

21 Court of Cassation, 10th Civil Chamber, E. 1994/12170, K. 1994/19856, 6.12.1994: "In order for an agreement to be binding and to be considered by the Turkish courts, it must fulfill the conditions provided by Article 90 of the Constitution and Article 2 of the Act numbered 244. The main rule in this field is the rule which prescribes that the agreements that the Republic of Turkey enacts with foreign states and international organisations shall be ratified by the Grand National Assembly of Turkey (GNAT) in order for them to be enforced and to carry the effect of a law. If there was no such ratification or the relevant procedure has not been followed for the agreement to be in force, it shall not be binding. According to Article 90 of the Constitution and Article 2 of the Act numbered 244, it shall be an agreement relating to the implementation of an international agreement or it shall be an agreement ratified in accordance with a special authority given by law regulating economic, commercial or technical relations provided that its period does not extend one year, it does not bring a burden over the state finance and does not concern the status of persons or the real property rights of Turkish people in foreign countries to be in force upon publication. Even in this case, the relevant agreement shall be submitted to the GNAT within two months. Along with that, in any case, the agreements which result the amendment of Turkish laws shall be ratified by the GNAT by law in order for them to have an effect.": 21(1995)3 YKD, p. 416.

22 Court of Cassation, 4th Civil Chamber, E. 8217, K. 6585, T. 11.7.1994: 21(1995)1 YKD, p. 24.

treaty within the meaning of international law save in some exceptions.[23] The entering into force of a treaty comes about after deposit with a depositary of the treaty's counterparts executed by the required number of signatories and the passage of time as specified in the typical treaty.[24]

An international agreement that is brought into force pursuant to the procedures described above has the power of a national law (Article 90/V of the Constitution), which means that it has the binding effect of a national law.[25] According to Article 1(2) of PILA, application of international treaties ratified by Turkey takes priority over the application of national laws. Consequently, in each case, the court, before taking into account PILA's Article 29, has to determine whether any international treaty exists regarding the international transport of goods. If an international treaty exists then it takes priority.

While Turkish courts are frequently ignorant of international treaties, they are surprisingly cognizant of international conventions on the carriage of goods by air or road. Conventions on the carriage of goods by air or road are considered and applied by Turkish courts.[26] Mainly, one could say that there is a stable practice for application of international conventions on the carriage of goods by air or road to which Turkey is a party.

On the other hand, Turkish courts generally apply the *Turkish Commercial Code* to cases involving the international carriage of

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23 NOMER, p. 70-1.

24 NOMER, p. 71.

25 High Military Administrative Court, 1st Chamber, E. 1997/555, K. 1997/528 (*in*) Aslan GÜNDÜZ, Milletlerarasy Hukuk Temel Belgeler Örnek Kararlar [International Law-Basic Instruments-Selected Cases], 3rd edition, Istanbul 1998 p. 172.

26 For the precedents of the Court of Cassation concerning cases on international carriage by air or international carriage by road *see* EKŞİ, Nuray. *Milletlerarasy Nitelikli Davalara Ylikin Mahkeme Kararlary [Collection of Judgments Relating to Disputes Having International Element]*, pp. 573-630.

goods by sea without considering the conflict of laws rules of PILA.[27] It must be emphasized that those factors such as providing fair and convenient solution by the Turkish Commercial Code to disputes arising out of international contracts for the carriage of goods, or the location of loading or unloading ports in Turkey, or the Turkish nationality of at least one of the parties to the carriage of goods contract, or legal actions brought before Turkish courts are not decisive factors that lead to the application of the Turkish Commercial Code.[28] Turkish courts, for any dispute arising out of a contract involving the carriage of goods primarily, must respect international conventions to which Turkey is a party[29] and, in the absence of international conventions, PILA's Article 29.

PILA's Article 29 is rarely applicable to the carriage of goods by air, road, sea and railway because such transportation is within the realm of international treaties. Since international treaties have priority over national laws under Article 1(2) of PILA, PILA's Article 29 will be applied in cases where the transportation of goods is between states that are not party to the treaties or in matters that are outside the scope of treaties.

Presented below is a very brief survey of the various conven-

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27 YAZICIODLU, Emine . *Uluslararasy Deniz Taymalarynda Uygulanacak Kural Sorunu [The Question of Applicable Law to International Carriage by Sea], (2000)1-4 DenizHD Festschrift for the Memory of Gündüz Aybay*, pp. 46-7.

28 YAZICIODLU, p. 47.

29 Turkey has acceded to the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Official Gazette 22 February 1955 No. 8937). However, several conventions which are applied in wide extent are not ratified by Turkey, *i.e.*, Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ("Visby Rules"); and United Nations Convention on the Carriage of Goods by Sea ("Hamburg Rules"). The other basic instruments which are not ratified by Turkey are the following: the United Nations Convention on International Multimodal Transport of Goods 1980; Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea 1974; Protocol of 1976 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea; Protocol of 1990 to Amend the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea; Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea.

tions and protocols on the international carriage of goods that Turkey has ratified.

> The international carriage of goods by rail is regulated by a convention that was signed in 1980 in Bern and became effective in 1985. The Convention on International Carriage by Rail, known by the acronym COTIF,[30] was ratified by Turkey in 1985[31]. COTIF establishes the Intergovernmental Organization for International Carriage by Rail, commonly known as OTIF.[32] COTIF has two appendixes: Appendix A of COTIF contains the Uniform Rules Concerning the Contract for the International Carriage of Passengers and Luggage by Rail (CIV[33]); Appendix B of COTIF contains the Uniform Rules Concerning the Contract for the International Carriage of Goods by Rail (CIM[34]). CIM has four annexes: Annex I provides Regulations concerning the International Carriage of Dangerous Goods by Rail (RID[35]) that were prepared under Articles 4 and 5 of CIM. Annex II contains Regulations concerning the International Haulage of Private Owners' Wagons by Rail (RIP[36]) that was prepared under Article 8(1) of CIM. Annex III offers Regulations concerning the International Carriage of Containers by Rail (RICo[37]) that was drafted under Article 8(2) of CIM, while Annex IV provides Regulations concerning the International Carriage of Express Parcels by Rail (RIEx[38]) that was drafted under Article 8(3) of CIM. COTIF, CIM and CIV were amended by Protocols concluded in 1990[39] and 1999[40].

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30 COTIF= Convention Relative aux Transports Internationaux Ferroviaires.

31 Official Gazette 1 June 1985 No. 18771.

32 OTIF= l'Organisation Intergouvernementale pour les Transports Internationaux Ferroviaires.

33 CIV= Concernant le Contract de Transport International Ferroviaire des Voyageurs.

34 CIM= Concernant le Contract de Transport International Ferroviaire des Marchandises.

35 RID= Règlement Concernant le Transport International Ferroviaire des Marchandises Dangereuses.

36 RIP=Règlement Concernant le Transport International Ferroviaire des Wagons de Particuliers.

37 RICo=Règlement Concernant le Transport International Ferroviaire des Conteneurs.

38 RIEx=Règlement Concernant le Transport Internationals Ferroviaire des Colis Express.

CIM generally applies to any kind of cargo carried over the territories of at least two states (Article 1 of CIM). Article 4 of CIM lists the types of goods that are not acceptable for carriage by rail. For example, carriage of articles within the monopoly of postal authorities is not subject to CIM Rules. Certain cargoes listed in Article 5 are acceptable for carriage provided the stipulated conditions are met. Funeral consignments or live animals are examples of the conditional carriage by rail.

The 1929 *Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air*, to which Turkey has acceded,[41] applies to the international carriage of passengers, cargo and luggage by air for reward [Article 1(1) of Warsaw Convention]. However, gratuitous carriage by air is not excluded altogether from the scope of the Warsaw Convention. An exception has been made for gratuitous carriage by aircraft performed by an air transport company. Accordingly, Article 1(1) says that the Warsaw Convention applies equally to gratuitous carriage by air performed by an air transport undertaking.

Considering the new requirements of international carriage by air, the Warsaw Convention was amended and renewed by the following protocols and a supplementary convention: 1955 Hague Protocol; 1971 Guatemala Protocol; four Montreal Additional Protocols signed in 1975; and 1961 Guadalajara Convention supplementary to the Warsaw Convention. Turkey has ratified Hague Protocol[42], Guatemala Protocol[43] and Montreal Protocols.[44] In addition to the Warsaw Con-

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39 1990 Protocol has been ratified by Turkey. For the ratification law *see* Official Gazette 14 December 1993 No. 21788; for the promulgation of Council of Ministers *see* Official Gazette 22 June 1994 No. 21968.

40 1999 Protocol has been ratified by Turkey. For the ratification law *see* Official Gazette 12 October 2005 No. 25964; for the promulgation of Council of Ministers *see* Official Gazette 24 December 2005 No. 26033 Mükerrer

41 Official Gazette 3 December 1977 No. 16128.

42 Official Gazette 3 December 1977 No. 16128.

vention, Turkey has also concluded several bilateral treaties relating to international carriage by air.[45]

Contractual and non-contractual obligations arising from the international carriage of cargoes, passengers and language are subject to the Warsaw Convention.[46] It must be stressed that the Warsaw Convention is applicable exclusively in the sphere of transportation by air; and it does not, for instance, cover the liability of manufactures and air traffic controllers.[47] In order to define carriage by air as "international", the places of departure and destination must be situated in different states. In addition, as a fundamental requirement for application, the countries in which the places of departure or destination are located must be parties to the Warsaw Convention.

The *Convention on the International Carriage of Goods by Road* (hereinafter referred to as the "CMR"[48]) covers contracts for the carriage of goods by road for reward. Turkey is a party to CMR.[49] According to the CMR, the international element of the carriage of goods

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43 Official Gazette 21 April 1993 No. 21559.

44 Official Gazette 21 April 1993 No. 21559; Official Gazette 21 April 1993 No. 21559.

45 For example: Agreement Between the Government of the Republic of Turkey and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Concerning Air Services [Official Gazette 10 April 2001 No. 24369]; Air Transport Agreement Between the Government of the Republic of Turkey and the Government of the United States of America [Official Gazette 18 July 2001 No. 24466]; Air Transport Agreement Between the Government of the Republic of Turkey and the Government of the Slovak Republic [Official Gazette 16 May 2002 No. 24757], and Air Transport Agreement Between the Government of the Republic of Turkey and the Government of the Republic of Albania on Air Services Between and Beyond Their Respective Territories [Official Gazette 5 June 2004 No. 25513].

46 GM SMEELE, Frank. *The Contract of Carriage, International Contracts Aspects of Jurisdiction, Arbitration and Private International Law, Edt. Marielle Koppenol-Laforce*, London, 1996, p. 215.

47 IH Ph. DIEDERIKS-VERSCHOOR, *An Introduction to Air Law, 8th edition.* Kluwer Law International, 2006, p. 116.

48 Convention Relative au Contrat de Transport des Marchandise par Route.

49 Official Gazette 4 January 1995 No. 22161; Officail Gazette 28 July 1995 No. 22357.

by road depends upon the location in two different countries of the places of origin and destination specified in the contract. However, for the application of the CMR, it is not necessary that both such countries are party to the Convention. If one of those countries has acceded to the Convention, the CMR will apply. The place of domicile or the nationality of the parties is not important for the application of the CMR;[50] and the CMR will still be applicable even if one of the parties to the road carriage contract is a state or state entity (Article 1 of the CMR). Carriage of mail and postal packages in accordance with international conventions, as well as funeral consignments and furniture transportation, fall outside the scope of the CMR [Article 1(4)(a)(b)(c) of the CMR]. Although the CMR basically applies to the international carriage of goods by road, it is also applicable in situations where carriage by air or rail or sea is not subject to its own mandatory provisions and is a combined part of the through transport, and the goods are not unloaded from the vehicle during the course of transition.[51] The court of the Netherlands reached the same conclusion in its decision relating to the Ro-Ro carriage of goods in a truck on the ship from the port of Goteborg, Sweden to Rotterdam, Netherlands and held that if the carriage of goods contract was not subject to the Hague or Hague-Visby Rules and no bill of lading was issued, then the CMR should be applied.[52]

In addition to the CMR, Turkey is a party to several bilateral treaties on international carriage by road.[53]

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50 SMEELE, p. 226.

51 CARR, Indira. *International Trade Law, 3rd edition.* Oxon, 2005, pp. 378-79; SMEELE, p. 226; SCHMITTHOFF, Clive M. *Schmitthoff's Export Trade, The Law & Practice of International Trade, 3rd edition.* London, 1990, p. 636; CLARKE, Malcolm e YATES, David. *Contracts of Carriage by Land and Air.* London, 2004, p. 6 §1.18-1.19.

52 Decision of the Hoge Raad of June 29, 1990, (1990) European Transport Law, p. 589 *et seq.*

53 For instance, "http://rega.basbakanlik.gov.tr/"] and Pakistan [Official Gazette 20 May 2006 No. 26173].

b. International Conventions on the Carriage of Goods Not Ratified or Acceded to by Turkey

An international convention, which has not been brought into force in Turkey pursuant to required procedures, cannot be deemed to have a binding effect in Turkey. Therefore, there is no obligation on Turkish courts to apply an international convention that has not been ratified by Turkey to any disputes relating to a carriage of goods contract, even though the convention might otherwise regulate such a contract.

However, the possibility exists that parties might have made reference in their carriage of goods contract to an international convention that is not yet binding on Turkey. Nonetheless, even though a Turkish court cannot apply such an international convention as chosen law, all the provisions of the international convention are effective as if they have been set out in the contract, and they accordingly become the clauses of the carriage of goods contract. The court shall apply those provisions as if they are contained in the carriage of goods contract.[54] Indeed, many parties, prior to Turkey's ratification[55] of the CMR, used to incorporate the provisions of the CMR into their contracts. The Court of Cassation, in one of its decisions[56], reached the conclusion that even though Turkey was not then a party to the CMR, if the parties make a reference in their contract to the applica-

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54 EKŞİ, Nuray. *Milletlerarasy Deniz Ticareti Alanynda "Incorporatyon" Yoluyla Yapylan Tahkim Anlamalary [Arbitration Agreements made through Incorporation by Reference in International Maritime Law].* Istanbul 2004, pp. 26-7; Kanunlar Yhtilâfy Alanynda "Incorporation" ["Incorporation" in Conflict of Laws] (1999-2000)1-2 MHB, Festschrift for Aysel ÇELYKEL, Istanbul 2001, s. 286.

55 For the law approving the ratification *see* Official Gazette 14 December1993 No. 21788; For the promulgation of the Council of Ministers *see* Official Gazette 4 January 1995 No. 22161.

56 Court of Cassation, 11th Civil Chamber, E. 1340, K. 3332, T. 2.6.1987 (*in*) ERY, Gönen. *Açyklamaly Yçtihatly Uygulamaly Kara Tayma Hukuku [Carriage by Road Law with Comments and Cases].* Ankara, 1996, p. 36; ERY, Gönen. *Açyklamaly Yçtihatly Kyymetli Evrak ve Tayma [Negotiable Instruments and Transportation Law with Comments and Cases].* Ankara, 1988, p. 963.

tion of the CMR, the CMR will be binding on the parties and applied by the courts to the disputes as if the rules of the CMR are clauses of the parties' contract.

The 1924 *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* that was ratified by Turkey[57] (the "Hague Rules") regulates the international carriage of goods by sea under a bill of lading. Although Turkey acceded to the Hague Rules, no progress has been made in Turkey relating to the ratification of protocols amending the Hague Rules. The Hague Rules have been in force since 1931 and in order to supplement such Convention a 1968 Protocol was prepared.[58]. The Hague Rules, as amended by the 1968 Protocol is commonly referred to as the "Hague-Visby Rules". Not all the states parties to the Hague Rules are party to the Hague-Visby Rules. The Hague-Visby Rules were amended by a 1979 protocol[59] Pursuant to which the reference to gold francs is replaced by reference to special drawing rights ("SDR").

The *United Nations Convention on the Carriage of Goods by Sea*[60] (the "Hamburg Rules") had been drafted with the expectation that it would be ratified by most of the major maritime countries, but the major, traditional maritime countries have not yet ratified it.[61] Turkey has not ratified the Hamburg Rules as well. Thus, the Hamburg Rules have not acquired any binding character for the Turkish courts. In case the parties make reference to the Hamburg Rules in their con-

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57 Official Gazette 22 February 1955 No. 8936.

58 Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels on August 25, 1924.

59 Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading as Amended by the Protocol of February 25, 1968.

60 For more information on the Convention *see* YAZICIODLU, Emine. *Hamburg Kurallaryna Göre Tayyanyn Sorumluludu Labey/Visby Kurallary ile Karylatyrmaly Olarak [The Liability of the Carrier under Hamburg Rules with Comparison Hague/Visby Rules].* Istanbul, 2000.

61 SMEELE, 228-229.

tract for the carriage of goods, such rules will be taken into consideration as the equivalent of contract clauses.[62] Indeed, foreign courts reach the same conclusion. For example, England has not ratified the Hamburg Rules but English courts will apply the Hamburg Rules if the parties in their contract make reference to them. Such rules, of course, are treated by English courts not as the provisions of an international convention but simply as the provisions incorporated by reference to govern the carriage of goods by sea.[63]

International conventions gain enforceability and effectiveness as to matters falling within their scope of application. However, the parties in a commercial relationship can agree to the application of an international convention to legal disputes between them even if strictly speaking their matters in dispute are not within the normal scope of the convention. Such agreements are unlikely to be regarded as null and void. Moreover, it is stated expressly in several international conventions that application of the convention even as to matters that do not fall within the scope thereof are possible, if so stipulated by the parties.[64] CMR, for instance, provides that regardless of the domicile and nationality of the parties, CMR's provisions shall be applied to contracts for the carriage for reward of goods by a vehicle by road if the location of the place of taking over and the place of destination specified in the contract are in two different countries. According to Article 6(1)(k) of the CMR, if the parties want CMR's provisions to be applied to a transportation contract not normally covered

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62 The method of incorporation is widely used in international maritime commerce law. For more information *see* Milletlerarasy Deniz Ticareti Alanynda. *"Incorporation" Yoluyla Yapylan Tahkim Anlamalary ve Bu Anlamalaryn Üçüncü Kiilere Etkisi [Arbitration Agreements made through Incorporation by Reference and Effects of those Agreements to Third Parties in International Maritime Law].* (2003)1-4 DenizHD, pp. 1-23; EKŞİ, [Arbitration Agreements made through Incorporation by Reference in International Maritime Law], 21 *et seq.*

63 CHUAN, Jason. *International Trade Law, 2nd edition.* London, 1999, s. 74; CARR, p. 294; EKŞİ, Incorporation, p. 287.

64 EKŞİ, Incorporation, p. 289.

by the CMR, they may agree to that effect even though the contract for carriage does not fall within the scope of Article 1 of the CMR so long as they stipulate that the carriage will be made in accordance with the CMR. The CMR shall be applied to the dispute just as though the CMR's provisions are provisions of the contract itself or an annex thereto.[65]

2. Contracts for Carriage of Passengers

PILA's Article 29 only contains a conflict of laws rule concerning the law applicable to contracts for the carriage of goods. It is not possible even by way of analogy to extend this rule to the international carriage of passengers. Contracts for carriage of passengers are usually subject to international conventions, and, in default, to the law of the country determined in accordance with PILA's Article 24.

III. Problems in Connection with Application of Article 29 of PILA

1. Absence of Provision Concerning the Form of Choice of Law

PILA's Article 29 poses several problems. First, it provides for the application of the law chosen by the parties without clarifying whether that choice must be expressed or can be implied. For the first time in the Turkish Private International Law history an implied choice of law provision is inserted into Article 24 of PILA, which contains a general conflict of laws rule for any type of contract. In contrast, Article 29 of PILA has no provision as to the required form of a selection of law clause in a transportation contract.

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65 EKŞİ, Incorporation.

2. Whether Article 29 of PILA Applies Whatever the Type of Contract

Article 29 makes no distinction among various possible types of the transportation contracts. In other words, whether the contract is for carriage by air or by rail or by sea or is multimodal bears no important role in the application of this Article.

PILA's Article 29 has the same content of Article 4(4) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations,[66]-[67] (hereinafter referred as to "the Rome Convention"). Article 4(4) of the Rome Convention[68] applies only to the carriage of goods and does not cover carriage of passengers. Contracts for the carriage of passengers are, however, subject to Article 4(2) of the Rome Convention.[69]

The Rome Convention was converted into a regulation. The *Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations*[70] is commonly known as

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66 OJ 26.1.1998 C 27, pp. 34-46.

67 For the Turkish Translation of the Rome Convention *see* EKŞİ, Nuray. *Sözlemeden Dodan Borç Ylikilerine Uygulanacak Hukuk Hakkynda AT Roma Konvansiyonu (Çeviri) [The EC Rome Convention on the Law Applicable to Contractual Obligations (Translation)], Festschrift for Yylmaz ALTUD.* Istanbul 2000, pp. 163-81; EKŞİ, Nuray. *Roma Konvansiyonu [Rome Convention],* p. 237-259.

68 For more information *see* EKŞİ, Nuray. Roma Konvansiyonu [Rome Convention], 34 *et seq.*; Nuray EKŞİ, Yabancylyk Unsuru Tayyan Akit, Milletlerarasy Akit Kavramlary ve Bunlaryn AT Roma Konvansiyonuna Göre Anlamy [Contracts Contains a Foreign Element, Contracts Having International Character and the Meaning of Those under the EC Rome Convention] (1992)1-2 MHB, pp. 1-10; EKŞİ, Nuray. *Avrupa Birlidi Roma Konvansiyonuna Göre Tüketici Sözlemelerine Uygulanacak Hukuk [The Law Applicable to Consumer Contracts under the EC Rome Convention], III(2004)1-2 YKÜ Hukuk Fakültesi Dergisi*, pp. 135-53.

69 PLENDER, Richard e WILDERSPIN, Michael. *The European Contracts Convention The Rome Convention on the Choice of Law for Contracts.* London, 2001, p. 157; CHESHIRE and NORTH's Private International Law, Edt. PM North/JJ Fawcett, 13th edition, London 2004, p. 572.

70 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), OJ 4.7.2008 L 177, pp. 6-16.

"Rome I" or "the Rome I Regulation". In the Rome I Regulation, Article 4(4) of the Rome Convention was amended fundamentally, its scope was extended, and it was renumbered as Article 5. As mentioned before, carriage of passenger contracts fall outside the scope of Article 4(4) of the Rome Convention. Differently, a new conflict of laws rule concerning the governing law applicable to the carriage of passengers is added to Article 5 as paragraph (2).[71] Under the Rome I Regulation, Article 5(1), freedom of choice of law is accepted. Article 5(1) of the Rome I Regulation provides that the law chosen by the parties shall govern a contract of carriage of goods. Article 5 of the Rome I Regulation provides that, if the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery, as agreed by the parties, is situated shall apply. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in preceding sentences the law of that other country shall apply.

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71 Rome I Regulation Article 5: *Contracts of carriage*
(1) [...]
(2) To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply. The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the law of the country where:
(a) the passenger has his habitual residence; or
(b) the carrier has his habitual residence; or
(c) the carrier has his place of central administration; or
(d) the place of departure is situated; or
(e) the place of destination is situated.
(3) Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

The Commission regarded the Rome Convention as a cornerstone when drafting Article 29 of the new Turkish PILA. Reference was not made to the draft of the Rome I Regulation, which was in the preparatory stage at that time. For that reason one cannot focus on the Rome I Regulation but must look at the Rome Convention.

Article 4(4) of the Rome Convention provides that, as to a contract for the carriage of goods, if, at the time the contract is concluded, the country in which the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country.

Charter parties can be divided into three basic types of charter parties: voyage[72], time, and demise or bareboat. Under a voyage charter party, the ship-owner agrees to charter its vessel to the charterer for one or more specified voyages. The vessel remains under the control of the ship-owner and the ship-owner is responsible for the payment of the wages of the seamen and for equipping and manning the vessel. The ship-owner is under the obligation to carry the goods between the ports specified in the voyage charter party. The charterer undertakes to provide the cargo and pay for the freight.[73] The charterer in time charter hires the vessel for a specified period of time. Similar to a voyage charter, in time charter, the ship-owner holds the control of the vessel and employs the master and crew. However in contrast to the situation in a voyage charter, the charterer under a time charter does not undertake the responsibility towards the ship-owner for carrying the cargo to a specified port.[74] The ship-owner passes

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72 For a comprehensive work on voyage charter party *see* ÜLGENER, M. Fehmi. *Çarter Sözleşmeleri I Genel Hükümler Sefer Çarteri Sözleşmesi [Carter Parties I General Provisions Voyage Charter Party].* Istanbul, 2000.

73 CARR, 164.

74 ÇADA, Tahir e KENDER, Rayegan. *Deniz Ticareti Hukuku II Navlun Sözleşmesi [Maritime Commerce Law II Freight Contracts], 8th edition.* Istanbul, 2006, p. 8; CARR, p. 165.

possession and control of the vessel to the charterer under a demise charter and master and crews become the responsibility of the charterer and are under its control and direction. In short, under a demise charter, the charterer undertakes to man and equip the vessel for the duration of the demise charter.[75]

It has been stated that because time and demise charters have none of the characteristics of a transportation contract, Article 4(4) of the Rome Convention should not be applied.[76] Germany implemented the provisions of the Rome Convention into its national law by the EGBGB. Article 4(4) of the Rome Convention has become §28/IV of the EGBGB. Whether §28/IV of the EGBGB is applicable to time and demise charter is a highly controversial issue in German doctrine. *Mankowski*[77] believes that because the charterer under time charter undertakes no responsibility for the carriage of goods from one port to another, which is the core element of a contract for the carriage of goods, one cannot reach the conclusion that a time charter is a kind of transportation contract. Providing an opportunity to the charterer to use the vessel in maritime commerce is the basic characteristic of a time charter. According to *Mankowski,* because the time charter is not a transportation contract, it is not possible to ascertain the applicable law in accordance with §28/IV of the EGBGB. In this respect, regard should be given to §28/II of the EGBGB that has a provision parallel to Article 4(2) of the Rome Convention. In other words, in the absence of a choice made by the parties, the law applicable to the time charter is law of the country in which the principal place of business of the ship-owner is situated.[78] *Mankowski* also emphasizes that a demise charter cannot be classified as a type of transportation contract. Under the demise charter the ship-owner passes the possession of a

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75 CARR, p. 165; John F. Wilson, *Carriage of Goods by Sea, 5th editon.* London, 2004, pp. 7-8.

76 PLENDER/WILDERSPIN, p. 157.

77 MANKOWSKI, Peter. *Seerechtliche Vertragsverhältniss im Internationalen Privatrecht*. Tübingen, 1995, p. 95.

78 MANKOWSKI, p. 95.

vessel to a charterer and for that reason such a charter should be characterised as a contract of hire. He says that demise charter does not fall within the scope of §28/IV of the EGBGB. Therefore, the law applicable to those kinds of contracts should be ascertained under §28/II of the EGBGB, namely the law of the country in which the ship-owner, at the time of conclusion of the contract, has its principal place of business.[79]

Whether time and demise charters fall within the scope of Article 4(4) of the Rome Convention is a not only a problem before national courts of EU Members but also before the European Court of Justice. Reference for a preliminary ruling from the Hoge Raad (i.e., Supreme Court) of the Netherlands was lodged on 2 April 2008 concerning the interpretation of Article 4(4) of the Rome Convention. One of the questions referred to the ECJ is whether Article 4(4) of the Rome Convention must be construed as applying only to voyage charter parties and whether other forms of charter parties fall outside the scope of that provision.[80] The Hoge Raad referred another question to the ECJ: If the question just posed is answered in the affirmative, must Article 4(4) of the Rome Convention then be construed as meaning that, in so far as other forms of charter party also relate to the carriage of goods, the contract in question comes, so far as that carriage is concerned, within the scope of that provision and the applicable law is for the rest determined by Article 4(2) of the Rome Convention? A decision on questions referred for a preliminary ruling has not been given by the ECJ.

The French Court of Cassation applied the Rome Convention to disputes arising from a time charter[81] taking the view that in situa-

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79 MANKOWSKI, p. 119.

80 Reference for a preliminary ruling from the Hoge Raad der Nederlanden, lodged on 2 April 2008-*Intercontainer Interfrigo (ICF) SC v Balkenende Oosthuizen BV and MIC Operations BV* (Case C-133/08): OJ 21.6.2008 C 158, s. 10.

81 Cour de cassation Chambre Commerciale Audience publique du 20 mai 1997 Nº de pourvoi 95-1619295-20943, "http://www.rome-convention.org" (25.9.2008).

tions where the law ascertained under the Rome Convention recognizes the right of hypothec or chattel on the cargo on board then the cargo on board can be detained and sold upon request by the ship-owner for collection of payment of hire arising out of a time charter. The "Van Dyck shipping company" (Van Dyck) and the "Compagnie sénégalaise de navigation maritime" (Cosenam) concluded a "time charter-party", under which the ship-owner Van Dyck agreed to charter the ship Nobility to the charterer, Cosenam. The charter contained a choice of law clause that provided for the charter to be governed by English law.

During a stopover of the Nobility in a French harbour, Van Dyck, asserting the charterer owed it money, obtained from a French judge an order providing for the consignment of the goods in hands of a third party, and for the transfer of the proceeds of the sale of the goods to Van Dyck. The order was issued under French law, because the court regarded applicable law as that of the place where the goods were located. Before the French Court of Cassation, the cargo interests, invoking their bills of lading, asked that the order be quashed, alleging that under English law, which should apply to the contract under Article 3 of the Rome Convention, the ship-owner cannot claim any rights against cargo owners who are in possession of bills of lading. The French Court of Cassation quashed the order, on the ground that the English law, chosen in the charter-party as the law governing the contract, should have been taken into account to determine the rights a ship-owner could claim on the cargo against cargo owners in possession of bills of lading.

The French Court of Cassation did not directly make a reference to Article 4(4) of the Rome Convention. Article 3(1) of the Rome Convention was applied by the Court of Cassation. However, the important issue here is whether the demise charter or time charter is subject to the Rome Convention. According to the Rome Convention, a contract of carriage of goods shall be governed by the law chosen by the parties (Article 3(1) of the Rome Convention). To the extent that the law applicable to the contract has not been chosen in accord-

ance with Article 3, the law applicable to the carriage of goods contract shall be ascertained under Article 4(4) of the Rome Convention. The French Court of Cassation stated that in order to collect the payment of hire arising out of the time charter, detention of the cargo on board and transfer of the proceeds of the sale of the goods to the ship-owner are matters governed by the Rome Convention. Therefore, the French Court of Cassation accepted that the law is to be ascertained in accordance with Article 3(1) or, in default of a choice, Article 4(4) of the Rome Convention. This judgment is of a crucial value in that it concludes that a time charter falls within the scope of the Rome Convention.

The French Court of Cassation went even further in 1999[82] and construed the scope of Article 4(4) of the Rome Convention broadly. The background of the case is follows: goods bought by a Swiss company were damaged during carriage by sea, a French insurer compensated the Swiss company and as a subrogated party brought an action before the French Tribunal de Commerce against the carrier of the goods, a Singapore shipping company. The Tribunal decided it had no jurisdiction. Because the bill of lading contained a clause giving jurisdiction to the high court of Singapore, the issue to be decided was whether this clause was binding on the French insurer. The court held that the answer was to be found in the law governing the contract of carriage. In order to determine this law, the court applied Article 4(4) of the Rome Convention and concluded to the applicability of Singapore law, this law applying as the law of the country in which were both located the carrier's principal place of business and the place of discharging of the goods. The law applicable to the contract of carriage, under Article 4(4) of the Rome Convention, shall govern the issue of the binding effect of a jurisdiction clause contained in a bill of lading, with regard to the subrogated insurer of the consignee. Under Singapore law, the jurisdiction clause inserted in the bill of

82 *Compagnie Mutuelles du Mans et autres c Société Unison Shipping Private Ltd et autres*, Cour d'appel de Paris, 5ème chambre, section, A, 1999, September 9: "http://www.rome-convention.org" (25.9.2008).

lading was binding on the subrogated insurer; consequently, the court held that it did not have jurisdiction over the claim.

This judgment is open to criticism. The Rome Convention does not apply to agreements on the choice of a court. The Rome Convention contains a special provision that holds that agreements on jurisdiction are outside the scope of the Convention (Article 2(2)(d) of the Rome Convention). Despite this fact, the French court applied the Rome Convention to determine the binding effect of a jurisdiction clause contained in a bill of lading.

After a long debate during the drafting of the Rome Convention, the Committee of Experts agreed to include contracts for the carriage of goods within the scope of the Convention. Considering the peculiarities of the contracts for carriage of goods, a specific provision which deals with the applicable law in the absence of a choice by the parties was inserted in the Rome Convention.[83] The Committee considered that the connecting factors in Article 4(2)[84] of the Rome Convention, which deals with the applicable law to the extent that the applicable law has not been chosen, were not appropriate for the carriage of goods contract, therefore a paragraph having appropriate connecting factors, namely paragraph 4 of Article 4, was added to the Convention.[85] However, there could be some situations where the carriage of goods contract is subject to Article 4(2) because Article 4(4) requires certain conditions. In fact the Italian court applied Article 4(2), instead of 4(4), of the Rome Convention to a carriage of goods contract.[86] *Sadav Line* and *Italgrani Iberia* concluded an af-

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83 Report on the Convention on the Law applicable to Contractual Obligations by Mario GIULIANO, Professor, University of Milan, and Paul LAGARDE, Professor, University of Paris I, OJ 31.10.1980 C 282, p. 21.

84 The applicable law in the absence of choice of law by the parties to the contracts that are outside the scope of the special conflict of laws rules concerning consumer and individual employment contracts are to be determined according to Article 4(2) of the Rome Convention.

85 GIULIANO/ LAGARDE, 21.

86 *Italgrani Iberi SA v Sadav Line srl in liq.*, Corte d'Appello di Genova 1997, June 2: "http://www.rome-convention.org" (5.9.2008).

freightment contract. Because of damage, the buyer refused to accept the cargo and the dispute was submitted to arbitration in which the arbitrator applied Italian law in accordance with Article 4(4) of the Rome Convention. *Italgrani* asked the Corte d'Appello di Genova to set aside the award claiming that Article 4(4) of the Rome Convention is not applicable because it requires additional conditions for the application of the law of the country where the carrier has his principal place of business, i.e., the law of the country in which the carrier has his principal place of business is applicable provided that that country is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated. In a contract of affreightment, the characteristic performance of the contract is not the payment of the freight, but the transportation. This presumption cannot be rebutted by Article 4(4), unless the requirements of Article 4(4) are realised. For the application of Article 4(4), certain requirements must be met. However these requirements are not met in the present case. The Italian court held that because the requirements of Article 4(4) are not met, the presumption of Article 4(2) should have been applied. In respect of Article 4(2), the characteristic performance of the contract of affreightment must be determined. The characteristic performance of the contract of affreightment is transportation. Consequently, in situations where the Article 4(2) of the Rome Convention is applied, it is presumed that the contract is most closely connection with the country where the carrier, who is to affect the characteristic performance of the contract, has its habitual residence.

3. Applicability of Article 29 of PILA to Contracts for Multimodel Transport of Goods

PILA's Article 29 does not contain a separate provision relating to multimodel or combined transport. Whether problems might occur from the application of Article 29 to combined or multimodal transportation will be seen with the passage of time. However it must be stressed that contracts for multimodal transport of goods are carefully

drafted by parties with a broad approach in practice and they insert detailed clauses to solve all types of disputes arising from such contracts. Moreover, most contracts for multimodal transportation of goods incorporate the *1980 United Nations Convention on International Multimodel Transport of Goods* by reference. This Convention has not been ratified by Turkey yet. However, by use of an incorporation by reference clause, the Convention becomes an integral part of or an annex to the contract. The courts will apply the provisions of the 1980 Convention as if they are clauses contained in the contract. Because the 1980 Convention has solutions for all disputes arising out of multimodel transportation of goods, the conflict of laws rules are, in fact, of little practical importance.

4. Lack of Precise Definition of Principal Place of Business of Carrier

No attempt has been made to define the principal place of business of the carrier in PILA's Article 29. "The principal place of business of the carrier" is not the place where the company was incorporated but the place where the activities of the company are carried out.[87] Subsequent changes in the principal place of business of the carrier or the place of loading or unloading following the conclusion of the contract bears no importance. Subsequent changes with malicious intent in the principal place of business of the carrier might happen. As a preventive factor for this kind of dishonest behaviour the principal place of business at the time of the conclusion of the contract is determinative. In practice, the transportation of goods is frequently performed by a sub-carrier. "Carrier" under Article 4(4) of the Rome Convention, means the party who undertakes to carry the goods, and the question of whether carriage *de facto* performs on its own is irrelevant.[88] Regardless of who is the *de facto* performer of the

87 PLENDER/WILDERSPIN, p. 132-3.

88 GIULIANO/LAGARDE, 22.

carriage, the principal place of business of the party who has control of the goods is controlling.

5. Problems that Arise out of Application of Article 29 to Contracts for the Carriage of Goods by Sea

a. Difficulties in Ascertaining the Principal Place of Business of Companies Registered in Offshore Countries

It is an undeniable reality of international maritime commerce that ships are owned by offshore companies or branches and are registered in countries that offer flags of convenience. In other words, flagging out from the traditional maritime registries into offshore registries is inevitable in international maritime commerce.[89] The advantages to ship-owners resulting from placing their vessels under flags of convenience (such as those offered by the Bahamas, Bermuda, Cayman Islands, Costa Rica, South Cyprus, Honduras, Hong Kong, Lebanon, Liberia, Maldives, Malta, the Netherlands' Antilles, Panama, Seychelles, Singapore, Somali, Antigua and Barbuda, Belize, Cook Islands, Gibraltar, Marshall Islands, Mauritius, St. Vincent, Grenadines, Sri Lanka, Tuvalu, Vanuatu)[90] may be summarised as follows: there are no taxes or only minimal taxes payable; the registration fees are relatively low; there are no laws preventing employment of seamen from the international workforce at low wages; the ultimate owner of a vessel can usually not be determined by examining the public records of the jurisdiction of incorporation.[91] The vessel registered in an offshore registry providing a flag of convenience will perform transportation only in unrelated countries to avoid taxation by the country providing the locus for incorporation and the place of registry. Therefore, even though on paper the principal place of busi-

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89 EKŞİ, Nuray. *Yabancy Gemilerin Yhtiyati Haczi [Arresting Foreign Ships], 2nd edition*. Istanbul, 2004, p. 16.

90 EKŞİ, Nuray. *Yabancy Gemilerin Yhtiyati Haczi [Arresting Foreign Ships]*, p. 14.

91 EKŞİ, Nuray. *Yabancy Gemilerin Yhtiyati Haczi [Arresting Foreign Ships]*, p. 16-17.

ness of the vessel-owning company is located in an offshore tax haven country, its *de facto* place of business will be situated in another country. Except for providing the place of registration, the country of incorporation or vessel registry has no other relation whatsoever with the vessel-owner. In this case, the principal place of business of the carrier is not deemed to be situated in the country of incorporation or vessel registry. The country in which the company has actually and habitually performed its activities should be considered as the location of the carrier's principal place of business.[92]

b. Problems Arising from the Various Meanings of "Carrier", "Consignee" and "Shipper" Involved in Contracts for the Carriage of Goods

Due to the complex nature of contracts for the carriage of goods by sea, the question arises how PILA's Article 29 will be applied to disputes relating to such contracts. In particular, in maritime commerce, as a consequence of differing meanings given to the terms carrier, consignee and shipper, the classification of these terms frequently needs to be analysed in the course of application of Article 29. This issue has been dealt with in foreign doctrine as well, and it is suggested that classification of those concepts, namely, carrier, consignee and shipper, must be made according to the *lex fori*.[93]

c. Non-Applicability of Article 29 of PILA to Disputes Relating to Bills of Lading

Disputes relating to bills of lading are not subject to PILA's Article 29 because Article 1(2) of the Rome Convention on which Article

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92 R. ASARIOTIS. *Contracts for the Carriage of Goods by Sea and Conflict of Laws: Some Questions Regarding the Contracts (Applicable Law) Act 1990, 26(1995) JMLC*, p. 311.

93 ASARIOTIS, 311.

29 is based excludes bills of lading from the scope of the Convention. Turkey has ratified the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924.[94] Because Article 1(2) of PILA gives priority to international conventions ratified by Turkey, disputes arises out of bills of lading will be resolved in accordance with the 1924 Convention.

d. Applicability of Article 29 to a Bill of Lading Containing Provisions as to Carriage

For the application of PILA's Article 29, an essential problem occurs in situations where the bill of lading also includes clauses as to carriage.[95] The same discussions have also been made with respect to Article 4(4) on which PILA's Article 29 is based. In reality, the Rome I Regulation has replaced the Rome Convention. But here, the Rome Convention is considered because in the course of drafting Article 29 of the new Turkish PILA, regard was given not to the Rome I Regulation but to Article 4(4) of the Rome Convention.

Under Article 1(2)(c) of the Rome Convention, obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character are excluded from the scope of the Convention. However, sometimes the bill of lading or contract for carriage of goods by sea

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94 Official Gazette 22 February 1955 No. 8937.

95 For detailed information on the determination of applicable law in case of concurrence of charter party and bill of lading before the abolished PILA numbered 2675 which does not provide for a special conflict of laws rule concerning international carriage contracts, *see* GÖDER, Erdodan. *Deniz Hukukundaki. Eya Tayma (Navlun) Mukavelelerinden Dodan Kanunlar Yhtilafy [Conflict of Laws in Carriage of Goods (Freight) Contracts in the Maritime Commerce Law].* Ankara 1965, p. 97. Additionally, for a monograph on the conflict of laws problems arising out of international maritime commerce in that period, *see* GÖDER, Erdodan. *Deniz Ticareti Hukukundan Dodan Kanunlar Yhtilafy [Maritime Commerce Conflict of Laws].* Ankara, 1969.

integrates the other.[96] The question, therefore, is whether Article 4(4) of the Rome Convention applies at all where a carriage of goods contract is contained in or incorporated by a reference in a bill of lading. German doctrine has opposite views for the application of Article 4(4) of the Rome Convention to the bill of lading issued in connection with a carriage of goods contract.[97] One of those opinions, by stressing the negotiable character (wertpapier) of the bill of lading, states that Article 4(4) of the Rome Convention is not applicable.[98] It has also been argued that the carriage of goods contract itself must be separated from not only the covering documents but also the bill of lading.[99]

Asariotis[100] claims that in UK law, Article 4(4) of the Rome Convention should apply to all contracts for the carriage of goods, including those covered by a negotiable bill of lading. To put it another way, in a cargo claim, when obligations under a contract for carriage of goods, which is contained in bill of lading, are at issue, Article 4(4) of the Rome Convention is applied. Apart from this question, however, obligations arising out of the negotiable character of a bill of lading should not be governed by Article 4(4) of the Rome Convention.

In order to prevent the problems that may arise out of the various views among academics in this regard and hesitation in course of application of Article 29, a provision similar to Article 5 of the Netherlands Conflict of Maritime Laws Act, which has been in force since

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96 For the relation between bill of lading and contracts for carriage by sea in the Turkish Commercial Code *see* ÇADA/KENDER, p. 83-5.

97 ASARIOTIS, p. 297.

98 For more information on the discussions in German law *see* RABE, Dieter. *Seehandelsrecht, fünftes Buch des Handelsgesetzbuches mit Nebenvorschriften und Internationalen Übereinkommen, 4 Auflage*. München. 2000, pp. 343-5; MANKOWSKI, §6.

99 ASARIOTIS, p. 297.

100 ASARIOTIS, p. 297.

May1993[101], should have been inserted in Article 29 of the Turkish PILA. Article 5(1) of the Netherlands Conflict of Maritime Laws Act provides that in the case of the carriage of goods under a bill of lading, the question whether, and, if so, under what conditions, a third party (apart from the person who signed the bill of lading or on whose behalf it was signed) is subject to the rights and obligations of a carrier under the bill of lading, and also the question of who is subject to the rights and obligations arising out of the bill of lading *vis-à-vis* the carrier, shall be determined, irrespective of the law chosen by the parties in the contract of carriage, by the law of the state of the port, where under the contract, discharge should be effected. The second paragraph of Article 5 provides that the question indicated in the preceding paragraph however, shall be determined by the law of the state in which the port of loading is located in so far as the obligations relating to the furnishing of the goods contracted for and the place, manner and duration of loading are concerned.

6. Whether Article 29 of PILA is Applicable to Contracts for Carriage Concluded with Cargo Companies

It must also be clarified whether PILA's Article 29 is applicable to contracts for carriage concluded with international cargo transport companies, for example, with *UPS*, *DHL*, *FedEx* et al. We are of the view that such contracts are subject to Article 29. At present there is no judgment regarding this matter granted by the Turkish Court of Cassation. An examination of the decision reached in 2007 by the United States Court of Appeals for the Second Circuit[102] may help to

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101 For the English version of the Netherlands Conflict of Maritime Laws Act *see* TETLEY, William. *International Conflict of Laws Common, Civil and Maritime*. Montreal, 1994, pp. 1069-72; for the Turkish translation and a brief overview of the Act *see* EKŞİ, Nuray e BUDAK, Ali Cem . *Hollanda Deniz Kanunlar Yhtilâfy Kanunu [The Netherlands' Maritime Conflict of Laws Act]*. I(2004)2 Yeditepe Üniversitesi Hukuk Fakültesi Dergisi, pp. 161-7.

102 *Eli Lilly Do Brasil, Ltda. v. Federal Express Corporation*, United States Court of Appeals for

illustrate how problems occur in practice, how the governing law is ascertained, and how to analyze which country has the more significant relationship.

In October 2002, *Eli Lilly* contracted with *Nippon Express*, which, in turn, subcontracted with *FedEx* to transport fourteen drums of Cephalexin from *Lilly*'s factory in Brazil to Japan, through *FedEx*'s hub in Memphis. *FedEx* received the cargo and consigned it to *Jumbo Jet Transportes Internacionais* for transportation by truck to the airport in Brazil. The truck was hijacked en route and the cargo, worth approximately US Dollars 800,000, was stolen. As explained in the Court's opinion:

> The waybill for the shipment limited *FedEx*'s liability for stolen goods to $20 per kilogram. If a customer, such as *Lilly*, was dissatisfied with the limitation, it was given the option of securing additional coverage by declaring a higher value and paying additional charges. The limitation of liability on the face of the waybill was conspicuous. *Lilly* did not elect to declare a higher value or to pay for additional coverage. The record is silent as to the circumstances of the theft. It is not disputed that, if the limitation applied, *FedEx*'s exposure for the loss was approximately $28,000.
>
> Lilly, a Brazilian firm, chose not to sue *FedEx* in Brazil but instead sued in the Southern District of New York. The parties cross-moved for partial summary judgment. *FedEx* sought to limit its liability in accordance with the waybill and *Lilly* sought to have Brazilian law applied, believing that the limitation might not be enforceable if it could prove that the trucking company acted with gross negligence. Both parties assumed that federal common law choice-of-law analysis applied but they disagreed as to the results of that analysis.

In determining whether Brazilian law or the American law was applicable, the Court reached the conclusion that a federal common

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the Second Circuit, August Term, 2006 567 (Argued: September 22, 2006 Decided: September 11, 2007) Docket No. 06-0530-cv.

law choice-of-law analysis was appropriate. The Court made its evaluation under Restatement Second §197, which is a conflict of laws rule applicable to the transportation of goods that refers to the principles of Section 6, noting that:

> Section 6 identifies a number of factors relevant to determining which state has the more significant relationship with the parties and the contract: a) the needs of the interstate and international systems, b) the relevant policies of the forum, c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, d) the protection of justified expectations, e) the basic policies underlying the particular field of law, f) certainty, predictability and uniformity of result, and g) ease in the determination and application of the law to be applied.

The Court stated its reasoning as follows:

> Brazil's interests in the contract and the parties are by no means insignificant. The contract was negotiated and executed in Brazil, between a Brazilian company and a United States company that regularly transacts business in Brazil. The purpose of the contract was to ship goods located in Brazil, out of Brazil to Japan. Because the cargo was stolen on the way to the airport the goods did not enter the United States and would have done so only because Memphis is the *FedEx* tranships centre. However, Brazil's interest, based only on § 188 contacts, is greater than the United States' cannot be the end of our inquiry or determinative of its conclusion. The United States also has some interest in this transaction and the parties, being *FedEx*'s domicile. Which state is most interested under § 188 is a different question from which state has the more significant relationship with the parties and the contract for purposes of § 197.

The Court of Appeal emphasised that

> [...] even taking account of Brazil's superior §188 contacts, two of the §6 factors emerge as determinative of United States venue:the relevant policies of other interested states and the relative interest of those

> states in the determination of the particular issue in dispute and protection of the parties' justified expectations. The paramount importance of enforcing freely undertaken contractual obligations, especially in commercial litigation involving sophisticated parties[is] obvious The Restatement expressly provides that the justified expectation of enforceability generally predominates over other factors tending to point to the application of a foreign law inconsistent with such expectation.[T]he contract contained not only a loss limitation clause, but offered *Lilly* the option of securing more insurance if it paid a higher premium —an option *Lilly* did not avail itself of *Lilly* has offered no satisfactory justification for expecting that it would be permitted to finesse this commitment.

The Court held that invalidating the limitation clause stipulated by the parties in the contract would be contrary to their expectations that, citing the Restatement:

> "at the very least,the provisions of the contract will be binding upon them. Their expectations should not be disappointed by application" of the Brazilian law which strikes down the contract or a provision thereof.

The dissent filed with the majority's opinion agreed that the Court should apply the federal common law's choice of law rules to determine whether this contract is governed by Brazilian law or federal common law and that the Court may look to the Restatement Second of Conflict of Laws. However, the dissent disagreed with the majority's conclusion that under federal common law and the Restatement the United States has a greater interest in this litigation than does Brazil, reasoning as follows:

> The *FedEx* Air Waybill called for the transportation of *Lilly*'s goods from Brazil to Japan. The Waybill contained no choice of law provision. Under Restatement §197 contracts for the transportation of goods are governed by the local law of the state from which the goods are dispatched.

The dissent continued its analysis:

> To determine which state has the most significant relationship to the transaction and the parties under §188 [] the court evaluates the following five contacts: the place of contracting; the place of negotiation of the contract; the place of performance; the location of the subject matter of the contract; and the domicile, residence, nationality, place of incorporation and place of business of the parties [...].The §6 principles are those general considerations that underlie all rules of choice of law [...]. Thus, to determine whether the United States has a significant or close relationship to the contract and to the parties, the Court must first evaluate each state's §188(2) contacts with the *FedEx* Air Waybill. The *FedEx* Air Waybill was negotiated between *FedEx* and *Lilly*'s Brazilian freight forwarder *Nippon Express* in Brazil. The contract between *FedEx* and *Jumbo Jet Transportes Internacionais*, and the contract between *Lilly* and *Nippon Express*, also were negotiated in Brazil [...]. *FedEx* picked up and accepted the pharmaceutical cargo at the *Nippon Express* freight forwarding facility in Guarulhos, Brazil.

Because the truck was hijacked and the cargo was stolen, the dissent reasoned that

> the only performance that ever took place under the contract occurred in Brazil [...]. The parties involved are either Brazilian companies or companies that regularly conduct business in Brazil [...]. When the §188(2) and §197 factors[103] are taken into account and applied to the §6 principles Brazil emerges as the state with the most significant relationship to the transaction and to the parties.

The dissent continued its reasoning:

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103 For a comprehensive work on Restatement Second §6, §188 and §197 in Turkish doctrine *see* Gülin GÜNGÖR, Temel Milletlerarasy Özel Hukuk Metinlerinin Sözlemeden Dodan Borç Ylikilerine Uygulanacak Hukuk Konusunda Yakynlyk Yaklaymy ["The Closest Connection Approach" in the Basics Instruments of Private International Law Relating to the Law Applicable to Contractual Obligations], Ankara 2004, p. 21 *et seq*.

> Furthermore, while the federal common law's presumption in favour of applying the law that tends to validate contracts might mean that the United States has a general interest in validating contracts, the United States still does not have a "significant" or "close" relationship with this contract. Therefore, Brazil remains as the default jurisdiction whose laws govern this contract of transportation regardless of whether the liability limitation is valid under Brazilian law.
> [...] Of course, where two states have significant interests in the contract the common law presumption in favour of applying the law of the state that tends to validate the contract might prove dispositive. However, this is not such a case. Brazil's interest in regulating commerce within its own borders heavily outweighs any interest the United States has in enforcing this contract For the foregoing reasons, Brazilian law should have been applied.[104]

6. Applicability of Article 29 of PILA to Carriage of Mail and Postal Packages

Under Article 1(a) of *the Postal Code* numbered 5584[105], acceptance, transportation and delivery of letters, post cards, both single and with reply paid, newspapers, periodicals, books, printed papers of every kind, small parcels, commercial papers and patterns or samples of merchandise, and service of summons are among the functions of Turkey's Post Telephone and Telegraph ("PTT"). Transportation of small parcel and articles are also subjected to the services of the PTT.

Although the services provided by the PTT are considered public services, the transportation of parcels and articles should be evaluated as commercial activity, and therefore such activities should be kept outside the jurisdiction of administrative courts. If it is accepted

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104 For the comments on the judgment *see* SYMEONIDES, Symeon C.. *Choice of Law in the American Courts in 2007: Twenty-First Annual Survey*. 56(2008) AJCL, pp. 49-51.

105 Official Gazette 8 March 1950 No. 7451.

that the functions of the PTT with respect to transportation of parcels and articles fall within the scope of private law, then disputes relating to the contracts for carriage of such items should be dealt with the commercial courts. *The Postal Code* sets out rules as to claims for damages against the PTT, but is silent as to which kinds of courts, administrative or commercial courts, have the competence and jurisdiction for such claims. In our view, legal actions against the PTT concerning the post of articles and parcels should be not brought before administrative courts but commercial courts.

When evaluating the carriage of parcels and articles by post in respect of private law, one is confronted with the question whether PILA's Article 29 is applicable to PTT's performance of the international carriage of parcels and articles. If any legal action is taken against to the PTT because of loss or damage during the course of such transportation, the question of which country's law is to be applied must be resolved in accordance with PILA's Article 29. In practice, there is no choice of law clause in the bill of receipt relating to transportation of packets and parcels. For that reason, under the paragraph (2) of Article 29 of PILA the law of the country in which the principal place of post administration is located shall apply provided that, at the time the contract is concluded, that country is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated. Since the principal place of the PTT is located in Turkey, if the sender lodged his parcels or packets in Turkey the requirements of Article 29(2) are met, and therefore Turkish law is applicable.

In Turkish law, disputes arising out of carriage of parcels lodged at the PTT for transportation to a place outside Turkey are subject to the Postal Code numbered 5548 since the scope of Postal Code is also expressly extended to international post services. The requirements for the application of the Postal Code to parcels and packages lodged in Turkey for carriage to a place outside Turkey are laid down in Article 67 thereof. Article 67 of the Postal Code provides that, unless otherwise expressed in bilateral or multilateral international trea-

ties,[106] the provisions of this Code shall be applicable to international post services. In short, the Postal Code governs international post services performed by the PTT.

As discussed above, international post services are primarily subject to bilateral or multilateral international treaties. In the absence of a treaty, the Postal Code will be applied if it is so provided by PILA's Article 29. For example, carriage of mail and postal packages in accordance with international conventions falls outside the scope of the CMR [Article 1(4)(a) of the CMR]. In the same way, Article 4 of the CIM, among others, lists carriage of articles within the monopoly of postal authorities as a type of cargo that is not acceptable for carriage. Carriage of mail and postal packages in accordance with international conventions is excluded from the scope of the Warsaw Convention by Article 2(2) thereof. Slight modifications were made to this provision by subsequent amendatory Protocols. The Hague Protocol to the Warsaw Convention introduced a provision for the carriage of mail

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106 Promulgation of Council of Ministers No. 86/10241 on the Approval of the Agreements Signed at XVIIIth World Congress of Universal Postal Union: Official Gazette 20 January 1986 No. 18994; Promulgation of Council of Ministers No. 86/10418 on Second Additional Protocol to the Constitution of the Universal Postal Union: Official Gazette 13 April 1986 No. 19077; Promulgation of Council of Ministers No. 88/13301 on Constitutional Law and Regulation of the West Asian Postal Union Signed at the Meeting of the Planning Council of the Economic Cooperation Organisation (ECO): Official Gazette 17 October 1988/19962; Law Number 3896 Ratifying the Third Additional Protocol to the Constitution of the Postal Union: Official Gazette 21 March 1993 No. 21531; Law Number 3897 Ratifying the Fourth Additional Protocol to the Constitution of the Postal Union: Official Gazette 21 March 1993 No. 21531; Promulgation of Council of Ministers No. 95/6537 on Agreement Between the Government of the Republic of Turkey and the Government of the State of Israel Concerning Cooperation in the Field of Telecommunications and Posts: Official Gazette 13 March 1995 No. 2222; Law Number 4473 Ratifying the Fifth Additional Protocol to the Constitution of the Postal Union: Official Gazette 11 November 1999 No. 23873; Promulgation of Council of Ministers No. 2000/486 on the Fifth Additional Protocol to the Constitution of the Postal Union: Official Gazette 24 May 2000 No. 24058; Protocol on the procedure to be followed in case of deportation of passengers, luggage, cargo and mail specified by the "Agreement Between the Government of Republic of Turkey and the Government of Georgia on the Joint Usage of the Batumi International Airport" by the competent authorities of the both contracting parties or of the third countries: Official Gazette 3 July 2007 No. 26571.

and postal packages slightly different from the one in the Warsaw Convention and states that the Warsaw Convention does not apply to postal carriage. Article 2(2) of the Warsaw Convention as amended by Article II of the 1975 Montreal Protocol No 4 provides that the carrier's responsibility toward the post authorities for postal carriage comes within the ambit of the rules of the Warsaw Convention applicable between the relations to carrier and post authorities. Except for this provision, the Warsaw Convention as amended Montreal Protocol No 4 does not apply to the carriage of mail and postal packages.

While the CIM and the CMR do not apply to international carriage of mail and postal packages, in the event of damage or loss to the cargo, the Turkish court will ascertain the governing law by referring to conflict of laws principles, that is, PILA's Article 29. There is no postal carriage contract concluded between the sender and postal administration containing a choice of law clause in traditional sense. Lacking a choice of law, the international carriage of postal items is subject to the law of the country in which the sender and the administration of postal services are situated and the postal item has lodged.

7. Whether Article 29 of PILA is Applicable to International Transportation of Corpses

As a matter of tradition, particularly in Asian countries, significant efforts are made for the conveyance of corpses from foreign countries to the home state of the deceased for burial. Countries cannot avoid taking necessary steps for the international transportation of corpses of their nationals.[107] The international transfer of corpses,

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107 GÜLER, Çadatay e ÇOBANODLU, Zakir. *Mezarlyklar Tesisi, Ölü Defin ve Nakil Yleri [Cemetery Allocations, Burial and Transportation of Funerals], General Coordinator for Health Projects, General Directorate of Fundamental Health Services, Ministry of Health, Serials of Basic Documents for Environmental Health Publication No: 20, 2nd edition.* Ankara, 1996, p.11.

as an important issue, involves not only transportation law but also environmental and health considerations. Burials are regulated by national laws considering, in addition to the interests of relatives, protection of the environment and the health of human beings. Problems that may arise in connection with the international transportation of corpses[108] are dealt with by national laws and international conventions.

The formalities relating to deceased aliens in Turkey have been comprehensively and extensively established by the national legislation and regulations and several multilateral and bilateral conventions that Turkey has ratified. Article 37(1) of *the Vienna Convention on Consular Relations*[109] provides that if the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty in the case of the death of a national of the sending State, to inform without delay the consular post in whose district the death occurred. Bilateral consulate treaties to which Turkey is a party have similar provisions. For example, Article 45 of the treaty with Macedonia[110]; Article 37(1) of the treaty with Libya[111]; Article 15 of the treaty with Bosnia and Herzegovina[112]; Article 45 of the treaty with Lebanon[113]; Article 45 of the treaty with Moldova[114] provide that in case of death of a citizen of the sending state in the receiving state, the competent authorities of the receiving state shall without delay inform the consular post thereof. They issue a consular post, the certificate of death or other documents of death.

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108 For more information as to the problems relating to international conveyance of corpses *see* GÜLER/ÇOBANODLU, 15-16.

109 Official Gazette 27 September 1975 No. 1539.

110 Official Gazette 18 March 2004 No. 25406.

111 Official Gazette 9September 2003 No. 25224.

112 Official Gazette 12 August 2003 No. 25197.

113 Official Gazette 1 September 2004 No. 25570.

114 Official Gazette 11 August 2003 No. 25196.

Austria, Belgium, South Cyprus, Estonia, Finland, France, Greece, Iceland, Leetonia, Luxembourg, Moldova, the Netherlands, Norway, Portugal, Spain, Slovakia, Slovenia, Switzerland and Turkey[115] are parties to the *Agreement on the Transfer of Corpses* that was drafted by the Council of Europe in 1973. The purpose of the 1973 Convention is to assure simplification of the formalities relating to the international transfer of corpses and to make the passage or admission easier by issuing special documents accompanying corpses. The 1973 Convention covers international transport of corpses from the state of departure to the state of destination. The Convention, however, does not apply to the international transport of ashes [Article 1(3) of the 1973 Convention]. Any corpse shall, during the transfer, be accompanied by a special document issued by the competent authority of the state of departure. The information that is contained by the document and form thereof are set out in the model annex to the Convention. The standards for coffins are ascertained in Articles 6 and 7 of the 1973 Convention. These Articles determines the size and the shape of the coffin and they also provide that the coffin must be impervious and contain absorbent material.

Turkey is also a party[116] to *the International Arrangement Concerning the Conveyance of Corpses* signed at Berlin in 1937 by and among Germany, Belgium, Czechoslovakia, Denmark, France, Switzerland, Chile and Turkey. The 1937 Arrangement lays down provisions on conveyance or transit passage of the corpses of deceased in one of the contracting state to another contracting state. The transportation of corpses covered by the Arrangement can either be made by road, air or sea (Article 6 of the 1937 Arrangement). The 1937 Arrangement only applies to the international transportation of corpses immediately after death or exhumation. Moreover, the 1937 Arrangement does not apply to the transport of ashes (Article 11 of the of

115 Official Gazette 6 August 1975 No. 15318.

116 Official Gazette 7 February 1939 No. 41261.

1937 Arrangement). Other provisions of the 1937 Arrangement are similar to those in the 1973 Convention.

Many funeral service and transportation companies in contracting states transport corpses in accordance with the aforementioned two international conventions.[117] However, those conventions regulate only the administrative and procedural formalities relating to conveyance of corpses, i.e., these conventions govern activities of official authorities of the contracting.

Neither the 1937 Arrangement nor the 1973 Convention contain provisions regarding claims against funeral transportation companies.[118] Both instruments deal with the formalities performed by officials. Consequently, it is not possible to apply these two international conventions to legal actions against funeral transportation companies.

PILA's Article 29 covers carriage of goods and because a corpse is a movable good, the question of whether Turkish courts should apply Article 29 must be resolved. There should be no problem with the application of PILA's Article 29 to the international conveyance of corpses. Although Article 29 is applicable to international transportation of corpses, it should be noted that international conventions containing rules as to the conveyance of corpses have priority over PILA's Article 29. A corpse can be transported by air or road or sea. Although such carriage is under the sovereignty of international conventions, funeral consignments mostly fall outside the scope thereof. For example, funeral consignments are excluded from the scope of the CMR [Article 1(4) of the CMR]. In contrast, in the CIM, funeral consignments

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117 GÜLER/ÇOBANODLU, p. 16.

118 The Ministry of Justice General Directorate of International Law and Foreign Affairs prepared a circular regarding "Declaration of Death of Foreign Persons" on 1 January 2006. The declaration of death of foreign persons by authorities and the transportation of corpses within the framework of agreements to which Turkey is a party and Turkey's laws have been explained in detail in this circular (For detailed information *see*, EKŞİ, Nuray. *Yabancylar Hukukuna Ylikin Temel Konular [Basic Issues on Law of Foreigners], 2nd edition.* Istanbul, 2007, pp. 26-9).

are listed as one of the cargoes that are acceptable for carriage provided the stipulated conditions are met [Article 5(1) of the CIM]. In default of international conventions containing provisions on funeral consignment or when the international conventions clearly exclude funeral consignments from their scope, the governing law applicable to claims arising out of the international conveyance of corpses should ascertained under Article 29 of PILA.

IV. Absence of Transitional Provisions in the New PILA Numbered 5718 Leads to the question of when Article 29 is Applicable

PILA has no specific provision governing transition. For that reason, the problem arises as to what date, the date when the *contract was concluded* or the date when the *claim arises* should determine applicability of PILA's Article 29. In other words, can the governing law to the disputes arising out of contracts for the carriage of goods concluded prior to the entry into force of the new PILA numbered 5718 on 12 December 2007 be ascertained under Article 29? If the date when the contract was concluded controls then the applicable law is determined under Article 24 of the ex PILA numbered 2675 if the contract was concluded prior to the new PILA. On the other hand, if regard is given to the date when the case has arisen and that date is after the date of the new PILA, then the governing law is ascertained under Article 29 of the new PILA.

The Rome Convention, on which Article 29 of PILA is based, has a provision governing transition. Article 17 of the Rome Convention, under the title of "no retrospective effect", says that this Convention shall apply in a Contracting State to contracts made after the date on which the Convention has entered into force with respect to that State.[119] In fact, the French Court of Cassation in its decision in

119 The Rome I Regulation has also a transitional provision. Under the title of "application in time" Article 28 of the Rome I Regulation says that this Regulation shall apply to contracts

1999[120], considered the date on which the contract was concluded and reached the conclusion that because the Rome Convention was not in force at that time, the governing law is not ascertained thereunder. Under the contract reviewed in that case, the Japanese transportation company, *NYK Line,* undertook to carry a cargo of perfume from France to Saudi Arabia by sea. During the transportation some of the cargo was lost. The French insurer compensated the consignee and as subrogee brought an action before a French court against the carrier to recover the compensation it had paid. The problem arose whether the Rome Convention or French conflict of laws principles should be applied. The French Court of Cassation held that, under Article 17 of the Rome Convention, because the carriage of goods contract was concluded prior to the entry into force of the Rome Convention, the case was to be controlled by the former French conflict of laws rules.

The Swiss PILA[121] has detailed provisions (Articles 196 to 199) on transition and provides not only for non-retroactivity of the new PILA (Article 196 of the Swiss PILA), but also, without having a lacunae that leads to ambiguity, it contains a transitory provision governing the international jurisdiction of the Swiss courts (Article 197 of the Swiss PILA); a transitory provision on conflict of laws (Article 198 of the Swiss PILA); and a transitory provision on recognition and enforcement of foreign judgments (Article 199 of the Swiss PILA). All the provisions of the Swiss PILA will not be reviewed here, but since they are directly relevant to this article, the non-retroactivity provision in Article 196 and the transitory provision in Article 198 will be evaluated.

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concluded after 17 December 2009. For the Rome I Regulation *see* Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 4.7.2008 L 177 pp. 6-16.

120 *Nippon Yusen Kaisha Line c. compagnie GAN et a.* Cour de cassation chambre commerciale, 1999, February 2, Revue critique de droit international privé 1999, s. 303-305.

121 For the English version of the Swiss PILA *see* KARRER, Pierre A. e ARNOLD, Karl W., Switzerland's Private International Law Statute of December 18, 1987 The Swiss Code on Conflict of Laws and Related Legislation, 2nd edition, Deventer 1989.

Under title of "*non-retroactive*", Article 196(2) of the Swiss PILA provides that *the legal effects of factual situations or legal transactions initiated and completed before the entry into force of this Statute on 1 January 1989 are governed by the previous law.* Article 196(2) says that *the legal effects of factual situations or legal transactions initiated before the entry into force of this Statute, but designed to continue, are subject to the previous law, prior to that date. From the entry into this Statute onwards these effects are governed by the new law.*

Article 198 of the Swiss PILA, which regulates the transitional application of conflict of laws rules, focuses on the date on which the legal action has been taken. The date on which the factual situation or legal transaction was initiated plays no role. According to Article 198 of the Swiss PILA *for lawsuits and petitions that are pending at the trial level at the time of entry into force of this Statute, the applicable law is determined according to the* Swiss PILA.

With respect to Turkey's PILA, it seems appropriate to accept the solution offered by Article 198 of the Swiss PILA, that is, the applicable law should be determined in accordance with the conflict of laws rules in force at the time when the legal action has taken no matter when the factual situation occurred or the legal transaction was initiated.

V. Conclusion

International treaties, to a significant extent, cover contracts for the carriage of goods. Furthermore, standard contracts and general terms are extensively used in this field to provide detailed solutions for all potential problems that may arise from contracts for the carriage of goods. Hence, there will, in principle, be no need to resort to conflict of laws principles in situations where the provisions of international treaties, or standard contracts or general terms, are applied to disputes arising from contracts for the carriage of goods.

Where there is need to resort to the rules on the conflict of laws, the law applicable to the contract for the carriage of goods will be determined in accordance with Article 29 of PILA. Article 29 of PILA is the first piece of legislation that contains a specific rule on the conflict of laws in connection with the contracts for the carriage of goods in Turkish private international law. Although the new PILA contains a new provision, however, the mentioned article falls short of shedding light on certain issues that arise in practice. Furthermore, Article 29 itself has caused certain problems. In this article, attempt has been made to identify the problems that may arise from Article 29 of PILA and to propose solutions thereto. Our work will accomplish its objective to the extent practitioners and researchers find it helpful in resolving the legal questions they encounter with regard to conflicts of laws pertaining to the contracts for the carriage of goods.