# THE GERMAN FORWARDING AGENT.*

American law lacks a thoroughly worked out body of rules with regard to forwarding agents. The operations of forwarding agents fall either under the rules of law of agency, of common carriers, or of warehousemen. In Germany the "forwarding agent" (in the economic sense) carries on a many sided business. He makes freight contracts with railroads, steamship lines or other freight companies for the transportation of freight; he carries out with his own or borrowed vehicles agreements to forward goods; he himself undertakes transportation to other places by rail or water at a fixed rate; he manages shipments of separate consignors in combined loads which he himself places on board the railroad cars; he keeps storehouses and is a warehouseman. The position of forwarding agent is one of great respectability; among them are found influential men enjoying leading positions in public life. The German legislature has from an early period devoted special attention to the law of shipping.

But the legal conception of the term "forwarding agent" is narrower than its economic meaning. A forwarding agent in the sense given the word by the *"Handelsgesetzbuch"* or "Commercial Code", is one who undertakes to conduct the business of forwarding goods through the intervention of a carrier or the owner of a ship, in his own name on the account of another—the consignor.[1] The forwarding agent is, therefore, only a middleman. He makes the contract for freighting in his own name, but upon the credit of his principal. The execution of the transportation itself is not essentially his affair, nor is the storing, though he also usually conducts operations of carrying and storing. In this he is not a shipper in the legal sense, but a common carrier acting as a warehouseman.

The question of the validity of a contract of shipping between a German forwarding agent and an American principal causes no difficulties. As a general rule the contract of shipping under the German law requires no special form. But it should be

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[1] Art. 407.

noted that the invalidity of contracts by reason of having been made on Sunday is a principle foreign to German law.[2]

In regard to the most important duties of the forwarding agent, the Commercial Code[3] lays down the rule that

> "The forwarding agent, in carrying out the forwarding of the goods, and in particular the selection of carriers by land or sea and sub-agents, must act with the diligence of a capital mercantile trader; he must protect the interests of the sender and carry out his instructions.
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> "He may not charge the sender with a higher rate than that agreed upon between himself and the carrier."

Thus the forwarding agent has to attend to the route, instrumentality and manner of shipment and choose a reliable carrier with whom to contract for the transportation, to whom to deliver the goods for dispatch, and to whom to give orders during the actual journey. He must obey the instructions of his principal and only when there is danger of delay and where he may presume that his principal would consent to a deviation, may he exceed his authority. Should he without cause deviate from the orders of the consignor, he is liable for any resulting loss, or, according to another view, the consignor may repudiate the un-

[2] The law of the place where the contract is made, "*lex loci contractus,*" does not primarily enter into the consideration of this question according to the prevailing German view, but the test is rather the intention, either expressed or implied, of the parties. Generally, however, if a German forwarding agent is employed by an American, German law will determine the validity of their contract, as, in the absence of any recognized intention of the parties, the law of the place where the contract is made governs. And so the obligation of the American consignor for the payment of commissions and expenses is determined by his domicile at the time of the formation of the contract. If this domicile should be in a State which holds contracts void when made on Sunday, it is likely that under the circumstances a German court would deny validity to the contract. A German judge would be slow to deny a German party his rights on the ground of a stipulation which is unknown throughout his country, and of which the local forwarding agent has taken no thought. The German court would, in such a case, rely on Article Thirty of the Introduction to the "*Bürgerliches Gesetzbuch*" or "Civil Code," which bars applications of a foreign law when such applications would be contrary to *bonos mores.*

The American court would, perhaps, come to a similar decision, if the contract is made or to be fulfilled in Germany; or if, according to the intention of the parties, the German law is to govern. Nevertheless contrary decisions must be reckoned with, especially if American courts hold that the execution of such a contract is contrary to good morals or the recognized policy of the particular State. This might be a grave matter for the German forwarding agent, so that he must act on the safe side.

[3] Art. 408.

dertaking as not being on his account. So long as no instructions are given to the forwarding agent he must choose from among possible routes only those which are the most favorable to the consignor. He has to take care of the interests of the consignor in the execution of the shipment. Acting from the point of view of the consignor, he must decide whether he will choose a route by water or by rail, longer or shorter, cheaper or more expensive.

The question then arises as to what law governs the forwarding agent in the performance of these duties. It is possible that at the domicile of the principal or of the consignee, customs and restrictions other than those in the country of the forwarding agent control. Thus instructions in the contract of shipment such as "Rush", "Prompt" and the like, do not, according to the practice prevailing in Germany, comprehend any other manner of shipping then the so-called *"Eilgut"*, or "fast freight."[4] Even if one consignment is sent by fast freight to the forwarding agent, in the absence of further orders it is not compulsory that it be always forwarded in the same manner. The Rules of Forwarding of the German Shippers' Association[5] provide that

> "So long as the rules do not oppose the orders of railroad traffic, forwarding by fast freight always requires a special order. Marking the goods as 'Goods for Market *(Marktgut)*' does not oblige the shipper to forward them under the circumstances more quickly than any other sort of goods."

If other principles hold abroad which law prevails? The prevalent view in Germany is based on the intent of the parties, and when such intent cannot be ascertained, on the law of the place of the execution of the contract. The forwarding agent, since his activity lies in the making of the contract of freightage and not in the shipping itself, must as a rule perform according to the law of the place where he makes the contract of freightage. That will ordinarily be his place of business. Some would make this place of business prevail in every case.

Thus German law will regularly prevail. In accordance with this law the forwarding agent is responsible for every injury

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[4] Senckpiehl, Speditions Geschäft, 114.

[5] "Die Allgemeinen Beförderungsfedingungen des Vereins deutscher Spediteure."

during the execution of the contract of shipment and attributable to him. The law in the German Empire is uniform, yet regard must be had for the customs and usages of the locality. In larger cities such as Berlin, the customs of the shipping trade are fixed; these customs are valuable in the determining implied terms of the contract. That the goods must pass through or to a foreign State, is immaterial in determining the law fixing the obligations of the German forwarding agent. But in the German law as a basis, the obligation of the forwarding agent can without doubt be controlled to a certain extent by the route taken or the destination of the goods. For example, he may have to make freighting and warehouse contracts or other similar agreements with American shippers or warehousemen, and so it is his duty to inform himself about the American tariff regulations, customs and directions in the interest of his principal, since he is forbidden to agree to any conditions of shipment particularly unfavorable to his client.

The duties, likewise, of the German agent who receives the goods from the carrier are shaped by the German law. This law lays upon the receiving agent the special obligation of caring for the rights of his principal against the carrier or sailing master if the freight is found in a condition of patent injury or deterioration, preserving evidence of their condition upon delivery and informing his principal forthwith. Failure to do so makes him liable to compensate for losses. The receiving or commission agent is liable for the loss and damage of goods in his custody, except when the loss or damage occurs through a chain of circumstances which could not have been averted by the use of reasonable care.[6]

The public is frequently inclined to blame the forwarding agent for loss or damage to the goods, as well as for delay in forwarding. It is supported in this by the fact that many forwarding agents, merely as a matter of accommodation make good losses for which they are not liable. For the forwarding agent as such is not liable, in accordance with the conclusions reached

[6] Commercial Code, §§388 ff.

above, for anything happening to the goods while in transit. His contractual obligations terminate with the delivery of the goods to the carrier.

The situation is different when the shipper himself acts as carrier. According to the Commercial Code, the forwarding agent is regarded as carrier in two cases.

1. When he forwards the goods in a common load with the goods of other consignors. He combines less-than-carload consignments of various shippers into a carload; he enters into a single contract of transportation with the railway for all the goods on his own account at carload rates; he places them on the cars himself and thereby saves freight charges which he allows to accrue to the advantage of the consignors.

2. When the shipper has agreed with the consignor about a particular item in the cost of shipping; when, for example, he undertakes for an American principal to forward freight arriving in Berlin from Russia from the Berlin depot to the steamer at Hamburg or even to New York for a specified sum.

In both these instances the shipper has the rights and duties of a carrier.[7] This liability, under German law, is not as extensive as under American common law where the carrier is liable as an insurer for losses and injuries of every kind from the moment of delivery to the end of the journey; by German law he is, in case of accident, permitted to evade liability by showing that the loss or injury occurred under circumstances which with reasonable care could not have been avoided.[8]

In the above example, where the forwarding agent receives a consignment arriving in Berlin from Russia, and delivers it to the carrier for Hamburg or New York, receipt by the carrier is execution of the contract to ship but not of the contract to carry. In this case the place of fulfillment of the contract to ship is Berlin. The obligations of the forwarding agent are determined by German law. As to shipment beyond Berlin he is a carrier and the place of fulfillment will be the city to which he has undertaken to forward the goods, Hamburg or New York. In this

[7] Commercial Code, §413.
[8] *Id.*, §429.

case it may happen that his obligation as carrier, as also his duty to insure, is fixed by American law, if the place of fulfillment of the contract is followed. This rule, in this case, is not altogether satisfactory, for if the forwarding is by German railways and German ships and ends in New York, it seems preferable to discard the rule of the conjectural intent of the parties in favor of German law. According to the theory of the implied intention of the parties American law would probably only take effect in the event of transportation of the goods beyond New York to another place in the United States. Conversely, the responsibility attendant upon an American agent who selects a carrier to Germany for a German principal is controlled by the more severe American rule, except when the facts involving the responsibility have occurred under jurisdiction of the German law. It is the prevailing view in Germany that the limitations as to time or place of delivery of the freight to the consignee are determined by the law of the place of delivery.

The place of performance is different for the forwarding agent and for the principal. The latter has to pay the commissions and advances of the shipper; and in the payment of these, his obligations, under German law, is governed by the law of the place of performance,—his place of business at the time of incurring the indebtedness.[9] The obligations of the forwarding agent on the other hand are to be performed at his place of business; for claims against him, such as claims for damages resulting from injuries to the goods, the law of his place of business regularly governs. Yet so long as the forwarding agent is himself a carrier as where there is a fixed price for transportation of the goods, or a combined carload shipment, the place of performance is regularly the place of delivery. The German forwarding agent can thus under these circumstances, even in accordance with the German law, be sued in America.

A contract for shipment made in Germany in accordance with German law can be enforced by suit in the United States in every State where the court has jurisdiction over the defendant if the terms of the contract do not conflict with *bonos mores* or

[9] §269 Civil Code; Kammergericht, Bl. 9,036; Senckpiehl, §§200-202.

the recognized policy of the particular State. Just so, in Germany, American law can be made binding,—*e. g.*, the American law of the responsibility of the carrier—in so far as it is not in conflict with *bonos mores* or the purpose of German law. Such a conflict with the purpose of a German law does not lie in the fact that the German law concerning common carriers is more lenient as to responsibility than American law. The application of the American law would be forbidden only under the rule of the Supreme Court of the Empire when the difference between the political or social aspects of the case on which American and German law is grounded is so important that the application of the foreign law would directly affect the basis of the German political state or economical life.[10] Apart from this, it is certain that no views exist in Germany against the application of American forwarding and shipping law. So, too, the principles upon which American law releases the common carrier from his responsibility—acts of God, acts of the public enemy, acts of the shipper, nature of the goods and acts of this law—would not be regarded as in conflict with German law.

The policy of German law today is to treat the whole contract in as uniform a way as is compatible with the law governing it. But that is only possible when there is sufficient evidence to assume a common intent of the parties in respect thereto.[11] Furthermore, the controlling theories in the Supreme Court of the United States (the law of the place where the contract is made; of the place where it is performed, of the presumed intent of the parties), are not well fixed and give no guarantee that all the legal relations between forwarding agent and principal shall be determined according to German or American law.

For this reason, it is certainly to be recommended that this question be controlled by the agreements of the parties. This is usual for German shippers. The recognized customs and usages of the Berlin Chamber of Commerce in the shipping and storing business of Berlin provide that

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[10] Reichsgericht, 60,299, 77,366.

[11] Dürminger in Wertheimers Jahrbuch für den internationalischen Rechtsverkehr, 651 ff.

"The place of execution of the obligations arising out of the terms of the contract, and the jurisdiction of suits over the terms of the contract, are determined as to both parties by the place of business of the forwarding agent.

"The rights and duties of both parties are fixed by German law."

The validity of such agreements has been at times questioned.[12] They are, however, held to be valid by the prevailing view. A decision of the Supreme Court at Rostock[13] has even sustained the submission of two merchants living in Germany to English law and English judgment. German forwarding agents have many times made agreements with others engaged in the same business either in the same or another locality concerning combined carload shipments, the observance of the minor points, *etc.*, and in doing this they subjected themselves to the decision of an arbitrator contrary to the usual process of law. An agreement by which the decision of a German or an American arbitrator is to settle all disputes arising out of the contract, would certainly be upheld by the German courts. As the current of American authority tends to base the dispute as to the application of the law upon the actual or probable intent of the parties, scruples which might question the legality of such agreements will not affect them. Certain American courts, especially the Supreme Court, have indeed restricted the right of the parties to choose their law, so that the system so chosen may not conflict with the view of public policy accepted by the American courts. Certain clauses of the Harter Act of 1893[14] forbid such a choice, and are binding upon foreign contracting parties. But apart from that act, the restriction, by common agreement of the parties, upon liability of the carrier of the forwarding agent that the milder German law should prevail,[15] is recognized by American courts.

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[12] Habicht Internationale Privatrecht, 07,47 ff; Jahrbuch des deutschen Rechts, 6,580.

[13] Mecklenburgische Zeitschrift, 27,334; Jahrbuch des deutschen Rechts, 9,530.

[14] 27 Stat. 445.

[15] Handelsgesetze des Erdballs, I. 1, X. 24.

Doubtless difficulties regarding the Statute of Limitations can arise since American courts, contrary to German practice, do not regard the Statute as a substantive, but rather as a procedural rule and always lay the foundation of law upon reasons of civil procedure.[16]

Special attention is due to the American right of stoppage *in transitu*, the right that accrues to the unpaid vendor after delivery of the goods to a common carrier for the purpose of transmission to the vendee again to take possession of them during the time of transportation, in case the vendee is or becomes insolvent.

Is a German forwarding agent able or required to observe this law in favor of American vendors? The question is one of great practical importance, for, according to the American rule, the common carrier is liable for the value of the goods, if he hands them over to the vendee after receiving notice from the vendor. The decisions of the court have not treated this point adequately.[17] The spirit of German law does not oppose the rule; indeed German law recognizes a tendency toward the rule in the case of insolvency.

There is the further question whether the vendor, who has exercised his right of stoppage *in transitu*, is the principal of the German forwarding agent or not. Thus, if the vendor still continues as his principal, the latter must, under German law, follow the instructions of his principal without further orders, and to look after his interests.[18] The German forwarding agent then becomes the agent of the American vendor, if as a common carrier by construction of law, he has accepted the goods from the original carrier with the original bill of lading and has assumed the further forwarding of the goods to the vendee. In this way he enters into a privity of contract with the vendor under the terms of the bill of lading.[19]

On the other hand, if the vendee has contracted with the forwarding agent for the reception of the goods on arrival, the

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[16] Jahrbuch des deutschen Rechts, 8,569; Wittmaack, Zeitschrift für internationale Privatrecht 09,126 ff.

[17] Reichsgericht, 41,333; Staub, Exk. to Par. 382, A. 117.

[18] Commercial Code, §408.

[19] *Id.*, §432.

forwarding agent has to take his orders from the vendee. A number of German forwarding agents may, in all cases, be given absolute authority from business houses to receive for them all their freight arriving by rail. The delivery of the freight to such authorized forwarding agents operates then as a delivery to the consignee himself. Authorized forwarding agents having such authority are not the agents of the vendor. If the forwarding agent has received the wares of an American vendor subject to purchaser's approval, the vendor's title to the goods, under the terms of the contract, ceases at the moment the purchaser approves of them. After that time the forwarding agent need not longer respect the right of stoppage *in transitu.*

Furthermore, according to American law, the right of stoppage is not limited to delivery to the purchaser, but extends to delivery to a representative of the purchaser, including the receiving agent who is bound to follow the purchaser's commands. The right of stoppage exists only in cases in which title to the wares has already passed to the vendee. But, according to German law, that does not in any way change the obligation of the forwarding agent to withhold the wares, if the vendor at the time of notice is still his principal.

Another question arises whether the right of stoppage is operative as between an American vendor and a German vendee. That depends upon which law is to determine rights and obligations of the vendor. But even if a detention of the wares by the vendor would be unjust to the vendee, the forwarding agent must respect the vendor's right, so long as the vendor is his principal; conversely, he may disregard the order to detain, even where it would not be unjust to the vendee if notice is given at a time when the vendee is the forwarding agent's principal.

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