

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

**AN HISTORICAL AND MULTI-JURISDICTIONAL
STUDY OF JURISDICTION CLAUSES IN
INTERNATIONAL MARITIME CARRIAGE CONTRACTS**

Natalie Isabelle Sanchez

SNCNAT001

LLM: Shipping Law

Supervisor: Graham Bradfield

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Masters of Law (LLM) Degree in Shipping Law in approved coursework and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of minor dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signature: Date:

I dedicate this thesis first to my French grandparents, Nani and Bob, without whom my South African adventure would never have seen the light of day. I also dedicate it to my parents, for all that they have done for me during these last months. Finally, I dedicate it to the Hare family and Mr Bradfield, for their generosity and support.

À mes grands-parents français, Nani et Bob, sans qui
mon aventure sud-africaine n'aurait pu se réaliser

À mes parents pour leur soutien indéfectible

et

À la famille Hare ainsi qu'à Monsieur Bradfield
pour leur générosité et leur patience

TABLE OF CONTENTS

<u>BIBLIOGRAPHY</u>	IV
BOOKS AND JOURNALS ARTICLES	IV
OTHER DOCUMENTS	XIII
DISSERTATIONS	XIV
LIST OF STATUTES, CODES, DECREES, CONVENTIONS AND REGULATIONS	XV
TABLE OF CASES	XVIII
<u>CHAPTER 1: INTRODUCTION</u>	1
<u>CHAPTER 2: JURISDICTION CLAUSES IN INTERNATIONAL MARITIME CARRIAGE CONTRACTS IN A NUTSHELL</u>	6
2.1 HISTORICAL REASONS FOR THE INCLUSION OF JURISDICTION CLAUSES	6
2.2 REGULATION OF JURISDICTION CLAUSES AT MARITIME LAW: INTERNATIONAL DISHARMONY	12
2.2.1 NATIONAL REGULATION OF JURISDICTION CLAUSES	12
2.2.2 EUROPEAN REGULATION OF JURISDICTION CLAUSES	15
2.2.3 INTERNATIONAL CONVENTIONS REGULATING JURISDICTION CLAUSES	16
2.3 THE CONTRACTUAL VALIDITY AND INTERPRETATION OF JURISDICTION CLAUSES IN CONTRACTS OF CARRIAGE BY SEA	23
2.3.1 LAW GOVERNING INTERPRETATION AND ENFORCEABILITY OF JURISDICTION CLAUSES	24
2.3.2 VALIDITY: FORM AND SUBSTANCE OF JURISDICTION CLAUSES	25
2.3.3 JUDICIAL INTERPRETATION: EXCLUSIVITY AND SCOPE OF JURISDICTION CLAUSES	26
2.4 JUDICIAL DISCRETION TO ENFORCE EXCLUSIVE JURISDICTION CLAUSES	30
2.4.1 TO STAY OR DISMISS PROCEEDINGS IN BREACH OF FOREIGN JURISDICTION CLAUSES	30
2.4.2 <i>FORUM NON CONVENIENS</i> VERSUS BREACH OF FOREIGN JURISDICTION CLAUSE	33
2.4.3 ENFORCING JURISDICTION CLAUSES WITH ANTI-SUIT INJUNCTIONS	36

2.4.4 JURISDICTION CLAUSES AND THE TIME-BAR DEFENCE	38
2.4.5 JURISDICTION CLAUSES AND JURISDICTION <i>IN REM</i> OR <i>IN PERSONAM</i>	40
2.5 FORUM SHOPPING AMIDST COMPETING INTERESTS AT MARITIME LAW	44
2.5.1 FORUM SHOPPING UNDER INTERNATIONAL MARITIME CARRIAGE CONTRACTS	44
2.5.2 COMPETING INTERESTS AFFECTING THE ENFORCEMENT OF JURISDICTION CLAUSES	46
2.5.2.1 NATIONAL SELF-INTEREST VERSUS COMITY OF NATIONS	46
2.5.2.2 FREEDOM OF CONTRACT VERSUS PROTECTIONISM	48
2.5.3 MAIN REASONS FOR AND AGAINST THE ENFORCEMENT OF JURISDICTION CLAUSES	53
CHAPTER 3: NATIONAL REGULATION AND ENFORCEMENT OF JURISDICTION CLAUSES	55
3.1 AUSTRALIA'S BRIGHT LINE RULE	56
3.2 UNITED KINGDOM'S LAISSER-FAIRE ATTITUDE AND STRONG CAUSE TEST	59
3.3 CANADA'S STATUTORY RESTRICTION ON PARTY AUTONOMY AND HOW THE FEDERAL COURT HAS MUDDIED THE WATERS	64
3.4 DOMESTIC DISCORD IN THE REGULATION AND ENFORCEMENT OF JURISDICTION CLAUSES IN THE UNITED STATES	69
3.5 FRANCE'S PROTECTION AGAINST UNEQUAL BARGAINING POWER AND THE "SPECIAL ACCEPTANCE" OF JURISDICTION CLAUSES BY THIRD PARTIES	74
3.6 NORDIC COUNTRIES' HAMBURG HYBRID OF LIMITED APPLICATION	79
3.7 CHINA'S RULE ON RECIPROCITY LIMITING PARTY AUTONOMY	82
3.8 CONCLUSION	85
CHAPTER 4: EUROPEAN REGULATION AND ENFORCEMENT OF JURISDICTION CLAUSES	89
4.1 RULES ON JURISDICTION CLAUSES UNDER THE EC JURISDICTION REGULATION	92
4.2 CRITICISM OF THE EUROPEAN REGULATION OF JURISDICTION CLAUSES	98

4.2.1 THE VALIDITY OF JURISDICTION CLAUSES UNDER ARTICLE 23 OF THE REGULATION	98
4.2.2 JURISDICTION CLAUSES AND <i>LIS PENDENS</i>	101
4.3 CONCLUSION	104
CHAPTER 5: REGULATION AND ENFORCEMENT OF JURISDICTION CLAUSES UNDER THE HAMBURG AND ROTTERDAM RULES	105
5.1 HAMBURG RULES	106
5.2 ROTTERDAM RULES	110
5.3 CONCLUSION	119
CHAPTER 6: CONCLUDING REMARKS	120
ANNEXURE A: EXAMPLES OF STANDARD FORM JURISDICTION CLAUSES IN INTERNATIONAL MARITIME CARRIAGE CONTRACTS	127

BIBLIOGRAPHY

Books and Journal Articles

Alcántara, José et al 'Particular concerns with regard to the Rotterdam Rules' (2010) 2(1) *Cuadernos de Derecho Transnacional* 5.

Allsop, James 'International commercial law, maritime law and dispute resolution: the place of Australia, New Zealand and the Asia Pacific region in the coming years' Frank Stuart Dethridge Memorial Address to the 33rd Annual MLAANZ Conference Sydney, 28 September 2006 (2007) 21 *A&NZ Mar LJ* 1.

Allsop, James 'International maritime arbitration: legal and policy issues', Paper presented to World Maritime University Malmö 14 May 2007 and to the Australian Maritime and Transport Arbitration Commission, Sydney 4 December 2007. Available at <http://acica.org.au/amtac/amtac-papers>.

Allsop, James 'Maritime law - the nature and importance of its international character' (2010) 34 *Tul Mar LJ* 555.

Amodeo, Delphine 'Le contrat de volume des règles de Rotterdam peut-il être un piège pour les chargeurs?' Newsletter du Centre de Droit Maritime et des Transports, May 2010. Available at http://www.droitmaritime.com/article.php3?id_article=528.

Andrieux, Gregoire 'Declining jurisdiction in a future international convention on jurisdiction and judgments—how can we benefit from past experiences in conciliating the two doctrines of *forum non conveniens* and *lis pendens*?' (2005) 27 *Loyola LA Int'l & Comp LR* 323.

Astle, WE *The Hamburg Rules* (1981) Fairplay Publications Ltd, London.

Baatz, Yvonne 'An English jurisdiction clause does battle with Canadian legislation similar to the Hamburg Rules' 2006 *LMCLQ* 143.

Baatz, Yvonne 'Jurisdiction and arbitration' in Rhidian Thomas (ed) *A new convention for the carriage of goods by sea – the Rotterdam Rules* (2009) Lawtext Publishing Ltd, Witney, Oxon, UK at 258.

- Baatz, Yvonne 'The conflict of laws' in *Institute of Maritime Law Southampton on shipping law* (2008) Informa, London at 1.
- Baatz, Yvonne 'Who decides on jurisdiction clauses' 2004 *LMCLQ* 25.
- Bayraktaroglu, Gulum 'Harmonization of private international law at different levels: communitarization v international harmonization' (2003) 5(1) *European Journal of Law Reform* 127.
- Berlingieri, Francesco 'Multimodal aspects of the Rotterdam Rules' Colloquium of the Rotterdam Rules 2009, De Doelen, Rotterdam, 21 September 2009.
Available at
<http://www.rotterdamrules2009.com/cms/index.php?page=text-speakers-rotterdam-rules-2009>.
- Bonassies, Pierre and Scapel, Christian *Droit maritime* 2ed (2010) Lextenso éditions, Paris.
- Borchers, Patrick 'Forum selection agreements in the Federal Courts after Carnival Cruise: a proposal for congressional reform' (1992) 67 *Wash L Rev* 55.
- Born, Gary *International arbitration and forum selection agreements: drafting and enforcing* 2ed (2006) Kluwer Law International, Alphen aan den Rijn, The Netherlands.
- Briggs, Adrian *Agreements on jurisdiction and choice of law* (2008) Oxford University Press Inc, New York.
- Briggs, Adrian 'Forum non conveniens and ideal Europeans' 2005 *LMCLQ* 378.
- Briggs, Adrian *The conflict of laws* 2ed (2008) Oxford University Press Inc, New York.
- Brogen, Blair et al (eds) 'Forum selection clause survey 2007-2008' (2008) 33 *Tul Mar LJ* 661.
- Burke-White, William 'International legal pluralism' (2004) 25 *Michigan Journal of International Law* 963.

- Carlson, Mary Helen 'US participation in the international unification of private law: the making of the UNCITRAL draft carriage of goods by sea convention' (2007) 31 *Tul Mar LJ* 617.
- Carruthers, Janeen M 'Substance and procedure in the conflict of laws' (2004) 53 *ICLQ* 693.
- Davies, Martin 'Forum selection clauses in maritime cases' (2003) 27 *Tul Mar LJ* 367.
- Delebecque, Philippe 'The new Convention on International Contract of Carriage of Goods Wholly or Partly by Sea: a civil law perspective' in Comité Maritime International *CMI Yearbook 2007-2008* Part 2, Documents for the Athens Conference, Antwerpen, Belgium at 264.
- Du, Huanfang 'An overview of choice of jurisdiction and law of foreign-related cases in China' (2009) 4(4) *Journal of Cambridge Studies* 72.
- Du Pontavice, Emmanuel 'Sur la clause attributive de juridiction d'un conaissance venu de Chine' (1994) 544 *DMF* 739.
- Fairplay International *The Hamburg Rules: an appreciation of the cause and effect of the amendments to the Hague Rules and the Hague-Visby Rules* (1981) Fairplay Publications Ltd, London.
- Farnsworth, Geoff, 'Laws in conflict – OT Africa Line Ltd v Magic Sportswear Corp' MLAAZ Conference Paper, October 2006. Available at <http://www.nortonwhite.com/adm/new/documents/laws%20in%20conflict.pdf>.
- Fawcett, James 'Trial in England or abroad: the underlying policy considerations' (1989) 9(2) *Oxford Journal of Legal Studies* 205.
- Fawcett, James 'Non-exclusive jurisdiction agreements in private international law' 2001 *LMCLQ* 234.
- Ferrari, Franco 'Forum shopping despite international uniform contract law conventions' (2002) 51 *ICLQ* 689.
- Figuroa, Dante 'Conflicts of jurisdiction between the United States and Latin America in the context of *forum non conveniens* dismissals' (2005) 37(1) *The University of Miami Inter-American LR* 119.

- Force, Robert and Davies, Martin 'Forum selection clauses in international maritime contracts' in Martin Davies (ed) *Jurisdiction and forum selection in international maritime law: essays in honor of Robert Force* (2005) Kluwer Law International, The Hague at 1.
- Fujita, Tomotaka 'Introduction' in Comité Maritime International *CMI Yearbook 2007-2008* Part 2, Documents for the Athens Conference, Antwerpen, Belgium at 277.
- Gold, Edgar *Maritime transport: the evolution of international marine policy and shipping law* (1981) Lexington Books, Lexington, Massachusetts.
- Goldberg, Roy 'Attempts to avoid foreign forum selection clauses post *Vimar Seguros v M/V Sky Reefer*' in *The Fourth International Conference on Maritime Law*, Conference Papers, Session 6, October 24-26 2000, Shenzhen, China.
- Gorton, Lars *The concept of the common carrier in Anglo-American law* (1971) Laromedelaferl, Gothenburg.
- Griggs, Patrick 'Obstacles to uniformity of maritime law – the Nicholas J. Healy lecture' (2003) 34(2) *JMLC* 191.
- Hare, John *Shipping law and admiralty jurisdiction in South Africa* 2ed (2009) Juta & Co Ltd, Cape Town.
- Hare, John 'Shopping for the best admiralty bargain' in Martin Davies (ed) *Jurisdiction and forum selection in international maritime law: essays in honor of Robert Force* (2005) Kluwer Law International, The Hague at 137.
- Herber, Rolf 'Jurisdiction and arbitration—should the new Convention contain rules on these subjects?' 2002 *LMCLQ* 405.
- Ho, LC 'Anti-suit injunctions in cross-boarder insolvency: a restatement' (2003) 52 *ICLQ* 697.
- Ho Tham, Chee 'Damages for breach of English jurisdiction clauses: more than meets the eye' 2004 *LMCLQ* 46.
- Hofmeyr, Gys *Admiralty jurisdiction law and practice in South Africa* (2006) Juta & Co Ltd, Cape Town.

- Honka, Hannu 'Jurisdiction and EC law: loss of or damage to goods' in Martin Davies (ed) *Jurisdiction and forum selection in international maritime law: essays in honor of Robert Force* (2005) Kluwer Law International, The Hague at 265.
- Hooper, Chester 'Choice of forum clauses and *forum non conveniens*', 2006. Available at <http://www.nsbs.org/librarydatabases>.
- Hooper, Chester 'Forum selection and arbitration in the draft convention on contracts for the international carriage of goods wholly or partly by sea, or the definition of *fora conveniens* set forth in the Rotterdam Rules' (2009) 44(3) *Texas international law journal* 417.
- Jackson, DC *Enforcement of maritime claims* 4ed (2005) Informa Professional, London.
- Karan, H *The carrier's liability under international maritime conventions: the Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY.
- Knauth, Arnold *The American law of ocean bills of lading* 4ed (1953) AMC, Baltimore.
- Kong, Qingjiang et al 'The Chinese practice of private international law' (2002) 3(2) *Melbourne Journal of International Law* Section C (page number unknown). Available at <http://mjil.law.unimelb.edu.au/go/issues/issue-archive/volume-3-2>.
- Kruger, Thalia *Civil jurisdiction rules of the EU and their impact on third states* (2008) Oxford University Press, New York.
- Kuusniemi, Ilkka 'Nordic maritime codes', Neptun Juridica, 22 September, 1994. Available at http://www.neptunjuridica.com/arc_nmc.html.
- Laurent, Deborah A 'Foreign jurisdiction and arbitration clauses in the New Zealand maritime context' (2007) 21 *A & NZ Mar LJ* 121.
- Leow, Vincent 'Exclusively here to stay: the applicable principles to granting a stay on the basis of an exclusive jurisdiction clause' 2004 *Singapore Journal of Legal Studies* 569.
- Mandaraka-Sheppard, Aleka *Modern maritime law and risk management* 2ed (2007) Routledge-Cavendish Publishing Ltd, Abingdon, Oxon, UK.

- Marcus, David 'The perils of contract procedure: a revised history of forum selection clauses in the Federal Courts' (2007-2008) 82 *Tul LR* 973.
- McDowell, C and Gibbs, H *Ocean transportation* (1954) McGraw-Hill Book Co, New York.
- Meeson, Nigel 'Comparative issues in anti-suit injunctions' in Martin Davies (ed) *Jurisdiction and forum selection in international maritime law: essays in honor of Robert Force* (2005) Kluwer Law International, The Hague at 59.
- Merrett, Louise 'Article 23 of the Brussels I Regulation: a comprehensive code for jurisdiction agreements?' (2009) 58 *ICLQ* 545.
- Mukherjee, Proshanto et al 'A legal and economic analysis of the volume contract concept under the Rotterdam Rules: selected issues in perspective' (2009) 40(4) *JMLC* 579.
- Murray, Peter 'China: an emerging jurisdiction' in Martin Davies (ed) *Jurisdiction and forum selection in international maritime law: essays in honor of Robert Force* (2005) Kluwer Law International, The Hague at 119.
- Myburgh, Paul 'Uniformity or unilateralism in the law of carriage of goods by sea?' (2000) 31 *Victoria University of Wellington LR* 355.
- Oland, Barry 'Acceptance of jurisdiction and forum selection under Canadian maritime law' 1 June 2006. Available at <http://www.nsbs.org/librarydatabases>.
- Oland, Barry 'The premature demise of section 46 or the law giveth and the lords taketh away.' Available at <http://www.cmla.org> (reports & papers link).
- Olawoyin, Adewale A 'Forum selection disputes under bills of lading in Nigeria: a historical and contemporary perspective' (2004-2005) 29 *Tul Mar LJ* 257.
- Peel, Edwin 'Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws' 1998 *LMCLQ* 182.
- Peel, Edwin '*Forum non conveniens* and European ideals' 2005 *LMCLQ* 363.

Philip, Allan 'Scope of application, choice of law and jurisdiction in the new Nordic law of carriage of goods by sea' in Goran Melander (ed) *Modern issues in European law. Nordic perspectives: essays in honour of Lennart Palsson* (1997) Kluwer Law International, Gothenburg at 173.

Remond-Gouilloud, Martine 'Jurisdiction and arbitration: articles 21 and 22 of the Hamburg Rules' in European Institute of Maritime and Transport Law *The Hamburg Rules: a choice for the EEC?* (1994) Maklu, Antwerpen at 117.

Remond-Gouilloud, Martine 'Des clauses de connaissements maritimes attribuant compétence à une juridiction étrangère: essai de démystification' (1995) 549 *DMF* 339.

Schoenbaum, Thomas J *Admiralty and maritime law* 4ed (2004) West, a Thompson business, St Paul, Minnesota.

Sesser, Gary D 'Choice of law, forum selection, and arbitration clauses in international contracts: the promise and the reality, a US view' (1992) 20 *Intl Bus Law* 397.

Shany, Yuval *Regulating jurisdictional relations between national and international courts* (2007) Oxford University Press Inc, New York.

Shuz, R 'Controlling forum shopping: the impact of *MacShannon v Rockware Glass Ltd*' (1986) 35 *ICLQ* 374.

'SITPRO's Guide to the Rotterdam Rules' 2010. Available at www.sitpro.org.uk/rotterdamrules.

Smith, Neville 'Rotterdammerung, or twilight of the COGSA (and the Hague-Visby Rules).' Available at <https://www.bimco.org/Members/News/2009/2009.aspx>.

Solimine, Michael E 'Forum-selection clauses and the privatization of procedure' (1992) 25 *Cornell Int'l LJ* 51.

Sparka, Felix *Jurisdiction and arbitration clauses in maritime transport documents: a comparative analysis* (2010) Springer, Hamburg.

Sturley, Michael et al *Benedict on Admiralty* 6ed Vol 2a (1990) Matthew Bender & Co, New York.

- Sturley, Michael 'Jurisdiction under the Rotterdam Rules' Colloquium of the Rotterdam Rules 2009, De Doelen, Rotterdam, 21 September 2009.
Available at
<http://www.rotterdamrules2009.com/cms/index.php?page=text-speakers-rotterdam-rules-2009>.
- Sturley, Michael 'Overruling Sky Reefer in the international arena: a preliminary assessment of forum selection and arbitration clauses in the new UNCITRAL transport law Convention' (2006) 37 *JMLC* 1.
- Sturley, Michael 'Proposed amendments to the Carriage of Goods by Sea Act' (1996) 18 *Hous J Int'l L* 609.
- Sturley, Michael 'The history of COGSA and the Hague Rules' (1991) 22 *JMLC* 1.
- Sturley, Michael 'The UNCITRAL Carriage of Goods Convention: changes to existing law' in Comité Maritime International *CMI Yearbook 2007-2008* Part 2, Documents for the Athens Conference, Antwerpen, Belgium at 254.
- Sweeney, Joseph 'Happy birthday, Harter: a reappraisal of the Harter Act on its 100th anniversary' (1993) 24 *JMLC* 1.
- Sweeney, Joseph 'UNCITRAL and the Hamburg Rules – the risk allocation problem in the maritime transport of goods' (1991) 22 *JMLC* 529-30.
- Tan, D et al 'Breaking promises to litigate in a particular forum: are damages an appropriate remedy?' 2003 *LMCLQ* 435.
- Tang, Zhengyu 'Maritime jurisdiction of the People's Republic of China: legal framework, recent developments, and future prospects' (1994) 25(2) *JMLC* 251.
- Tassel, Yves 'La forme en laquelle doit être convenue, en matière internationale, une clause attributive de juridiction et la liberté d'interprétation des juges du fond s'agissant d'une clause rédigée en une langue étrangère' (1995) 548 *DMF* 289.
- Tetley, William 'Arrest, attachment, and related maritime law procedures' (1999) 73 *Tul LR* 1895-1985.

- Tetley, William *International conflict of laws: common, civil and maritime* (1994) Blais, Montreal, Quebec.
- Tetley, William 'International maritime law: uniformity of international private maritime law—the pros, cons, and alternatives to international conventions—how to adopt an international convention' (2000) 24 *Tul Mar LJ* 775.
- Tetley, William 'Interpretation and construction of the Hague, Hague/Visby and Hamburg Rules' (2004) 10 *JIML* 30.
- Tetley, William 'Jurisdiction and arbitration clauses in carriage of goods by sea in Canada – the new law' (paper presented to the Carriage of Goods by Sea Committee of the U.S. Maritime Law Association, New York City, May 3, 2006). Available at <http://www.mcgill.ca/maritimelaw/maritime-admiralty/>.
- Tetley, William *Marine cargo claims* 4ed (2008) Editions Yvon Blais, Cowansville, Quebec.
- Tetley, William *Maritime liens and claims* 2ed (1998) Blais, Montreal, Quebec.
- Tetley, William 'Professor Tetley's comments on Senate COGSA '99 (sixth U.S Senate Staff Working Draft Bill of September 24, 1999)' 1 February 2001. Available at <http://www.mcgill.ca/maritimelaw/maritime-admiralty/tetley-cogsa>.
- Tetley, William "The demise of the demise clause?" (1999) 44 *McGill LJ* 807.
- Transport Canada International Marine Policy *UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: information paper* February 2009. Available at <http://www.cmla.org> (reports & papers link).
- Thomas, D Rhidian 'Editorial of the Journal of International Maritime Law' (2008) 14 *JIML* at 190.
- Von Ziegler, Alexander 'Jurisdiction and forum selection clauses in a modern law on carriage of goods by sea' in Martin Davies (ed) *Jurisdiction and forum selection in international maritime law: essays in honor of Robert Force* (2005) Kluwer Law International, The Hague at 85.

Wang, Marcus 'Dancing with the dragon: what U.S. parties should know about Chinese law when drafting a contractual dispute resolution clause' (2009) 29 *Northwestern Journal of International Law & Business* 309.

Withers, Christopher 'Jurisdiction clauses and the unfair terms in consumer contracts regulations' 2002 *LMCLQ* 56.

Yackee, Jason Webb 'Choice of law considerations in the validity and enforcement of international forum selection agreements: whose law applies?' (2004) 9 *UCLA J Int'l L & Foreign Affairs* 43.

Yiannopolous, *A Negligence clauses in ocean bills of lading* (1962) Louisiana State University Press, Louisiana.

Other Documents

Commission of the European Communities 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee of 21 April 2009 on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.' Available at http://www.ipex.eu/ipex/cms/home/Documents/doc_COM20090174FIN.

Doyle, Norman 'Marine Liability Act, second reading, Canadian parliamentary debates online, House Hansard, 37th Session'. Available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=37&Ses=1&DocId=2332110#LINK198>.

European Union Preparatory Acts, Commission staff working document, accompanying the proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements, Impact Assessment COM (2008) 538 final OE SEC (2008) 2390 (accessed on Westlaw International).

Green Paper accompanying the European Commission's Report of 21 April 2009. Available at http://www.ipex.eu/ipex/cms/home/Documents/doc_COM20090175FIN.

UNCITRAL, 'Report of the Working Group III (Transport Law) on the work of its fifteenth session (New York, 18-28 April 2005)' 13 May 2005, UN Doc A/CN.9/576.

UNCITRAL, 'Report of the Working Group III (Transport Law) on the work of its sixteenth session (Vienna, 28 November – 9 December 2005)' 4 January 2006, UN Doc A/CN9/591.

UNCITRAL, 'Report of the Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006)' 27 November 2006, UN Doc A/CN9/616.

Dissertations

Bursanescu, Silviu *Reform of the Carriage of Goods by Sea Act in the United States: between COGSA 99 and UNCITRAL's draft convention on the carriage of goods [wholly or partly] [by sea]* (2007) Master's Research Project, McGill University, Montreal.

Rochester, Vanessa *The lone carrier* (2005) LLM Dissertation, University of Cape Town, Cape Town.

Rochester, Vanessa *Nautical fault: a historical and multi-jurisdictional study of the exemption for errors relating to navigation and management of the vessel in modern carriage law* (2008) PHD Dissertation, University of Cape Town, Cape Town.

List of Statutes, Codes, Decrees, Conventions and Regulations

Australia

Carriage of Goods by Sea Act 1991, No 160, 1991, as amended by the Carriage of Goods by Sea Regulations 1998 (No 2).

Canada

Federal Court Act, RSC 1985, c F-7.

Marine Liability Act, 2001, SC 2001, c 6.

European Union

Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

France

Law of 18 June 1966 (Law No 66-420).

The New Code of Civil Procedure (established by Decree No 75-1123 of December 5, 1975).

Decree of 31 December 1966 (Decree No 66-1078).

Decree of 12 November 1987, amending art 37 of Decree No 66-1078 of December 31, 1966 (Decree No 87-922).

New Zealand

Maritime Transport Act 1994, No 104.

Nordic Countries (Sweden, Finland, Norway, Denmark)

Maritime Code of Denmark, 1994.

Finnish Maritime Code 1994, No 674.

Norwegian Maritime Code 1994, No 39.

Swedish Maritime Code 1994, 2ed Andrea Upplagan TOM 30 June 2000, Stockholm.

People's Republic of China

Civil Procedure Law 1991 of the People's Republic of China.

South Africa

Admiralty Jurisdiction Regulation Act 1983, Act 105 of 1983.

Carriage of Goods by Sea Act 1986, Act 1 of 1986.

United Kingdom

Carriage of Goods by Sea Act 1971.

United States

Federal Rules of Civil Procedure 2009.

Harter Act of 1893, Title 46 United States Code §§190-96.

Carriage of Goods by Sea Act of 1936, Title 46 United States Code §§ 1300-1315.

Carriage of Goods by Sea Act of 1999, 106th Cong, 1999 - not in force.

International Conventions

Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 ("Brussels Convention").

Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 15 October 2007 (“New Lugano Convention of 2007”)

Convention on Limitation of Liability for Maritime Claims, 1976 (“Limitation Convention, 1972”).

International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Hague 25 August 1924 (“Hague Rules”).

International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Sea-going Ships, 1957 (“Limitation Convention, 1957”).

International Convention on the Arrest of Ships, 1999, Geneva - not in force (“Arrest Convention 1999”).

International Convention Relating to the Arrest of Sea-Going Ships, Brussels, 10 May 1952 (“Arrest Convention 1952”).

Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 (“Lugano Convention of 1988”).

Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, 23 February 1968; Protocol amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, as amended by the Protocol of 23 February 1968, Brussels 21 December 1979 (collectively “Hague/Visby Rules”).

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, New York, 11 December 2008 (“Rotterdam Rules”).

United Nations Convention on the Carriage of Goods by Sea, Hamburg, 31 March 1978 (“Hamburg Rules”).

Table of Cases

Australia

Akai Pty Ltd v People's Insurance Co Ltd (1996) 188 CLR 418 (High Ct Aus).

Brazin Ltd v Transarea China Ltd [2007] FCA 610 (Fed CA).

Hi-Fert Pty Ltd v United Shipping Adriatic Inc (1998) 165 ALR 265 (Fed Ct).

Incitec Ltd v Alkimos Shipping Corporation [2004] FCA 698 (Fed CA).

Bulk Chartering & Consultants Australia Pty Ltd v T&T Metal Trading Pty Ltd
("The Krasnogrosk") (1993) 31 NSWLR 18.

Canada

Ford Aquitaine Industries SAS v The Canmar Pride [2005] FC 431 (Fed Ct).

Incremona-Salerno Marmi Affini Siciliani snc v The Castor [2002] FCA 479
(Fed CA).

Mitsui OSK Lines Ltd v Mazda Canada Inc ("The Cougar Ace") [2008] FCA
219 (Fed CA).

OT Africa Line Ltd v Magic Sportswear Corp [2006] FCA 284 (Fed CA).

ZI Pompey Industrie v ECU-Line NV [2003] 1 SCR 450 (Supreme Court of
Canada).

European Union

Bols Distilleries BV v Superior Yacht Services Ltd [2007] 1 WLR 12 (Privy
Council).

Coreck Maritime GmbH v Handelsveem BV [2000] ECR I-9337, Case C-
387/98.

Erich Gasser GmbH v MISAT Srl [2003] ECR I-4693, Case C-116/02.
Owusu v Jackson [2005] ECR I-553, Case C-281-02.

Tilly Russ, The [1984] ECR I-2417, Case C-71/83.

Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA [1999] ECR I-1597, Case C-159/97.

Turner v Grovit [2004] ECR I-3565, Case C-159/02.

France

Apt Mariner, The 2003 DMF 41, Cour de Cassation, 25 June 2002, note Ph Delebecque.

Bonastar II, The (2001) DMF 994, Cour de Cassation, 12 July 2001, note Ph Delebecque.

Chang Ping, The (1996) DMF 393, Cour de Cassation, 16 January 1996, note P Bonassies.

Jerba, The (2005) DMF 133, Cour de Cassation, 7 December 2004, note JP Remery.

M/V Johnny, The (2006) DMF 1, Cour de Rouen, 23 June 2005, note Ph Delebecque cited in Bonassies, Pierre and Scapel, Christian *Droit maritime* 2ed (2010) lextenso editions, Paris at 801 footnote 111.

Nagasaki, The (1995) DMF 209, Court de Cassation, 29 November 1994, note P Bonassies.

Silver Sky, The (1999) DMF 1007, Cour de Cassation, 8 December 1998, note P Nicolas.

Hong Kong

Canavan v Battenfeld [2010] 4 HKLRD 513.

Singapore

Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd [1977] 2 MLJ 181 (CA).

Golden Shore Transportation Pte Ltd v UCO Bank [2004] 1 SLR 6 (CA).

Jian He, The [2000] 1 SLR 8 (CA).

South Africa

Achilleus, The 1992 (1) SA 324 (N).

Intercontinental Export Co (Pty) Ltd v The Dien Danielson 1982 (3) SA 534 (N).

Spartan-Runner, The 1991 (3) SA 803 (N).

United Kingdom

Abidin Daver, The [1984] 1 Lloyds Rep 339 (HL).

Adolf Warski, The [1976] 2 Lloyds Rep 241 (CA).

Aggeliki Charis Compania Maritima SA v Pagnan SpA (“*The Angelic Grace*”) [1995] 1 Lloyd's Rep 87 (CA).

Airbus Industrie GIE v Patel [1998] 1 Lloyds Rep 631 (HL).

Akai Pty Ltd v Peoples Insurance Co Ltd [1998] 1 Lloyds Rep 90.

A/S D/S Svendborg v Wansa [1996] 2 Lloyds Rep 559, affirmed [1997] 2 Lloyds Rep 87 (CA).

Atlantic Star, The [1972] 2 Lloyds Rep 446 (CA).

British Aerospace Plc v Dee Howard Co [1993] 1 Lloyds Rep 3.

Chaparral, The [1968] 2 Lloyds Rep 158 (CA).

Citi-March v Neptune [1997] 1 Lloyds Rep 72.

Coggs v Bernard (1703) 2 LdRaym 909 cited in John Hare *Shipping law and admiralty jurisdiction in South Africa* (2009) Juta & Co, Cape Town at 483 footnote 45.

Continental Bank NA v Aeakos Compania Naviera SA and Others [1994] 1 WLR 588 (CA).

Donohue v Armco Inc [2002] 1 Lloyds Rep 425 (HL).

El Amria [1981] 2 Lloyds Rep 119 (CA).

Eleftheria, The [1969] 1 Lloyds Rep 237.

Havhelt, The [1993] 1 Lloyds Rep 523.

Makefjell, The [1976] 2 Lloyds Rep 29.

MC Pearl, The [1997] 1 Lloyds Rep 566.

OT Africa Line v Magic Sportswear Corp [2005] 2 Lloyds Rep 170 (CA).

Sennar, The (No 2) [1985] 1 Lloyds Rep 521 (HL).

Spiliada, The [1987] 1 Lloyds Rep 1 (HL).

Thyssen Inc v Calypso Shipping Corp SA [2000] 2 Lloyds Rep 243.

United States

Bremen, The v Zapata Off-Shore Co 407 US 1 (1972) (US Supreme Ct).

Delaware, The 161 US 459 (1896) (US Supreme Ct).

Fireman's Fund Ins Co v MV DSR Atlantic 131 F 3d 1336 (9th Cir 1997) (CA).

Hilton v Guyot 159 US 113 (1895) (US Supreme Ct).

Indussa Corp v SS Ranborg 377 F 2d 200 (2d Cir 1967) (CA).

Mitsui & Co (USA) v M/V Mira 111 F 3d 33 (5th Cir 1997) (CA).

New Moon Shipping Co Ltd v MAN B & W Diesel AG 121 F 3d 24 (2d Cir 1997) (CA).

Nippon Fire & Marine Ins Co v M/V Spring Wave 92 F Supp 2d 574 (EDLA 2000).

Talatala v Nippon Yusen Kaisha Corp 974 F Supp 1321 (D Hawaii 1997).

Thyssen Inc v M/V Markos N 1999 AMC 2515 (SDNY 1999).

Vimar Seguros y Reaseguros SA v M/V Sky Reefer 515 US 528 (1995) (US Supreme Ct).

Univesrity of Cape Town

CHAPTER 1: INTRODUCTION

Choice of jurisdiction is an important strategic issue in international litigation and the source of countless commercial disputes on preliminary matters, which may, at times, frustrate proceedings on the merits of claims. Its determination is of particular significance in the context of transnational contracts of carriage by sea for a number of reasons.

Firstly, contracts of carriage by sea often take the form of negotiable bills of lading, which not only act as receipt for the goods and evidence of the contract, but also serve as documents of title. These transport documents, which often involve multiple jurisdictions, may be transferred, sometimes more than once, to third party cargo interests, who usually inherit all legal rights and obligations flowing from the agreement upon receipt of the goods, even if they are not privy to its terms when negotiating the contract for the sale of goods. Secondly, carrier liability is limited by ship tonnage, and varies significantly depending on whether the jurisdiction seized with the maritime dispute is party to the 1957 Limitation Convention¹ or the 1972 Limitation Convention,² the latter of which offers higher limits of liability and renders the tonnage limitation system virtually “unbreakable.”³ Thirdly, in certain jurisdictions, a vessel—the typical defendant—may be arrested *in rem* and/or *in personam*, not only as a means of guaranteeing security for cargo claims, but also to found jurisdiction before courts that would not otherwise be authorized to hear the dispute. Fourthly, cargo

¹ International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-going Ships, 1957.

² Convention on Limitation of Liability for Maritime Claims, 1976.

³ J Hare ‘Shopping for the best admiralty bargain’ in M Davies (ed) *Jurisdiction and forum selection in international maritime law: essays in honor of Robert Force* (2005) 148.

claims are generally subject to mandatory rules,⁴ which provide minimum standards of 'responsibilities, obligations and liabilities of the carrier',⁵ and include stipulations on such matters as prescription, seaworthiness, and per package or unit limitation, all of which will differ depending on the particular maritime regime adopted by a seafaring nation through its domestic legislation. Fifthly, as a consequence of globalization, a certain number of shipowners worldwide register their ships under "flags of convenience," even though the link between the ship's registration and ownership is tenuous, so as to keep up with other shipowners by reducing registration fees, lowering taxes, and employing cheap labour. Many of these national registries of convenience also have low safety and training standards, which may have a bearing on the outcome of claims. Sixthly, whether lawyers represent carrier or cargo interests, shopping around for the best forum to bring suit and enforce claims is fairly common and generally encouraged in maritime industry. For these and other reasons, choice of jurisdiction takes on a particular significance in the context of maritime litigation.

When carriers agree to move cargo under contracts of carriage, they often make use of standard form bills of lading,⁶ which typically include jurisdiction or arbitration clauses specifying choice of venue for litigation or arbitration in their boilerplate terms on the reverse side.⁷ Briggs defines a

⁴ A Von Ziegler 'Jurisdiction and forum selection clauses in a modern law on carriage of goods by sea' in M Davies (ed) *Jurisdiction and forum selection in international maritime law: essays in honor of Robert Force* (2005) 94: '[T]he Hague and Hamburg Rules is framed in language that makes the scheme of the Convention mandatory for the parties.'

⁵ *Ibid.*

⁶ They may also be found in other forms of maritime agreements, such as marine insurance policies, towing contracts and charterparty agreements.

⁷ A study of the regulation and enforcement of arbitration agreements and other jurisdictional issues, such as the recognition and enforcement of foreign judgments, lies beyond the scope of this dissertation.

jurisdiction clause⁸ as ‘a contractual term, which restricts or purports to restrict the procedural freedom of a party to sue in a court which would otherwise have had jurisdiction....’⁹ In admiralty, these clauses are seldom negotiated between commercial parties to the carriage agreement and rarely sighted by third or fourth parties to the contract before they take possession of the goods and become bound by the bill’s terms. Consequently, some argue—mostly for historical reasons—that cargo interests have weaker bargaining power and require special legislative protection against carriers in the form of mandatory rules on jurisdiction to protect them against the purported one-sided effects of jurisdiction clauses.

But until relatively recently, no maritime Convention prescribed rules to standardize the treatment of jurisdiction clauses in contracts of carriage by sea. Instead, it was left entirely to national jurisdictions to regulate and enforce. As a result, the treatment of these clauses has varied—at times significantly—from one seafaring nation to the next. This incongruity has induced commercial parties to engage in offensive forum shopping tactics and commence parallel proceedings leading to conflicts of jurisdiction problems, which can hardly be said to uphold main objectives of maritime law (and indeed international law in general), namely promoting predictability, consistency, coherency and fairness in the law.

Meanwhile, through its regional initiative, the European Community has achieved some degree of success in harmonizing rules on jurisdiction clauses and avoiding conflicts of jurisdiction problems with the EC Jurisdiction Regulation, which applies to civil and commercial matters alike,

⁸ A jurisdiction clause is also commonly referred to as a “forum selection” clause/agreement, a “choice of court” clause/agreement, a “choice of forum” clause/agreement, and a “forum” clause/agreement.

⁹ A Briggs *Agreements on jurisdiction and choice of law* (2008).

including contracts for the carriage of goods. Under this Regulation, freedom of contract is encouraged, and jurisdiction clauses are generally permissible.

At the international level, the Hamburg Rules provide the first attempt at a harmonized response to the forum selection problem under maritime law. But this Convention has not enjoyed wide ratification as it strongly favours cargo interests, and is simply too drastic to be acceptable to major shipping nations. And yet, it has inspired a number of national jurisdictions to incorporate similar jurisdiction rules into their own legislation, and has served as a starting point for rules on jurisdiction contained in the newest maritime convention; therefore, it merits consideration in this study.

The most recent convention attempting to standardize rules on jurisdiction clauses under maritime law are the Rotterdam Rules, which, as of the date of submission of this dissertation, have yet to enter into force. This latest international initiative, much like the EC Jurisdiction Regulation at the regional level, recognizes commercial parties' freedom to contract as they see fit, under particular circumstances. It also introduces a 'wide contractual freedom for shippers and carriers to negotiate shipping contracts outside the Convention.'¹⁰ However, its chapter on jurisdiction —Chapter 14— is not mandatory unless nations "opt in" to it. Given the divergent national views vis-à-vis the enforcement of jurisdiction clauses, and rules on jurisdiction in general, it seems improbable that Chapter 14 of the Rotterdam Rules will truly contribute towards the greater harmonization and unification of international trade law; rather, it will most likely persuade most seafaring nations to maintain the status quo. And so, it would appear that nothing has changed.

¹⁰ Article 80 Rotterdam Rules.

But perhaps the truth of the matter is that nations are all “conventioned out” and there are other more efficient ways of achieving harmonization of rules on jurisdiction to govern all contracts of carriage alike, and promote predictability, consistency, coherency and fairness in the law.

This dissertation aims to engage in an historical and multi-jurisdictional study of forum selection clauses in the context of international maritime carriage contracts by:

1. Describing the historical situation which led to the inclusion of jurisdiction clauses in maritime contracts in the first place, providing background information on their regulation, construction and validity under the law, and touching upon other important preliminary considerations (**Chapter 2**);
2. Providing a multijurisdictional analysis of the national regulation and enforcement of jurisdiction clauses contained in carriage agreements (**Chapter 3**);
3. Providing an overview of the European regulation and enforcement of jurisdiction clauses contained in carriage agreements (**Chapter 4**);
4. Providing an overview of the regulation and enforcement of jurisdiction clauses under the Hamburg and Rotterdam Rules (**Chapter 5**); and
5. Offering suggestions for achieving greater harmonization of rules on jurisdiction clauses and concluding remarks (**Chapter 6**).

CHAPTER 2: JURISDICTION CLAUSES IN INTERNATIONAL MARITIME CARRIAGE CONTRACTS IN A NUTSHELL

Before engaging in a multi-jurisdictional analysis of the regulation and enforcement of jurisdiction clauses contained in international contracts for the carriage of goods by sea, it may be useful to describe the historical context which led to the inclusion of these boilerplate clauses in maritime carriage contracts in the first place, provide background information on their regulation, construction and validity under the law, and touch upon other important preliminary considerations.

2.1 Historical Reasons for the Inclusion of Jurisdiction Clauses

During the course of the seventeenth century, the English courts of common law, 'jealous of [the Admiralty Court's] burgeoning jurisdiction',¹¹ began to issue writs of prohibition and interpret statutes conferring Admiralty jurisdiction narrowly in an effort to restrict the Admiralty Court's jurisdiction and business.¹² As a result, the jurisdiction of the Admiralty Court was severely restricted over the next two hundred years,¹³ while that of the common law courts was broadened to include maritime litigation.¹⁴ It was during this time that the common law courts began to impose strict liability upon maritime carriers, as common carriers,¹⁵ for any loss or damage to

¹¹ G Hofmeyr *Admiralty jurisdiction law and practice in South Africa* (2006) 3.

¹² *Ibid.*

¹³ W Tetley *Maritime liens and claims* 2ed (1998) 33; Hofmeyr *ibid.*

The nineteenth century saw a dramatic increase in the business of the [Admiralty] court. Lord Stowell served as [an] admiralty judge from 1798 to 1827 and he gave the court a status it had not hitherto enjoyed. He was, moreover, careful to avoid prohibition and he gained the respect of the common law lawyers. Dr Lushington succeeded Lord Stowell and campaigned for the restoration to the court of its erstwhile jurisdiction. The result was the passing of the Admiralty Court Acts of 1840 and 1861 which restored to the court much of its previous jurisdiction.

¹⁴ L Gorton *The concept of the common carrier in Anglo-American law* (1971) 94.

¹⁵ According to T J Schoenbaum *Admiralty and maritime law* 4ed (2004) 514-15:

The essence of a common carrier is that he holds himself out to the general public as engaged in the business of marine transport for compensation. An example is the

cargo, which occurred in the course of a voyage, in breach of the bailment relationship,¹⁶ subject only to a limited list of exemptions.¹⁷ English courts relied upon public policy to support their legal reasoning and justify the imposition of a strict liability regime:

[A]t common law it was believed that a cargo owner who shipped his goods by a marine carrier should be afforded special protection; he was prevented, by geographic remoteness, from closely supervising the passage of his goods and he was particularly susceptible to collusion between dishonest carriers and thieves.¹⁸

Naturally, carriers were displeased with the broad liability and allocation of risk imposed upon them, and so they began to contract out of it, even in cases where loss or damage to cargo occurred as a result of their own negligence.¹⁹ Hare explains that “[a]t shippers risk” became the order of the day, and remained so until the turn of the 19th century.²⁰ To make

general ship which carries different shipments of cargo for independent shippers.... The common carrier was chargeable as an insurer of the goods, accountable for any damage or loss happening in the course of the conveyance. There were only narrow exceptions to this liability: acts of God, acts of the public enemy, and inherent vices or faults of the shipper [emphasis added].

See generally V Rochester *The lone carrier* (2005) LLM Dissertation, University of Cape Town 2-4; see also V Rochester *Nautical fault: a historical and multi-jurisdictional study of the exemption for errors relating to navigation and management of the vessel in modern carriage law* (2008) PHD Dissertation, University of Cape Town 13-17. Rochester explains in *Nautical fault* *ibid* at 15 that '[the] level of strict liability imposed on the carrier was not unique to England; rather this approach was adopted both in common law nations, including the United States, and in civilian nations.'

¹⁶ *Coggs v Bernard* (1703) 2 LdRaym 909 cited in J Hare *Shipping law and admiralty jurisdiction in South Africa* 2ed (2009) at 483 footnote 45; Rochester *Nautical fault* *ibid* at 14.

¹⁷ Schoenbaum *supra* note 15; M Sturley 'The history of COGSA and the Hague Rules' (1991) 22 *JMLC* 1 at 4; Hare *Shipping law and admiralty* *ibid* at 483-84. Rochester explains in *Nautical fault* *ibid* at 14 that if the carrier or one of its servants contributed to the loss or damage through its/his/her own negligence, then it is unable to benefit from the exemption and avoid liability. She adds at footnote 68 that there exists conflicting legal opinion as to whether it is the cargo owner or the carrier which bares the burden of proving such fault or the absence thereof.

¹⁸ M Sturley et al *Benedict on Admiralty* 6ed Vol 2a (1990) 2-1.

¹⁹ Sturley 'The history of COGSA and the Hague Rules' *supra* note 17 at 5; A W Knauth *The American law of ocean bills of lading* 4ed (1953) 120: Clauses contained in bills of lading not only excused carriers from liability for negligence, but also 'imposed a lien on the cargo for any indebtedness of the cargo owner, whether connected with the particular shipment or wholly unrelated thereto.'

²⁰ Hare *Shipping law and admiralty* *supra* note 16 at 485.

matters worse for cargo owners, the English legislature of the day, influenced by powerful shipowners, enacted George II's "Fire Statute" in 1734,²¹ which not only exonerated a carrier from liability for loss or damage resulting from fire on board ship, but also limited its liability based on ship tonnage.²² Thus, as a result of shrewdly drafted contracts and pro-carrier legislation effectively exculpating carriers from any liability whatsoever, the pendulum of liability swung in favour of the shipowner,²³ now free to carry shipments 'when he liked, as he liked, and wherever he liked.'²⁴ This carrier domination was further strengthened by the British courts, which systematically deferred to the commercial parties' freedom to contract as they saw fit; strict liability became the default position, 'in the absence of an agreement to the contrary.'²⁵ However the *laissez-faire* carrier-centric attitude of the British courts did not receive universal support.

At the end of the Napoleonic era, Great Britain was acknowledged as the world leader of the shipping industry. But its dominance was challenged,²⁶ especially by the United States, the Empire's most ambitious

²¹ Act of 7 George II, c 15. Later replaced by s 502 of the Merchant Shipping Act of 1894, which was thereafter replaced by s 18 of the Merchant Shipping Act of 1979.

²² Hare *Shipping law and admiralty supra* note 16 at 485.

²³ *Ibid.*

²⁴ Knauth *supra* note 19 at 116.

²⁵ Sturley states in 'The history of COGSA and the Hague Rules' *supra* note 17 at 5 that '[m]ost European and Commonwealth countries eventually followed the British example.' According to Hare in *Shipping law and admiralty supra* note 16 at 486, one of the inequitable consequences of the public support for the carrier's freedom to contract out of liability was the effect it had on the rights of innocent third parties: third party consignees or transferees who were not parties to the original contract evidenced by the bill of lading would most likely not be privy to any contractual exclusion of liability, the existence of which arguably diminished the commercial negotiability of the instrument. See Section 2.5.2.2.

²⁶ According to E Gold *Maritime transport: the evolution of international marine policy and shipping law* (1981) 111-112,

[B]y the end of the nineteenth century, international competition at sea had become exceedingly keen In particular, there were now more players in the game. The Scandinavians, particularly the Norwegians, had perfected tramp shipping.... The Greeks were often able to undercut British trade in the Mediterranean by using cheaper, second-hand tonnage.... Germany, France, Italy, the Netherlands, and the

and effective competitor.²⁷ From 1810 to 1840, the US shipbuilding industry thrived and its merchant fleet grew in strength and importance. The discovery of gold in California (at a time when the railroad had not yet been built), the American tea trade between China and New York and between Boston and London (after the British Navigation Acts had been repealed), and the creation of the cheaper, larger and faster softwood hulled California Clippers (more efficient than the British hardwood hulls of the day) all contributed to the success of the shipping industry in America.²⁸ Indeed, this period has been hailed as 'the most glorious period in American maritime history'.²⁹ However, its glory days were numbered. For various reasons, the tonnage of the American fleet declined significantly.³⁰ By 1890, the United States merchant fleet was reduced to less than 1 million gross tons, and its numbers continued to trail behind that of the Europeans at the turn of the century.

Yet, despite its shrinking fleet, the American economy was flourishing.³¹ To keep pace with international trade, US commercial interests began to rely on foreign shipping to carry their exports and imports, as they 'saw no reason to expend their special energies on a shipping industry that

United States had all focused or refocused on their shipping industries ... in the hope of making inroads on the British monopolies in this area of the shipping industry.... Competition became truly aggressive.

²⁷ Gold *supra* note 26 at 83-84.

²⁸ *Ibid* at 89.

²⁹ C McDowell and H Gibbs *Ocean transportation* (1954) 21.

³⁰ According to Gold *supra* note 26 at 90-91, these reasons include the American Civil war, which resulted in the transfer of over half a million United States hulls to the British fleet, the development of the American West and Midwest, which meant less investment in the United States shipping industry, and the ground-breaking innovation by the British of 'iron-hulled, double-bottomed, screw propelled, steam-powered' (McDowell and Gibbs *ibid* at 27) ships, which eventually replaced the slower sail-powered wooden ones.

³¹ According to Gold *ibid* at 142, by 1914, 'the great bastion of free-enterprise commerce' had become a prosperous world power.

was adequately supported by other maritime states....³² Cargo owners and shippers now dominated the United States maritime industry. It therefore comes as little surprise that American judges of the late nineteenth century restricted commercial parties' freedom of contract by invalidating clauses in bills of lading that altogether exempted shipowners from liability for negligence or failure to provide a seaworthy ship, as they deemed these blanket stipulations to be unreasonable and against public policy.³³

According to Knauth:

The views of the English, Continental and American judges as to the nature of the carrier's obligations and the propriety of contracts exonerating carriers from their common-law liabilities soon came into head-on collision. In the English and European courts, contracts of exoneration were valid. In the American federal courts, they were invalid; some of the American state courts followed the federal courts; a few—notably those of New York—followed the British courts. A chaotic legal situation developed with great suddenness.³⁴

And so it came to pass that carriers' exculpatory clauses were enforced by courts on one side of the Atlantic, where British shipowners' interests dominated the shipping industry,³⁵ but rejected on the other, where American cargo interests prevailed. British carriers reacted to the American courts' invalidation by inserting exclusive forum selection clauses and choice of law clauses in bills of lading, naming London as the sole jurisdiction to hear claims and English law as the applicable law.³⁶ For their part, United States cargo owners and shippers retaliated against carriers' strong-arm

³² *Ibid.*

³³ Hare *Shipping law and admiralty supra* note 16 at 486; J C Sweeney 'Happy birthday, Harter: a reappraisal of the Harter Act on its 100th anniversary' (1993) 24 *JMLC* 1 at 8: 'We can ... speculate that the Supreme Court may have been well aware of the decline of the American merchant marine, the US reliance on the British merchant fleet to carry its foreign trade, and the need for American courts to protect American shippers.'

³⁴ *Supra* note 19 at 119.

³⁵ Hare explains in *Shipping law and admiralty supra* note 16 at 486, that in the late 19th century, British liners not only controlled the bulk of the Transatlantic trade, but also set the freight rates.

³⁶ Sweeney *supra* note 33 at 8. See Sturley 'The history of COGSA and the Hague Rules' *supra* note 17 at 13-14; see also Rochester *Nautical fault supra* note 15 at 23-24.

tactics by lobbying US Congress and demanding that action be taken to protect cargo interests.³⁷ Congress responded with a bill, which ultimately became the Harter Act of 1893.³⁸ This bill was ‘originally conceived as an instrument of international trade war’,³⁹ designed ‘to protect US public policy’⁴⁰ and ‘bring British shipping to heel in relation to contracting out of liability.’⁴¹ But it ultimately emerged as ‘a compromise or package deal between conflicting economic interests.’⁴² In terms of jurisdiction clauses, the

³⁷ See generally *The Delaware* 161 US 459 (1896) (US Supreme Ct); see also Sweeney *ibid* at 8 footnote 39: ‘Discussion on the floor of the House... cited choice of forum and choice of law clauses favoring England as a reason for the proposed bill.’

³⁸ Title 46 United States Code §§190-96. According to Sweeney *ibid* at 1 and 9, this Act, named after Congressman Michael D Harter, applies to US domestic and international ocean voyages. It has never been repealed or amended, and therefore remains in force today. W Tetley in *Marine cargo claims* 4ed (2008) refers to the Harter Act as one of the first consumer protection acts.

³⁹ A Yiannopolous *Negligence clauses in ocean bills of lading* (1962) 46.

⁴⁰ Sweeney *supra* note 33 at 8.

⁴¹ Hare *Shipping law and admiralty supra* note 16 at 486.

⁴² Sweeney *supra* note 33 at 9. H Karan *The carrier's liability under international maritime conventions: the Hague, Hague-Visby, and Hamburg Rules* (2004) 19: ‘It was the first national statute which established a compromise between carriers’ and shippers’ interests by mitigating the strict nature of the common law, limiting the long list of exemption clauses, and nullifying unreasonable clauses in the list’. According to Rochester in *Nautical fault supra* note 15 at 26, the original version of the Harter Act, which ‘strongly favoured cargo interests’, was amended because there were ‘concern[s] ... that the objective of the bill would impede the ability of United States shipowners to compete with the English carriers.’ The compromise reached: in exchange for liability, albeit limited, carriers were given certain exemptions from liability, such as for nautical fault and fire. Also, the carrier’s absolute guarantee of seaworthiness was reduced to an obligation to exercise due diligence to make the vessel seaworthy. Sturley ‘The history of COGSA and the Hague Rules’ *supra* note 17 at 15: ‘Although the United States stood alone with the Harter Act for a decade, eventually other nations with strong cargo interests followed the US lead.’ Rochester states in *Nautical fault ibid* at 27-28, that this ground-breaking legislation has served as a model for similar legislation adopted by other nations such as Australia, New Zealand, Canada, Morocco and Fiji, although most of these nations adopted legislation that rendered the carrier’s obligations more onerous. She also notes that ‘[o]ther nations such as Denmark, Finland, France, Iceland, The Netherlands, Norway, South Africa, Spain and Sweden, had all contemplated introducing legislation modeled after the Harter Act.’ F Sparka explains in *Jurisdiction and arbitration clauses in maritime transport documents: a comparative analysis* (2010) 22 that ‘[a]s a result of the enactment of [the US] COGSA, the application of the Harter Act has now been limited to domestic trade and foreign trade up to the point where goods are loaded on board and for the time between discharge from the vessel and delivery.’

Act remained silent, leaving the determination of their validity and enforcement entirely at the courts' discretion.

2.2 Regulation of Jurisdiction Clauses at Maritime Law: International Disharmony

2.2.1 National Regulation of Jurisdiction Clauses

As is the case under the US Harter Act, the Hague Rules of 1924⁴³ and the Hague/Visby Rules⁴⁴ do not tackle issues relating to jurisdiction of cargo claims;⁴⁵ indeed, neither maritime Convention prescribes rules standardizing the treatment of foreign jurisdiction clauses in international contracts of carriage by sea. Instead, it is left to national jurisdictions to regulate and enforce.⁴⁶ Bursanescu states that '[t]his approach is consistent with the

⁴³ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Hague 25 August 1924 (hereafter the "Hague Rules"). Von Ziegler *supra* note 4 at 89: '[T]he Hague Rules were the international answer to the Harter Act and, therefore, had a primary, if not a sole, focus on issues of liability of the carrier.'

⁴⁴ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, 23 February 1968; Protocol amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, as amended by the Protocol of 23 February 1968, Brussels 21 December 1979 (hereafter the "Hague/Visby Rules"). M Sturley 'Jurisdiction under the Rotterdam Rules' Colloquium of the Rotterdam Rules 2009, De Doelen, Rotterdam, 21 September 2009 at 3-4. Available at <http://www.rotterdamrules2009.com/cms/index.php?page=text-speakers-rotterdam-rules-2009> at 3-4 [Accessed on 1 February 2011]:

During the negotiations that produced the Visby Protocol, jurisdiction was on the agenda In the end... the sub-committee... concluded that the liability regime should instead focus on the substantive rules governing the liability of the parties. The delegates felt that a liability regime was 'hardly the ideal vehicle for a special provision about conflicts of law laying down what jurisdiction is acceptable [footnote omitted]'

⁴⁵ Tetley *Marine cargo claims supra* note 38 at 1912.

⁴⁶ Von Ziegler explains *supra* note 4 at 89 that

[T]he Hague Rules do not deal with jurisdiction. Having embodied the principles of liability, which were at debate after the conflict between the Harter Act and the English general maritime law, the international delegates to the Hague conference were justifiably confident that they had done the job. For a long time, jurisdictional issues were not that important, as the application of the Hague Rules was quite uniform. With the great disparity that ensued, in particular relating to the monetary element of the package or per kilo limitation, this situation changed [emphasis added].

philosophy of the rules, which aimed to unify “certain” rules of law relating to bills of lading, while leaving the rest to be governed by national law.⁴⁷

But, as Chapter 3 will demonstrate, in the absence of harmonized rules regulating jurisdiction, maritime nations do not treat foreign jurisdiction clauses in a uniform manner: whereas some nations restrict commercial parties’ freedom of contract by laying down strict criteria to govern the validity and enforcement of forum clauses contained in contracts of carriage, or by providing plaintiffs with the option to choose to litigate in their jurisdiction notwithstanding contracts requiring that claims be heard elsewhere, others outright prohibit the use of these so-called ousters of local jurisdiction.⁴⁸ Still others deem these clauses to be presumptively valid, only

W E Astle *The Hamburg Rules* (1981) 157:

The Hague Rules are silent on the matter of jurisdiction clauses. However, some countries, in giving effect to the Rules, have included provisions concerning jurisdiction. [B]ut the courts of those countries having no jurisdiction provisions may invoke Article III paragraph 8 of the Rules at their discretion. [According to] this rule ... the jurisdiction clause is invalid if the court should consider that the change might have the effect of reducing the rights of the cargo owner [emphasis added].

A Mandaraka-Sheppard *Modern maritime law and risk management* 2ed (2007) 186-87:

[J]urisdiction clauses will not be upheld if the HVR apply to the bill of lading contract by force of law, and the foreign law chosen by the foreign jurisdiction clauses confers less liability upon the carrier than the liability under the HVR – unless the defendant undertook to take no advantage of the lower limit. If not, then the foreign jurisdiction will be null and void by virtue of Art [III paragraph] 8 of the HVR [emphasis added].

Concur Tetley *Marine cargo claims supra* note 38 at 1965. Tetley provides the example of *The Morviken* [1983] 1 Lloyd’s Rep 1, where the applicable law was English law and the English enactment of the Hague/Visby Rules (that is, the Carriage of Goods by Sea Act 1971), and the bill of lading provided for exclusive jurisdiction in the court of Amsterdam; had the clause been enforced, it would have resulted in the Hague Rules 1924 applying, along with its lower package limitation, which arguably would have been in violation of art III (8) of the UK COGSA as it would have lessened the carrier’s liability.

⁴⁷ S Bursanescu *Reform of the Carriage of Goods by Sea Act in the United States: between COGSA 99 and UNCITRAL’s draft convention on the carriage of goods [wholly or partly] [by sea]* (2007) Master’s Research Project, McGill University at 66.

⁴⁸ Tetley *Marine cargo claims supra* note 38 at 1915-20 and 2007. Jurisdiction clauses are so-called ousters of jurisdiction because the jurisdiction of a court can never actually be ousted; rather a court, at its discretion, has the power to decide not to exercise its jurisdiction by staying proceedings in breach of a foreign jurisdiction agreement.

to be set aside if proven unreasonable. The resulting “conflict of laws”⁴⁹ and inconsistent judicial interference with commercial parties’ freedom to contract as they see fit continue to be a source of significant controversy and litigation on accessorial matters.⁵⁰ Tetley advises that ‘just as it is imperative that maritime law be uniform and international and that choice of law rules be similar throughout the world, so is it essential that choice of jurisdiction rules used by various seafaring nations be the same.’⁵¹

E Peel ‘Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws’ 1998 *LMCLQ* 182 at 188:

The fiction lies in the proposition that, as an attempt to oust the jurisdiction of the courts, a foreign jurisdiction agreement is automatically void.... Courts possess jurisdiction by the operation of law. One of the powers which jurisdiction confers is the power to decide whether or not to exercise their jurisdiction by hearing a case....

⁴⁹ Tetley *ibid* at 1909:

Choice of jurisdiction is one of the three major branches of conflict of laws [the other two branches being choice of law and recognition of foreign judgments], and is of major importance in maritime law, because of the mobility of ships (the usual defendant) and the fact that carriage by sea very often involves more than one jurisdiction.

The study of the other two branches of conflict of laws lies beyond the scope of this dissertation. For more on these two other branches, see generally A Briggs *The conflict of laws* 2ed (2008) 53-117 and 153-203; Briggs *Agreements on jurisdiction supra* note 9 at 140-42 and 423-71; G Born *International arbitration and forum selection agreements: drafting and enforcing* 2ed (2006) 102 and 119-26; DC Jackson *Enforcement of maritime claims* 4ed (2005) 691-94; Tetley *ibid* at 1990 (choice of law in the international maritime law context); T Kruger *Civil jurisdiction rules of the EU and their impact on third states* (2008) 241-44 (choice of law issues in European law context). See Section 2.3.1 re choice of law as it pertains to assessing validity of jurisdiction clauses.

⁵⁰ H Honka ‘Jurisdiction and EC law: loss of or damage to goods’ in M Davies (ed) *Jurisdiction and forum selection in international maritime law: essays in honor of Robert Force* (2005) 265.

⁵¹ Tetley *Marine cargo claims supra* note 38 at 1909-10. See generally W Tetley ‘International maritime law: uniformity of international private maritime law—the pros, cons, and alternatives to international conventions—how to adopt an international convention’ (2000) 24 *Tul Mar LJ* 775. For further discussion on uniformity see Chapter 6.

2.2.2 European Regulation of Jurisdiction Clauses

Meanwhile, the situation in the European Community is quite different, as will be elucidated in Chapter 4: 'market integration ... has led to a great number of harmonized rules, including those concerning jurisdiction of courts.'⁵²

The general jurisdiction rule under the Brussels I Regulation, Council Regulation (EC) No 44/2001 ("EC Jurisdiction Regulation"),⁵³ which governs both civil and commercial matters,⁵⁴ is that 'persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'⁵⁵ There are, however, important exceptions to this general rule, including the recognition of party autonomy in situations where parties have concluded an exclusive jurisdiction agreement consenting to litigate in a court of a Member State.⁵⁶

Article 23 provides that where at least one of the parties to the jurisdiction agreement is domiciled in an EC Member State, the court or courts chosen shall have exclusive jurisdiction, but only if the agreement satisfies certain formalities stipulated under the rule. On the other hand, where neither party is domiciled in an EC Member State, but they agree to litigate in a court of a Member State, then 'the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.'⁵⁷ Baatz explains that '[i]n this situation the

⁵² Honka *supra* note 50 at 265.

⁵³ Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, (at times referred to as the Brussels I Regulation). In force in all 27 Member States of the European Union and recently, also Denmark (one of the "Lugano States"). Replaces the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968.

⁵⁴ Article 1 EC Jurisdiction Regulation.

⁵⁵ Article 2 EC Jurisdiction Regulation.

⁵⁶ Y Baatz 'The conflict of laws' in Institute of Maritime Law *Southampton on shipping law* (2008) at 4-8.

⁵⁷ Article 23(3) EC Jurisdiction Regulation.

court chosen may apply its own national law to determine whether it has jurisdiction and may decline jurisdiction.⁵⁸

Thus, where at least one party to the agreement is domiciled in a Member State, there is 'no discretion to override a valid jurisdiction agreement';⁵⁹ however, where neither party to the agreement is domiciled in a Member State, but have agreed to litigate in the court of a particular Member State, then the agreement may be overridden, but only if the nominated court, in the exercise of its discretion, has first declined jurisdiction.⁶⁰

Despite achieving a remarkable milestone by harmonizing rules on jurisdiction in civil and commercial matters throughout the European Community, Honka cautions that the EC Jurisdiction Regulation has important limitations, and provides as an example the fact that the Regulation does not apply, even in a Member State, where the defendant does not have proper domicile.⁶¹ He cautions that '[u]nless the gap is supplemented with internationally applicable jurisdiction rules, the mosaic of national law will prevail, a state of affairs nobody wants.'⁶²

2.2.3 International Conventions Regulating Jurisdiction Clauses

The Hamburg Rules⁶³ provide the first international attempt at a harmonized response to the forum selection problem under maritime law.⁶⁴ In particular,

⁵⁸ Baatz 'The conflict of laws' *supra* note 56 at 6.

⁵⁹ Briggs *Conflict of laws supra* note 49 at 72.

⁶⁰ *Ibid.*

⁶¹ *Supra* note 50 at 280-81.

⁶² *Ibid* at 281.

⁶³ United Nations Convention on the Carriage of Goods by Sea, Hamburg, 31 March 1978 ("Hamburg Rules"). In force 1 November 1992.

⁶⁴ For further discussion regarding regulation of jurisdiction clauses under the Hamburg Rules, see the first part of Chapter 5.

'Article 21 lays down mandatory rules as to the court or courts where the cargo claimants may, at their option, bring legal proceedings to enforce their claim'.⁶⁵

As per paragraph 1 of Article 21, the plaintiff has the option to sue the defendant in a court which, according to the law of the State where the court is situated, is competent, provided that the court in question is located in any one of a list of reasonable forums, all of which have 'a significant connection with the transaction or the carrier'.⁶⁶ Paragraph 2 of Article 21 provides that when a ship or sistership is arrested in a port state subject to the Hamburg Rules, an action may be instituted in this location, notwithstanding the fact that it is not one of the places enumerated at paragraph 1 of the rule. However, a defendant may petition to have the action removed from this jurisdiction, and so long as sufficient security is provided, the claimant must relocate the proceedings to one of the places enumerated at paragraph 1. No judicial proceedings relating to the carriage of goods under the Convention may be instituted in a place other than one of the forums specified under paragraphs 1 and 2.⁶⁷ Notwithstanding these provisions above, once a claim has arisen, parties are free to choose the place of suit by agreement; in other words, any jurisdiction clause agreed upon *after* a cargo claim has materialized is effective.⁶⁸

⁶⁵ Fairplay International *The Hamburg Rules: an appreciation of the cause and effect of the amendments to the Hague Rules and the Hague-Visby Rules* (1981) 138-41.

⁶⁶ Sturley 'Jurisdiction Under the Rotterdam Rules' *supra* note 44 at 4. Note that some jurisdictions, such as Canada, have incorporated the Hamburg Rules notion of optional jurisdictions for cargo claimants into their own national laws (sometimes with certain national qualifications), though the Convention itself does not have force of law in their countries (Tetley *Marine cargo claims supra* note 38 at 1914 and 1919-20).

⁶⁷ Article 21(3) Hamburg Rules.

⁶⁸ Article 21(5) Hamburg Rules.

Thus, the overall effect of Article 21 is to limit the right of contracting parties to agree to litigate in foreign jurisdictions by giving cargo claimants the option to override such an agreement by choosing instead to bring suit in one of the above-mentioned places, with the proviso that where an agreement is reached *after* a claim has arisen, it *will* be legally binding on all parties.⁶⁹ Truth of the matter is, however, that '[t]he Hamburg Rules ... are not particularly important for international shipping due to lack of real support.'⁷⁰

The latest international convention attempting to unify rules on jurisdiction under maritime law is the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, otherwise known as the Rotterdam Rules.⁷¹

⁶⁹ Tetley *Marine cargo claims supra* note 38 at 1913.

⁷⁰ Honka *supra* note 50 at 278. M Remond-Gouilloud 'Jurisdiction and arbitration: articles 21 and 22 of the Hamburg Rules' in European Institute of Maritime and Transport Law *The Hamburg Rules: a choice for the EEC?* (1994) 117 at 119:

On the dark side, the Hamburg Rules ... result in lessened freedom for the carrier. In that respect Articles 21 and 22, especially as regards jurisdiction and arbitration clauses, are symbolic for the whole Hamburg Rules system. Whereas the carrier is no longer free to choose the appropriate forum, that freedom is granted to the shipper, with the risk of forum shopping. This explains the strong reservations of sea-faring nations about the rules. The text was prepared under the aegis of the United Nations, the goals of which were not precisely shipping-minded. The 1978 situation was, in a way, similar to that existing in 1924 when the Hague Rules were adopted intending to see the law modified in their favour. However, in 1978 there was no Harter-Act and no shipper country pressing for change such as the United States. Actually, the countries parties to the Hamburg Rules up to date account for little in the world tonnage.

Hare in *Shipping law and admiralty jurisdiction supra* note 16 at 490 says that the Hamburg Rules swing the pendulum of liability 'squarely back onto the shoulders of the carrier', a shift in risk allocation considered too drastic to be acceptable to major shipping nations. As of the date of submission of this dissertation, the Hamburg Rules only have 28 signatories and 34 parties. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XI-D-3&chapter=11&lang=en [Accessed on 1 February 2011].

⁷¹ Adopted by the United Nations General Assembly on 11 December 2008 under Resolution A/RES/63/122. The Rotterdam Rules opened for signature on 23 September 2009, in Rotterdam (The Netherlands), and as of the date of submission of this paper, 23 nations have signed them. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XI-D-8&chapter=11&lang=en [Accessed on 1 February 2011]. Note, however, that the ratification,

The provisions on jurisdiction are contained in Chapter 14 of these Rules.⁷²

The general rule regarding choice of jurisdiction, which is similar to the

adoption, accession or approval of these Rules by 20 states is required before they can become law. A/CN.9/572 Report of the UNCITRAL Working Group III (Transport Law) on the work of its fourteenth session at paras 111-13. Available at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html [Accessed 1 February 2011]:

In general, the [Working Group] supported the inclusion of a chapter relating to jurisdiction. Some views were expressed that the question of jurisdiction should be left entirely to the choice of the parties to the contract of carriage. In addition, it was feared that negotiations in this complex subject area could ultimately result in a failure to reach consensus on the provisions ... or that jurisdiction provisions along the lines of the Hamburg Rules as currently in the draft instrument could create barriers to States wishing to ratify the instrument After discussion, the [Working Group] agreed to include ... a chapter on jurisdiction.

P Delebeque 'The new Convention on International Contract of Carriage of Goods Wholly or Partly by Sea: a civil law perspective' in Comité Maritime International *CMI Yearbook 2007-2008* Part 2, Documents for the Athens Conference, Antwerpen, Belgium 264 at 276: '[The] UNCITRAL Convention is neither in favour of the owners nor in favour of the shippers ... [it] does not seek to protect any socio-professional category. It aims to realise a balance between both interests.' Therefore, it would seem that the Rotterdam Rules swing the pendulum of liability back towards the centre, to use Hare's terminology. T Fujita 'Introduction' in Comité Maritime International *CMI Yearbook 2007-2008* Part 2, Documents for the Athens Conference, Antwerpen, Belgium at 277:

"Balance of risk" was the most frequently used and sometimes abused phrase during the UNCITRAL Working Group III's deliberations of the new Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. Although all Working Group delegations unanimously favored a "fair balance of risk" between carrier and cargo interests, they never reached consensus about what constitutes optimal "balance" under a specific article or in a specific situation. As a result, although the basic formula for the basis of liability and the list of exonerations were decided relatively early on, other elements of the liability regime such as the treatment of delay or limitation levels were left open until the very last stage. How does the new Convention finally strike the balance of risk? ... As is often the case, the question is easier to ask than answer....

For further discussion regarding regulation of jurisdiction clauses under the Rotterdam Rules, see the second part of Chapter 5.

⁷² The Transport Law Working Group's decision to include this chapter in the Draft Rules, and more notably to render exclusive jurisdiction clauses permissible under certain circumstances, was not without controversy (see A/CN.9/572 Report of the UNCITRAL Working Group III (Transport Law) on the work of its fourteenth session at paras 110-13; A/CN.9/576 Report of the UNCITRAL Working Group III (Transport Law) on the work of its fifteenth session at paras 156-68; A/CN.9/591 Report of the UNCITRAL Working Group III (Transport Law) on the work of its sixteenth session at paras 19-40.) M Sturley 'The UNCITRAL Carriage of Goods Convention: changes to existing law' in Comité Maritime International *CMI Yearbook 2007-2008* Part 2, Documents for the Athens Conference, Antwerpen, Belgium, 254 at 258:

[Whereas] some ... members of Working Group III felt strongly about the need to address jurisdiction... other members felt strongly about preserving inconsistent domestic law. Matters were further complicated by the need to involve the European

general rule under the Hamburg Rules, is as follows: the plaintiff—whether shipper, consignee, other cargo interest—has the option to institute judicial proceedings against the defendant in a court of competent jurisdiction⁷³ located in any one of a finite list of courts ‘with a reasonable connection to the transaction’.⁷⁴ Alternatively, the plaintiff may choose to bring suit against the defendant in a competent court or courts designated by agreement between the parties.⁷⁵

However, where the contract of carriage is a volume contract⁷⁶ and contains an exclusive jurisdiction clause,⁷⁷ then the agreement overrides the plaintiff’s right to *opt* for a court situated in one of the places listed at Article

Commission, which has the exclusive competence to negotiate on this issue for the nations of the European Union. In the end, it was possible to reach a compromise solution.

⁷³ “Competent court” is defined at Article 1 paragraph 30 of the Rotterdam Rules as ‘a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.’

⁷⁴ Sturley ‘Jurisdiction Under the Rotterdam Rules’ *supra* note 44 at 9. See Chapter 5 for the differences between the Hamburg Rules and Rotterdam Rules on jurisdiction.

⁷⁵ Article 66(b) Rotterdam Rules (equivalent to Article 21(1)(d) of the Hamburg Rules). Note that the agreement must comply with the form requirements of Article 3 Rotterdam Rules to be valid.

⁷⁶ Defined in Article 1.2 of the Rotterdam Rules as a ‘contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range’. For more on volume contracts, see Chapter 5.

⁷⁷ In order for the jurisdiction agreement to be considered exclusive (versus non-exclusive), it must fulfil the requirements stipulated at article 67 (1), which will be explored in Chapter 5. According to the Transport Canada International Marine Policy in *UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: information paper* February 2009, available at <http://www.cmla.org> (reports & papers link) [accessed on 1 February 2011] at 2, a unique feature of the Rotterdam Rules is the introduction of ‘wide contractual freedom for shippers and carriers to negotiate shipping contracts outside the Convention.’ That said, they may not derogate from two important obligations: the carrier’s continued obligation to exercise due diligence in making the ship seaworthy, and the shipper’s obligation to provide complete instructions and documentation on carriage of goods. See generally Transport Canada International Marine Policy *UNCITRAL Convention ibid* at 2-3.

66.⁷⁸ Note too that third parties, such as consignees and transferee bill of lading holders, are also bound by exclusive jurisdiction agreements, but again, only if certain strict conditions are met.⁷⁹

In addition, as per Article 21(5) of the Hamburg Rules, any choice of court agreement, whether oral or written, implicit (through conduct) or explicit,⁸⁰ agreed upon *after* a dispute has arisen⁸¹ is enforceable, so long as the selected court is competent in accordance with Article 1(30) of the Rotterdam Rules. Furthermore, '[n]othing in the provisions of the Rotterdam Rules affects jurisdiction with regard to provisional or protective measures, including arrest *in rem* under the Arrest Convention.'⁸²

But there is an important caveat to Chapter 14: Article 74 (the "opt in" clause) states that '[t]he provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.' In other words, ratifying states may opt not to be bound by the chapter on jurisdiction, and instead leave the question of jurisdiction to be

⁷⁸ Though there are similarities between s 23 of the EC Jurisdiction Regulation and s 67 of the Rotterdam Rules, according to Y Baatz in 'Jurisdiction and arbitration' in Rhidian Thomas (ed) *A new convention for the carriage of goods by sea – the Rotterdam Rules* (2009) 258 at 276, the Rotterdam rule on jurisdiction clauses has a 'more restrictive and complex' application in view of the safeguards/formalities stipulated at Article 67(1) of the Rules.

⁷⁹ The conditions to be met are stipulated at Article 67(2) Rotterdam Rules and will be discussed in Chapter 5. Note too that the agreement must respect the form requirements of Article 3 of the Rules. The aim of the drafters in imposing certain conditions was to protect third parties from suffering hardship. There was much debate as to whether or not exclusive jurisdiction clauses contained in volume contracts should apply to third parties. In the end, it was decided that they should. See A/CN.9/576 Report of the UNCITRAL Working Group III (Transport Law) on the work of its fifteenth session at paras 164-168.

⁸⁰ A/CN.9/591 Report of the UNCITRAL Working Group III (Transport Law) on the work of its sixteenth session at para 62.

⁸¹ "After a dispute has arisen" has been described by the Transport Law Working Group in A/CN.9/591 Report of the UNCITRAL Working Group III (Transport Law) on the work of its sixteenth session at para 63 as 'the period following a voyage when the damage ha[s] already occurred, but a court ha[s] not yet been seized with the claim.'

⁸² Article 70 Rotterdam Rules.

determined by their national law or otherwise.⁸³ Thus, whereas some Contracting nations may choose to declare themselves bound by these provisions, others may choose to ignore them.⁸⁴

This raises the question, which will be explored further in Chapter 6: will this new optional chapter on jurisdiction truly contribute towards the 'progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contribut[ing] to universal economic cooperation among all States',⁸⁵ or will it merely encourage the majority of seafaring nations to

⁸³ A/CN.9/616 Report of the UNCITRAL Working Group III (Transport Law) on the work of its eighteenth session at para 246:

[It was proposed that,] given the range of divergent views that were expressed during [the Working Group's] sixteenth session with respect to the treatment and enforcement of choice of court clauses in the jurisdiction chapter of the draft convention, the Working Group should consider the adoption of [either a reservation or an "opt in" clause]. The view was expressed that this approach would make it more likely that the draft convention would be widely accepted by Contracting States, and that a broader consensus on the chapter on jurisdiction could be reached.... There was strong support for allowing for a reservation or 'opt in' clause to be provided for Contracting States in the draft convention with respect to the entire chapter on jurisdiction. A number of delegations that had originally expressed an interest during the sixteenth session in deleting the entire chapter on jurisdiction expressed their satisfaction with respect to this proposal and for the flexibility that it would grant to Contracting States.

According to Bursanescu *supra* note 47 at 72, '[t]his is hardly an acceptable disposition, as it essentially overrides all the work that was put in balancing the different interests under Chapter [14].'

⁸⁴ Sturley 'Jurisdiction under the Rotterdam Rules' *supra* note 44 at 8-9:

A nation choosing to be bound must make a formal declaration to that effect under article 91. A nation that simply ratifies the Convention without taking any further action, therefore, will not be bound by the chapter. A court in that nation will instead address these issues under the law that it would otherwise apply, which might be its own national law, the proper law of the contract, another international instrument, or even some combination of those sources.

Most nations making declarations under article 74 will presumably do so at the time they ratify the Convention, but article 91(1) permits the declaration to be made "at any time" and article 91(5) similarly permits a nation to withdraw its declaration "at any time". Thus a nation could ratify the Convention immediately while postponing its decision on the jurisdiction chapter. Moreover, it may revisit its decision at any time, either accepting rules that it had previously rejected or withdrawing from the coverage that it had previously elected [emphasis added].

⁸⁵ Preamble Rotterdam Rules.

maintain the *status quo*, as was the case with the Hamburg Rules, by looking impressive in theory but not in practice?

2.3 The Contractual Validity and Interpretation of Jurisdiction Clauses in Contracts of Carriage by Sea⁸⁶

When a party seeks to enforce a jurisdiction agreement⁸⁷ and persuade a court to exercise its discretion to dismiss or stay proceedings brought in a non-selected forum in breach of the agreement,⁸⁸ or to grant an anti-suit injunction to restrain parties from bringing or continuing foreign proceedings in breach of an agreement,⁸⁹ the applicant must be prepared to demonstrate that, in accordance with the law governing the agreement, the clause is valid and covers the scope of the dispute at issue, and the plaintiff's attempt to avoid the exclusive agreement constitutes a breach of contract.⁹⁰

⁸⁶ For a comprehensive analysis on the interpretation and drafting of jurisdiction clauses, see generally Briggs *Agreements on jurisdiction supra* note 9 at Chapters 4 and 5. See also Born *supra* note 49 at Chapter 2. See examples of jurisdiction clauses at Annexure A.

⁸⁷ It is assumed for the purposes of this present section that foreign jurisdiction clauses are generally enforceable, but as previously mentioned and as will be discussed further in the multijurisdictional analysis at Chapter 3, some jurisdictions continue to refuse to enforce these clauses.

⁸⁸ See Section 2.4.1.

⁸⁹ See Section 2.4.3.

⁹⁰ Briggs *The conflicts of laws supra* note 49 at 103. However, Briggs reminds his readers in *Agreements on jurisdiction supra* note 9 at para 4.10, that:

[P]arties do not have an unfettered right to confer jurisdiction on a court, and a contractual agreement on jurisdiction, taken by itself, cannot do so. Nor do the parties have a right to abrogate a court's jurisdiction, and an agreement on jurisdiction, taken by itself, does not do so. But such a term establishes that it would be a breach of their contract for one of the parties to bring proceedings in another court; and this paves the way for the counterparty to take further steps in response to the breach.

It is assumed for the purposes of this present section that the court or courts selected by the parties in the jurisdiction agreement are competent/have subject-matter jurisdiction.

2.3.1 Law Governing Interpretation and Enforceability of Jurisdiction Clauses⁹¹

Since substantive, procedural and conflict of law rules typically vary from one nation to the next, it is important to establish what body of law will govern the validity and enforceability of a foreign jurisdiction agreement contained in an international contract of carriage.⁹² A number of options present themselves, namely '(1) the law of the seized forum (*lex fori*), even though that forum is not the forum designated in the FSA [Forum Selection Agreement]; (2) the law governing the underlying contract according to a choice of law clause contained therein; (3) the law governing the contract absent a choice of law clause; (4) the law of the designated forum.'⁹³

To be sure, in the context of the international carriage of goods, this determination is 'not without controversy'.⁹⁴ To make matters worse,

⁹¹ An in-depth study of choice of law in maritime commercial context and its bearing on jurisdiction clauses lies beyond the scope of this paper. For more on this topic, see generally Briggs *Agreements on jurisdiction supra* note 9 at 140-42 and 423-71; Briggs *The conflict of laws supra* note 49 at 153-203; Born *supra* note 49 at 102 and 119-26; Jackson *supra* note 49 at 691-94. See also Tetley *Marine cargo claims supra* note 38 at 1990; Kruger *supra* note 49 at 241-44.

⁹² Born *ibid* at 102. See also Kruger *ibid* at 241.

⁹³ J W Yackee 'Choice of law considerations in the validity and enforcement of international forum selection agreements: whose law applies?' (2004) 9 *UCLA J Int'l L & Foreign Affairs* 43 at 63. See Born *ibid* at 102, where the author explains that if one characterizes the choice of forum as a procedural issue, then the *lex fori* is the law applicable; but if one characterizes the choice of forum as a question of substantive law, then the law governing the parties' underlying contract is instead the law applicable. See generally J M Carruthers 'Substance and procedure in the conflict of laws' (2004) 53 *ICLQ* 693. Depending on the circumstances, different laws may apply to the same foreign jurisdiction clause (eg law of forum to govern the effect and law of contract to govern the validity of the clause). According to Tetley in *Marine cargo claims supra* note 38 at 1990, 'a court, in deciding whether a jurisdiction clause should be given effect, must apply the system of law with which the transaction has its closest and most real connection.'

⁹⁴ Peel *supra* note 48 at 187. For instance (re scope of a choice of law clause): does a choice of law stipulation merely provide for the 'indoor management of a contract', or does it extend to dispute resolution? Briggs in *Agreements on jurisdiction supra* note 9 at 141-42, believes that '[a]n agreement on choice of law should be seen as a choice of the law which, as the parties agree, is to be applied by a judge to resolve their disputes, and not just their contractual disputes. It is part of the agreement for the resolution of disputes.' Yet this and

‘different national courts may reach different conclusions as to the law governing the same forum selection clause in parallel proceedings in the same dispute.’⁹⁵ To avoid any ambiguity and reduce the uncertainty surrounding the interpretation and enforceability of jurisdiction clauses, parties may choose to continue jurisdiction clauses with a clear choice of law, expressly designating which law will apply to this particular clause.⁹⁶

2.3.2 Validity: Form and Substance of Jurisdiction Clauses⁹⁷

A jurisdiction clause must be valid under the applicable national law in order to take effect. A forum clause will be valid if it satisfies both formal and substantive conditions of validity.⁹⁸ According to Yackee:

Formal conditions are specific, tangible manifestations of consent to a FSA, in the absence of which the seized court will refuse enforcement. In most instances, conditions of formal validity will concern the necessity, form, content, or location of a “writing” containing or evidencing the FSA.... [They] serve primarily to assure the reality of party consent to a FSA [emphasis added.]⁹⁹

In other words, the form provides proof positive of the parties’ consent to the jurisdiction agreement. This entails scrutinizing written evidence and/or other proof (such as trade usage or practice) that confirms the parties’ intention to be bound by the jurisdiction clause.¹⁰⁰ The substantive conditions of validity, on the other hand, require establishing the absence of elements such as

many other choice-of-law issues are far from clear-cut or settled. Ultimately, a court must endeavour to give effect to the parties’ intention under the contract.

⁹⁵ Born *supra* note 49 at 102.

⁹⁶ *Ibid.*

⁹⁷ See generally Sparka *supra* note 42 at 99-105.

⁹⁸ Yackee *supra* note 93 at 47-56.

⁹⁹ *Ibid* at 50. At 50-53, the author explains that these conditions may or may not be made explicit under the law (compare position of US law, which rarely imposes explicit formal conditions, to that of European law under Article 23 of the EC Regulation, which establishes four “forms” that must be met in order for the clause to be valid. See also Kruger *supra* note 49 at 221-26 (re requirements for validity of the clause under European law). An example of a jurisdiction clause that does not meet the formal requirements of validity might be where a jurisdiction clause contained on the back of a bill of lading is deemed illegible (P Bonassies and C Scapel *Droit maritime* 2ed (2010) 797).

¹⁰⁰ Yackee *ibid* at 50.

fraud, mistake, duress, misrepresentation, undue influence, unconscionability, incapacity or illegality—all issues relating to the reality, quality or content of consent according to Yackee.¹⁰¹

2.3.3 Judicial Interpretation: Exclusivity¹⁰² and Scope¹⁰³ of Jurisdiction Clauses

Whether the jurisdiction clause is exclusive and mandatory and encompasses the particular dispute at issue or not will depend on a court's interpretation of the construction of the agreement, a matter to be settled in accordance with the proper law of the clause, which more often than not tends to be the law governing the contract.¹⁰⁴

¹⁰¹ *Ibid* at 56. See also Kruger *supra* note 49 at 223. Arguably, a third party consignee subject to a jurisdiction clause contained in a charterparty agreement and incorporated by reference into a bill of lading has not actually consented to the stipulation limiting jurisdiction yet is bound by it, and therefore some argue that it should be deemed invalid. Notwithstanding this argument, jurisdiction clauses incorporated by reference have been found to be valid in the US, in cases where the parties receive actual or constructive notice of the charterparty including its terms, and in the UK, in cases where the bill of lading expressly stipulates that the particular forum selection clause has been incorporated. See R Force and M Davies 'Forum selection clauses in international maritime contracts' in M Davies (ed) *Jurisdiction and forum selection in international maritime law: essays in honor of Robert Force* (2005) 1 at 30-40. According to Tetley in *Marine cargo claims supra* note 38 at 1992-93, whether the jurisdiction clause is stipulated *in concreto* in the bill of lading or is incorporated by reference into the bill of lading, a third party must be 'apprised of or consent to the jurisdiction clause' in order for it to be valid and enforceable. Note also that in order to ensure that the validity of a jurisdiction clause itself is not dependent on the validity of the underlying contract of carriage, which can be problematic in cases where the contract as a whole is deemed invalid for reasons of mistake or incapacity for example, Briggs in *Agreements on jurisdiction supra* note 9 at 79-85 and 150 recommends 'mak[ing] it clear in the drafting that the validity of the agreement on jurisdiction will not be jeopardized by the validity of the contract in which it is contained.' See also Born *supra* note 49 at 100; Sparka *supra* note 42 at 81-87 and 93-98; Kruger *ibid* at 222 (re Europe's position on the severability of jurisdiction clauses from underlying contracts.) For more on forum selection clauses and their impact on third parties, see section 2.5.2.2.

¹⁰² See generally Force and Davies *ibid* at 40-42; Briggs *ibid* at 110-21; Born *ibid* at 17-23; Peel 'Exclusive jurisdiction agreements' *supra* note 48 at 182-85; J Fawcett 'Non-exclusive jurisdiction agreements in private international law' 2001 *LMCLQ* 234; Sparka *ibid* at 63-68; Kruger *ibid* at 226-30.

¹⁰³ See generally Force and Davies *ibid* at 42-44; Briggs *ibid* at 125-34; Born *ibid* at 24-27; Sparka *ibid* at 69.

¹⁰⁴ Briggs *ibid* at 126; Fawcett 'Non-exclusive jurisdiction agreements' *supra* note 102 at 235.

A jurisdiction clause may be described as either exclusive (mandatory) or non-exclusive (permissive). A jurisdiction clause is exclusive when it requires parties to the contract to litigate in a particular jurisdiction, to the exclusion of all others. '[T]he parties are agreeing on trial in the chosen forum [and] implicitly agree[ing] not to object to the jurisdiction of that forum'¹⁰⁵ or to invoke another forum, failing which they will be in breach of their agreement.¹⁰⁶ Conversely, a jurisdiction clause is non-exclusive when it does not impose an obligation on parties to sue in the nominated forum, but rather acknowledges the jurisdiction as *an option* amongst others, which parties may later choose as the forum to resolve their dispute or disputes.¹⁰⁷ It is trite to say that judicial interpretation has a significant bearing on legal rights and remedies arising under the jurisdiction agreement.¹⁰⁸ For example, if a cargo claimant brings suit in the non-selected forum, defence

¹⁰⁵ Fawcett *ibid* at 234.

¹⁰⁶ *Ibid*. Note that according to article 23(1) of the EU Jurisdiction Regulation, a jurisdiction clause is presumed exclusive unless the parties expressly agree otherwise.

¹⁰⁷ Note, however, that this definition is generic and does not encompass all nuances. For instance, as discussed by Briggs in *Agreements on jurisdiction supra* note 9 at 115, consider the hybrid scenario of a non-exclusive jurisdiction clause that entitles a contracting party to decide later that the court chosen is to have exclusive jurisdiction (otherwise known as a floating or deferred choice of court). European Union Preparatory Acts, Commission staff working document, accompanying the proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements, Impact Assessment COM (2008) 538 final OE SEC (2008) 2390 (accessed on Westlaw International):

Non-exclusive jurisdiction clauses are very commonly used in international trade and finance. The use of a non-exclusive jurisdiction clause reflects a legitimate choice by parties where they wish the chosen forum to have jurisdiction but to retain the flexibility to bring proceedings before any other court of component jurisdiction. Such clauses respond to a genuine commercial need and would not be used in business-to-business contracts if this were not the case. Failure to include such clauses will seriously reduce the advantages of an international convention for international trade and finance [emphasis added].

¹⁰⁸ See generally Fawcett 'Non-exclusive jurisdiction agreements' *supra* note 102 at 241-57. According to G D Sesser in 'Choice of law, forum selection, and arbitration clauses in international contracts: the promise and the reality, a US view' (1992) 20 *Intl Bus Law* 397 at 398, the technicality or 'fine linguistic distinction' of interpreting jurisdiction clauses as non-exclusive/permissive and therefore not enforceable is sometimes used by the courts of countries such as the United States as a means to circumvent the presumptive validity of jurisdiction clauses.

counsel will either argue breach of contract or *forum non conveniens*, depending on whether the clause is construed by the courts as exclusive or not.¹⁰⁹ As always, problems of interpretation usually occur when an agreement is poorly drafted or ambiguous.¹¹⁰ According to Briggs, ‘the material question should not be what do these words mean but what did the parties intend by the use of this form of words.’¹¹¹ On balance, parties are

¹⁰⁹ Fawcett *ibid* at 237: ‘The burden of proving that a clause is an exclusive one rests on the party who relies on it.’ For more on the distinction between remedies of *forum non conveniens* and breach of jurisdiction agreement see Section 2.4.2. For more on the controversial issue of claiming damages for breach of a jurisdiction agreement, see generally Briggs *Agreements on jurisdiction supra* note 9 at 9-10 and 541-42; D Tan et al ‘Breaking promises to litigate in a particular forum: are damages an appropriate remedy?’ 2003 *LMCLQ* 435 [for position pro recovery of contractual damages]; compare to LC Ho ‘Anti-suit injunctions in cross-boarder insolvency: a restatement’ (2003) 52 *ICLQ* 697. See also CH Tham ‘Damages for breach of English jurisdiction clauses: more than meets the eye’ 2004 *LMCLQ* 46; Tetley *Marine cargo claims supra* note 38 at 2005-06; Peel ‘Exclusive jurisdiction agreements’ *supra* note 48 at 224-26; Baatz ‘The conflict of laws’ *supra* note 56 at 31-32 [for position in Europe]. Common sense would dictate that damages for breach of contract are not available where a clause is characterized as non-exclusive, since the clause is merely permissive and therefore not enforceable. However, if a jurisdiction clause is construed as exclusive, and is subject to common law rules, it may be possible for a defendant carrier to recover damages when suit is brought in breach of the choice of forum agreement, even in cases where proceedings are permitted to continue in the non-selected forum (although, as Peel explains *ibid* at 224, it may be problematic for the court to decline the stay and then agree that it was a breach of contract sanctioned by the court entitling the defendant to damages). According to Briggs *ibid* at 9-10 and 541-42:

Nothing is more fundamental to the common law than the fact that breach of contract gives rise to a right to damages: that *pacta sunt servanda*, contracts are to be performed, and that damages for breach are a matter of right and entitlement.... Though the implications are still to be fully worked out, breach of the terms of an agreement for the resolution of disputes should lead to damages.

In Europe, in cases where the EC Jurisdiction Regulation applies, defendants must seek to recover from the court first seized (where damages are possible under the law of that nation). The damages recoverable according to Tetley *ibid* at 2006 are ‘legal fees and related costs incurred by the defendant in investigating and defending the claims in the foreign proceedings instituted by the plaintiff in breach of the exclusive forum selection clause.’

¹¹⁰ According to Briggs in *The conflict of laws supra* note 49 at 103-104, uncertain or ambiguous wording makes the jurisdiction clause harder to construe with confidence, which ironically defeats its purpose in making the dispute resolution process more predictable.

¹¹¹ *Agreements on jurisdiction supra* note 9 at 112. At 121, the author goes on to explain that:

[T]hough it may be sensible to describe certain agreements as ‘exclusive jurisdiction agreements’, it may be seriously misleading to describe others as ‘non-exclusive’: if it is not an exclusive jurisdiction agreement, it may be one of a variety of otherwise-than-strictly-and-immediately-exclusive jurisdiction agreements, for these are simply

better served by clearly stipulating that a jurisdiction agreement is exclusive,¹¹² as it ‘reduces the risk of litigation in undesirable or unanticipated fora.’¹¹³ However, it is important to keep in mind that ‘for the parties to tie their hands to litigation in a court which may become unattractive in the period between the making of the contract and the dispute arising is not always sensible.’¹¹⁴ In such instances, non-exclusive or deferred jurisdiction clauses may in fact be a better option.

A jurisdiction clause may also be described as either broad or narrow, depending on whether the particular claim at issue falls within the material scope of the agreement or not. Whereas broadly drafted clauses encompass all forms of claims, narrow ones have limited application.¹¹⁵ Where the clause is ambiguous, it becomes difficult to determine which disputes are specifically targeted by the agreement, especially when claims are extra-contractual in nature.¹¹⁶ Again, what matters is the parties’ intention, which

defined by what they are not, and not by what they are. The true enquiry is always as to the precise nature of the rights and duties, powers and liabilities, intended by the parties and created by the words of their agreement. That is a matter of contractual construction to which no special rules, or labels, need to be applied. It is probably also something which does not allow shortcuts to be taken.

¹¹² Briggs in *The conflict of laws supra* note 49 at 103-104, says that ‘they do not need to have used the word ‘exclusive’, but it certainly helps if they do.’

¹¹³ Born *supra* note 49 at 19. According to Tetley in *Marine cargo claims supra* note 38 at 2006: ‘Virtually all standard-form bills of lading in contemporary maritime commerce require disputes to be resolved in a stipulated court or by an arbitral tribunal, according to a specified national law or international carriage by sea convention [emphasis added].’

¹¹⁴ Briggs *Agreements on jurisdiction supra* note 9 at 114-15.

¹¹⁵ If a defendant makes an application to the court to stay proceedings in breach of an exclusive jurisdiction agreement, the party acquiesces that the wording of the clause is broad enough to encompass the plaintiff’s claim. Alternatively, the defendant may argue that the plaintiff’s particular claim is excluded from the narrowly construed clause.

¹¹⁶ According to Briggs in *Agreements on jurisdiction supra* note 9 at 126, ‘[t]he problem stems from the fact that though the jurisdiction or arbitration clause will usually be contained in a contract, the legal relationship(s) between the parties may not be exclusively contractual.’ The author cites the following examples of claims, which may be excluded from the scope of application of the jurisdiction clause: claims in tort, claims to assert ownership in property, claims for breach of fiduciary/statutory duty, claims for equitable compensation, misrepresentation claim.

courts will attempt to determine in accordance with general principles of contractual interpretation under the applicable law.¹¹⁷ Born advocates the use of broad clauses as it 'reduces the risk of time-consuming preliminary litigation over questions of jurisdiction', and he encourages parties to engage in dispute settlement 'in a single, consolidated proceeding in a contractual forum, thus avoiding inconsistent results and multiple legal expenses', unless of course parties have a particular motive for choosing multiple proceedings.¹¹⁸

2.4 Judicial Discretion to Enforce Exclusive Jurisdiction Clauses

2.4.1 To Stay or Dismiss Proceedings in Breach of Foreign Jurisdiction Clauses

When a claim is brought in breach of an exclusive jurisdiction clause, which is valid in both form and substance, broad enough to encompass the claim, and enforceable under the applicable national law, then upon application, the non-selected forum court may exercise its discretion (depending on the nation) to give effect to the clause and refuse to exercise its jurisdiction.¹¹⁹

¹¹⁷ Born *supra* note 49 at 25.

¹¹⁸ *Ibid.* Examples of legal disputes over scope of jurisdiction clauses contained in maritime contracts as cited by Force and Davies *supra* note 101 at 43:

Where a time charterer signed the bill of lading 'as carrier' and there was no indication that it signed 'for the master,' the charter could invoke the forum selection clause in the bill of lading despite a definitions clause in the bill of lading that defined the term 'carrier' as meaning the 'owner' or 'demise charterer'. The Court refused to extend the forum selection clause to the owner (*Union Steel America Co v M/V Sanko Spruce* 14 F Supp 2d 682 (DNJ 1998)).

Where an insurer seeks contribution from a co-insurer, the claim is not one for subrogation and so a forum selection clause in the contract between the insured and the co-insurer is not applicable (*Adams v Unione Mediterranea Di Sicurita* 364 F 3d 646 (5th Cir 2004)).

¹¹⁹ Peel 'Exclusive jurisdiction agreements' *supra* note 48 at 227. Tetley in *Marine cargo claims supra* note 38 at 1991-94 indicates that 'there is no general rule as to whether a court will honour a jurisdiction clause', but says that there are 6 criteria that a court will generally base itself on when deciding whether or not to enforce the agreement: (In all cases) is clause clear and precise? Is the clause legible? Is the clause fundamentally unfair, inherently unjust, unreasonable, or violates strong public policy? (Where the clause is

That is to say, the court may either commence proceedings brought in

incorporated by reference) is jurisdiction clause that is referenced in another document detailed and precise? (Where the clause has impact on third party) is a third party to the contract apprised of clause, or has he/she consented to it? (Where there is more than one defendant) do the circumstances of the case forbid dividing the action? According to J Fawcett in 'Trial in England or abroad: the underlying policy considerations' (1989) 9(2) *Oxford Journal of Legal Studies* 205, the following underlying policy considerations are at work when a court seized with a jurisdiction dispute exercises its discretion in deciding whether a trial should take place in its forum or abroad: 1. satisfaction of the parties' interests in an economical trial; 2. protection of the parties (both defendant and plaintiff); 3. public interest in protecting other persons affected by trial; 4. maintenance of harmonious relations with other states; 5. ensuring minimum standards of justice are available in the other forum; 6. advancement of the forum's interest in local trial; 7. Interest in giving effect to plaintiff's choice of forum; 8. maintenance of the efficient administration of justice; and 9. upholding agreements on jurisdiction. D A Laurent explains in 'Foreign jurisdiction and arbitration clauses in the New Zealand maritime context' (2007) 21 *A & NZ Mar LJ* 121 at 153 that '[t]he main issue with discretion is that it does not lend itself well to uniformity; a discretionary power is just that, and the consideration of the surrounding circumstances will differ between courts and members of the judiciary.' According to Briggs in *Agreements on jurisdiction supra* note 9 at 239, in Europe 'no judicial discretion is permitted to modify the statutory mechanisms for enforcement or non-enforcement of jurisdiction agreements.' In other words, as Tetley explains *ibid* at 1924, if one of the parties is domiciled in a Member State of the European Union, and the form requirements stipulated at Article 23 of the EC Jurisdiction Regulation are met, then the jurisdiction clause must be given effect. However, as per A Briggs in 'Forum non conveniens and ideal Europeans' 2005 *LMCLQ* 378 at 380, '[w]hen used as the template for the law on jurisdiction clauses for non-Member States, Art 23 is not being used to confer or impose jurisdiction on the courts of a non-Member State: nothing in the Judgments Regulation can do that.' In other words, it would seem that the courts of non-Member States retain their discretion. See also E Peel 'Forum non conveniens and European ideals' 2005 *LMCLQ* 363 at 374-77. Note too that according to Tetley *ibid* at 1930 and 1977-82, in most civilian jurisdictions (including France, Germany and Latin American nations), judges do not have the discretion to stay or dismiss claims that fall within their subject-matter jurisdiction; a civilian court either has "competence" (jurisdiction) or not, depending on its interpretation of codified law. Valid foreign jurisdiction clauses, which have been agreed upon by commercial parties and are clearly designated in contracts, are recognized and a court must declare itself "incompétente" (without jurisdiction) in situations where it chooses to uphold/give effect to these agreements. D Figueroa 'Conflicts of jurisdiction between the United States and Latin America in the context of *forum non conveniens* dismissals' (2005) 37(1) *The University of Miami Inter-American LR* 119 at 151: '[In Latin American nations] a court either has or does not have jurisdiction to hear a case. Once jurisdiction is established, the court is not allowed to refuse to hear a case on grounds not permitted by the constitution or legislation.' G Andrieux 'Declining jurisdiction in a future international convention on jurisdiction and judgments—how can we benefit from past experiences in conciliating the two doctrines of *forum non conveniens* and *lis pendens*?' (2005) 27 *Loyola LA Int'l & Comp LR* 323:

Judicial discretion is defended in common law systems for its propensity to reach fair outcomes but feared in civil law countries for the unpredictability it generates. ...Therefore, this notion is the cornerstone of numerous conflicts between common law and civil law systems.

For more on the enforcement of jurisdiction clauses in civilian jurisdictions, see Chapter 3.

breach of the foreign jurisdiction clause, or exercise its discretion and order a stay or dismissal of proceedings.¹²⁰

According to Mandaraka-Sheppard, there exist two competing schools of thought at common law insofar as the exercise of judicial discretion in the enforcement of jurisdiction clauses is concerned: the broad and the narrow.¹²¹ Proponents of the broad point of view contend that the judiciary should be empowered 'to consider which would be the appropriate forum for the ends of justice and the interests of parties, which is almost identical to the doctrine of *forum non-conveniens*.'¹²² This broad exercise of discretion would have the effect of impeding legal certainty, but would arguably do so in the name of procedural fairness.¹²³ In contrast, the narrow point of view strongly advocates respecting the parties' contractual choice of jurisdiction to resolve disputes.¹²⁴ To wit, in many admiralty courts where jurisdiction clauses are as a rule upheld in the name of privity of contract and

¹²⁰ Tetley *ibid* at 1996-98:

In the United States, courts frequently dismiss suits instituted in breach of valid foreign jurisdiction or foreign arbitration clauses. There is no unanimity among American courts, however, as to the precise legal basis for such unconditional dismissals.... In England and Commonwealth countries, by contrast, forum selection clauses and foreign arbitration clauses are typically enforced not by dismissals, but rather by stays of proceedings, whereby the courts seized of the motion to enforce the clause does not deny its own jurisdiction, but merely declines to exercise it... In foreign forum selection clause cases too, stays would seem preferable to unconditional dismissals, particularly as a stay would permit the U.S. court to re-assume jurisdiction in situations where US COGSA applies and the foreign court reduced the rights of cargo claimants below the minimum guaranteed by US COGSA. Very often, judgments staying suit will be conditional on the defendant agreeing to appear and appearing in the new jurisdiction, on the time for suit defence being waived and on appropriate security being filed. This is an intelligent and proper approach [emphasis added].

Concur M Davies 'Forum selection clauses in maritime cases' (2003) 27 *Tul Mar LJ* 367 at 382.

¹²¹ Mandaraka-Sheppard *supra* note 46 at 181.

¹²² *Ibid.* According to Peel in 'Exclusive jurisdiction agreements' *supra* note 48 at 220, 'some of the cases in which the courts have declined to stay their proceedings have gone to the "verge of the law" in order to protect cargo owners who are vulnerable to jurisdiction clauses to which they have been given no real opportunity to object'.

¹²³ Sparka *supra* note 42 at 193.

¹²⁴ Mandaraka-Sheppard *supra* note 46 at 181.

predictability of commercial transactions, the clause is deemed presumptively valid, and the party seeking to bring proceedings in breach of the agreement will have the heavy burden of convincing the non-forum court that the clause should nevertheless not be enforced.¹²⁵ Under this stricter, less flexible approach, it is believed that 'discretion should be exercised in favour of a stay unless there are exceptional circumstances, such that it would be in the public interest not to do so.'¹²⁶

2.4.2 *Forum Non Conveniens* versus Breach of Foreign Jurisdiction Clause

At this point, it is perhaps fitting to comment on the difference in approaches taken by common law courts in their discretion, upon application by defence counsel, when ordering stays or dismissals of proceedings on the grounds of *forum non conveniens*¹²⁷ or breach of an exclusive jurisdiction clause.¹²⁸

Though there is overlap between the two approaches, and the relief sought

¹²⁵ However, in certain nations such as South Africa, China, and the Nordic Countries the legislature has stepped in to limit the scope of clauses, which attempt to circumvent jurisdiction (see Chapter 3).

¹²⁶ Peel 'Exclusive jurisdiction agreements' *supra* note 48 at 227. According to Hare in *Shipping law and admiralty supra* note 16 at 97, in admiralty, courts generally have 'a more sympathetic attitude towards forum shopping in light of the tenuous nature of executable maritime security and the facility with which a recalcitrant debtor can evade its debts.' See Section 2.5 on forum shopping.

¹²⁷ Most civilian countries do not recognize the discretionary remedy of *forum non conveniens* as a result of constitutional restrictions (though it is interesting to note that according to Briggs in '*Forum non conveniens* and ideal Europeans' *supra* note 119 at 381, the French courts are adopting a more liberal approach towards the recognition of international litispence (or *lis alibi pendens*) under principles of French private international.) Furthermore, Tetley explains in *Marine cargo claims supra* note 38 at 2008, that in Europe:

[T]he use of *forum non conveniens* to stay proceedings validly instituted in Brussels Convention States against parties domiciled in any such State... has been condemned and prohibited by the European Court of Justice as undermining the Brussels Convention (a ruling almost certainly applicable under EC Regulation 44/2001 as well.)

See *Owusu v Jackson* [2005] ECR I-553, Case C-281-02. For an analysis of the doctrine of *forum non conveniens* in the context of the EU, see Kruger *supra* note 49 at 276-307.

¹²⁸ For a concise yet comprehensive review of the distinction between these two main grounds for seeking a stay of proceedings under English common law, see generally Briggs *The conflict of laws supra* note 49 at 98-105.

is identical, ‘the principles which lead to [the stay or dismissal] are sharply distinct.’¹²⁹ In both cases, the court seized has the jurisdiction to hear the case, but the defendant appeals to the judge to nevertheless stay or dismiss proceedings and direct the claimant to sue in a court of another country, either because the foreign court is situated in the natural or more convenient or appropriate forum, or because the parties have agreed to sue in the foreign court under an exclusive jurisdiction agreement.¹³⁰ What differs in each case, however, is the test applied by the court seized to arrive at this conclusion.

The common law *forum non conveniens* analysis comprises of two stages.¹³¹ At the first stage, a court seized must determine on a balance of probabilities whether the foreign court is clearly the natural or more appropriate forum for the resolution of the parties’ dispute, which it does by analyzing what “connecting factors”¹³² are present. Once the defendant – who has the burden of proof – discharges this onus, the claimant may, at the second stage, seek to oppose the stay or dismissal by convincing the court that notwithstanding the greater “convenience” of the foreign forum, it would be ‘unjust’¹³³ to confine him to his rights and remedies as the foreign court will see them.’¹³⁴

¹²⁹ *Ibid* at 98.

¹³⁰ *Ibid*.

¹³¹ The test is based on Scottish law and was enunciated for the first time in English law in *The Spiliada* [1987] 1 Lloyds Rep 1 (HL). This test has been applied (and at times slightly modified) in other common law jurisdictions such as Canada, the United States, Australia, and South Africa. See generally Mandaraka-Sheppard *supra* note 46 at 167-74.

¹³² According to Briggs in *The conflict of laws supra* note 49 at 101, and Hare in *Shipping law and admiralty supra* note 16 at 96, examples of connecting factors include: location where the cause of action arose, location of witnesses, location of other parties involved in case, law governing the situation, security, extent of expenses or cost incurred.

¹³³ For instance, Briggs *ibid* says that it would be unjust to stay/dismiss proceedings in favour of a foreign jurisdiction if there were strong evidence that the claimant would not receive a fair trial in the foreign location.

¹³⁴ *Ibid*.

In contrast, in the context of foreign jurisdiction clauses, once the agreement has been examined, and found to apply to the particular dispute, and be valid, exclusive¹³⁵ and enforceable under the applicable law, then it will usually be upheld and a stay or dismissal granted, unless the claimant – who has the burden of proof – can show strong reasons why the court should not do so.¹³⁶ According to Davies:

It is ... a mistake (although a common one) to confuse the two types of cases, which are very different one from the other. In a *forum non conveniens* case, the court gives at least some deference to the plaintiff's choice of ... forum and should dismiss proceedings only if the defendant can show that the relevant factors strongly favour dismissal. In contrast, in a forum selection clause case, no deference is given the plaintiff's choice of ... forum, and the plaintiff bears the burden of showing the court why it should be allowed to proceed in the chosen ... forum in breach of the agreement [emphasis added].¹³⁷

Mandaraka-Sheppard adds:

There seems to be, in some respects, a great similarity between the two approaches, with regard to the factors taken into account. For this reason, the courts, in some cases, tend to conflate the principle and assimilate *forum non-conveniens* when considering a stay on the ground of foreign jurisdiction agreements. Such an approach, however, leads to inconsistent results given that, in other cases, the courts have distinguished the doctrine of *forum non-conveniens* per se from considerations applicable to a stay in favour of a foreign jurisdiction agreement and have approached the matter with caution in order to keep the parties to their bargain [emphasis added].¹³⁸

In short, despite their similarities, the two approaches are not to be confused. Though in both instances the court's unfettered discretion is retained to stay or dismiss proceedings where it is deemed appropriate to do

¹³⁵ According to Fawcett in 'Non-exclusive jurisdiction agreements' *supra* note 102 at 250-52, where a jurisdiction clause is found to be non-exclusive (permissive/optional), and therefore not enforceable, then a defendant may apply to the court for a stay or dismissal of proceedings on the grounds of *forum non conveniens*. In such instances, the non-exclusive clause may be regarded as an important connecting factor to be taken into account at the first stage of the aforementioned analysis.

¹³⁶ Briggs *The conflict of laws supra* note 49 at 103. In deciding whether to rebut the presumption in favour of enforcing the jurisdiction clause, the court seized will look at a number of "connecting factors" discussed above to determine if the clause is unreasonable.

¹³⁷ *Supra* note 120 at 368. See also Sparka *supra* note 42 at 136.

¹³⁸ *Supra* note 46 at 186.

so (based on its analysis of a number of “connecting factors”), the burden of proof and basis of each approach are different: whereas the burden of proof rests with the defendant under the doctrine of *forum non conveniens* to prove to the court that it should interfere with the claimant’s rightful and lawful choice of court because the other forum is clearly more appropriate, the burden of proof rests with the claimant to prove that despite the exclusive jurisdiction agreement, there are strong reasons why the court should nevertheless allow the party to litigate in the non-selected forum, in breach of the agreement.

2.4.3 Enforcing Jurisdiction Clauses with Anti-suit Injunctions¹³⁹

An additional remedy designed to curtail “offensive forum-shopping”¹⁴⁰ that is available to defendants seeking to prevent or put an end to proceedings brought in breach of a jurisdiction agreement is the anti-suit injunction, which is issued by common law courts¹⁴¹ at their discretion.¹⁴² In short, a defendant wishing to restrict a claimant’s right to bring suit to the contractually stipulated jurisdiction may apply to the forum court to seek an anti-suit injunction ordering the claimant not to commence or to discontinue a claim brought in a foreign court in breach of a jurisdiction agreement, or else face

¹³⁹ For a detailed analysis of anti-suit injunctions, see Mandaraka-Sheppard *ibid* at 243-71; Briggs *Conflict of laws supra* note 49 at 112-17; Peel ‘Exclusive jurisdiction agreements’ *supra* note 48 at 203-12; N Meeson ‘Comparative issues in anti-suit injunctions’ in M Davies (ed) *Jurisdiction and forum selection in international maritime law: essays in honor of Robert Force* (2005) 59-84; Tetley *Marine cargo claims supra* note 38 at 1998-2004; Baatz ‘The conflict of laws’ *supra* note 56 at 30-31.

¹⁴⁰ Briggs *ibid* at 112.

¹⁴¹ Tetley *Marine cargo claims supra* note 38 at 1999: ‘England is perhaps the world capital of anti-suit injunctions, although some American and Canadian courts have also issued them or declared their willingness to do so in proper cases.’ The author also explains *ibid* that the anti-suit injunction is available in certain mixed jurisdictions, such as Scotland and Quebec.

¹⁴² Mandaraka-Sheppard *supra* note 46 at 243: ‘The principal aim of the injunction is to resolve clash of jurisdictions and prevent irreconcilable judgments....’

contempt of court proceedings.¹⁴³ Since the anti-suit injunction infringes upon the proper jurisdiction of foreign courts, which is hardly consistent with the principle of international comity,¹⁴⁴ it is a discretionary remedy that should be issued “with caution”.¹⁴⁵

Under English law, where proceedings are brought in breach of a jurisdiction clause, a contractual anti-suit injunction will usually be granted at the discretion of the forum court if the agreement is exclusive and the application for an injunction is made promptly, unless there exists a good reason why the injunction should nevertheless be denied.¹⁴⁶ However, if a jurisdiction clause is non-exclusive or otherwise unenforceable, then the applicant must show that there is a sufficient connection between the action and the selected forum to justify an intervention with the foreign court,¹⁴⁷ and that the intervention is for the ends of justice,¹⁴⁸ before the party can persuade a judge to issue an anti-suit injunction.

¹⁴³ Tetley *Marine cargo claims supra* note 38 at 1998. Tetley explains *ibid* that the claimant/respondent must be ‘subject to the personal jurisdiction of the forum court’ in order for the injunction to take effect.

¹⁴⁴ *Ibid* at 2004. For further discussion on the principle of comity of nations, see Section 2.5.2.1.

¹⁴⁵ *Ibid* at 1999; Peel ‘Exclusive jurisdiction agreements’ *supra* note 48 at 204. According to Briggs in *The conflict of laws supra* note 49 at 112-13:

The order is not addressed to the foreign judge, who is manifestly neither subject to the personal jurisdiction of the English court nor on the receiving end of its order, but to the respondent, who is ordered to exercise self-restraint or suffer the consequences of prescribed law. Even so, a foreign judge may not appreciate the subtlety of the distinction [and decide that the injunction is unconstitutional and impeaches on the jurisdiction of its court’s sovereignty], and for this reason a concern for comity constrains the court in the exercise of its discretion.

See M E Solimine ‘Forum-selection clauses and the privatization of procedure’ (1992) 25 *Cornell Int’l LJ* 51 at 62-69.

¹⁴⁶ *A/S D/S Svendborg v Wansa* [1996] 2 Lloyds Rep 559 at 570, affirmed [1997] 2 Lloyds Rep 87 (CA). Examples of good reasons to deny the anti-suit injunction include unreasonable delay and voluntary submission to a foreign court.

¹⁴⁷ In other words, the applicant must show that the selected forum is the natural or appropriate forum – similar analysis to *forum non conveniens*.

¹⁴⁸ *Airbus Industrie GIE v Patel* [1998] 1 Lloyds Rep 631 (HL). Where proceedings are vexatious or oppressive or unconscionable, an injustice can occur.

Meeson states that ‘to the extent that forum selection issues are increasingly governed by international convention, the anti-suit injunction becomes both unnecessary and inappropriate.’¹⁴⁹ Indeed, in Europe, where nations have agreed to be governed by the EC Jurisdiction Regulation, the European Court of Justice has ruled that the issuance of anti-suit injunctions by courts of Member States is altogether prohibited.¹⁵⁰ Rule 27 of the EC Jurisdiction Regulation (re *lis pendens* conflicts to be resolved by court first seized)¹⁵¹ trumps Rule 23 of the EC Jurisdiction Regulation (re jurisdiction clauses). Consequently, when faced with the conflict of multiple proceedings involving the same cause of action and between the same parties brought in the courts of different Member States, the court first seized will, at its discretion, determine whether or not to stay proceedings in favour of the other European forum, thereby eliminating the risk of “offensive forum shopping” and the need for anti-suit injunctions altogether in cases where Member States are involved.

2.4.4 Jurisdiction Clauses and the Time-Bar Defence¹⁵²

What happens if a lawsuit is filed in a timely manner in the non-selected forum, and the foreign jurisdiction clause is successfully pleaded by the defendant, but not until after the claim has become time barred in the contractually selected forum,¹⁵³ or until there is so little time remaining that a

¹⁴⁹ *Supra* note 139 at 84; concur Tetley *Marine cargo claims supra* note 38 at 2004.

¹⁵⁰ *Turner v Grovit* [2004] ECR I-3565, Case C-159/02. According to Mandaraka-Sheppard *supra* note 46 at 247, ‘the use of anti-suit injunctions runs counter to the mutual trust which the Member States gave to each other’s legal system and institutions.’

¹⁵¹ Sometimes described as the “first come first served” rule. See Baatz ‘The conflict of laws’ *supra* note 56 at 8. See Chapter 4.

¹⁵² For more on the time bar defence in cases involving jurisdiction clauses contained in contracts of carriage by sea, see Force and Davies *supra* note 101 at 11-27 (re the *Thyssen Inc v M/V Markos N* 1999 AMC 2515 (SDNY 1999) and the *Thyssen Inc v Calypso Shipping Corp SA* [2000] Lloyd’s Rep 243 (QBD Comm Ct 2000) saga) and at 45-48. See also Mandaraka-Sheppard *supra* note 46 at 154-159; Hofmeyr *supra* note 11 at 33-36.

¹⁵³ Time bars under contracts of carriage to which the Hague, Hague/Visby, Hamburg or Rotterdam Rules apply are governed by those regimes, as enacted through national

claim cannot, for all intents and purposes, be filed in a timely manner in the foreign court?¹⁵⁴ Should the plaintiff lose his day in court and the right to recover altogether? Should the resulting time bar persuade a court not to enforce the jurisdiction clause against the parties' express wishes? Should it make a difference if a party purposely delays the action by filing a claim or defence in the non-selected forum in an untimely manner in order to gain a procedural advantage? The answers to these questions and exercise of judicial discretion in this matter are far from clear and consistent across maritime jurisdictions.

In the United States, it has been argued that to render a foreign jurisdiction clause unreasonable and therefore unenforceable as a result of a time bar lapse is tantamount to creating a loophole for plaintiffs seeking to avoid the clause's application.¹⁵⁵ According to Force and Davies, '[this attitude] evidences a punitive view towards plaintiffs who file actions in a non-selected forum'.¹⁵⁶ This hard-line approach in dealing with the statute of limitations problem is not unfamiliar to other common law jurisdictions, where the argument has been made that a time bar does not in and of itself constitute a strong cause to negate the enforcement of a jurisdiction clause.¹⁵⁷

legislation (the time bar for cargo claims (other than indemnity claims) under Hague and Hague/Visby is 1 year, and under the Hamburg and Rotterdam is 2 years).

¹⁵⁴ Force and Davies explain *supra* note 101 at 45 that where a claim is brought in the non-selected forum after the claim is time-barred in the selected forum, then the claimant is generally not entitled to relief. In such instances, courts of the US and England have not hesitated to order a dismissal or stay of proceedings. Mandaraka-Sheppard adds *supra* note 46 at 185 that this is especially true where it is found that the claimant has deliberately allowed a time bar to lapse in order to proceed in the other forum.

¹⁵⁵ *New Moon Shipping Co Ltd v MAN B & W Diesel AG* 121 F 3d 24 (2d Cir 1997) (CA).

¹⁵⁶ *Supra* note 102 at 48.

¹⁵⁷ *The MC Pearl* [1997] 1 Lloyds Rep 566; *The Achilleus* 1992 (1) SA 324 (N). According to Peel in 'Exclusive jurisdiction agreements' *supra* note 48 at 198-99:

[I]n cases involving a foreign jurisdiction agreement, they should also enforce the foreign limitation period indirectly by staying their proceedings, unless it would be

However, this strict approach is not embraced by all common law judges alike. Some believe that prescription *does* constitute a strong cause for staying or dismissing proceedings, and still others argue that it should be viewed as a neutral (rather than a balance-tipping) factor in the decision-making process.¹⁵⁸

A possible solution to avoid the tolling of the time bar might be to seek a protective writ, which would have the effect of suspending the operation of the statutory limitation in the nominated forum.¹⁵⁹ However, as Force and Davies remind their readers, initiating parallel proceedings is costly, impractical, and places an unnecessary burden on the judicial system by clogging court dockets.¹⁶⁰ What is more, extensions of time are not always permissible under the law of certain countries.¹⁶¹

2.4.5 Jurisdiction Clauses and Jurisdiction *in Rem* or *in Personam*

Professor Hare states that 'the choice of an execution forum is often driven by the availability of security against which a successful claimant can levy judgment.'¹⁶² Accordingly, cargo claimants may arrest or attach ships, depending on where the ship is located, to establish the jurisdiction of a

contrary to public policy. Even then, when assessing what public policy demands, they should take into account of the fact that the plaintiff agreed to abide by the relevant limitation period when agreeing to the foreign jurisdiction clause. If this approach is taken, it calls into question the practice of attempting to negate the effect of a foreign limitation period by making any stay of the English proceedings conditional on the defendant's undertaking not to invoke the time bar. The defendant should be entitled to rely on this advantage, like others he may have bargained for, unless allowing him to do so conflicts with English public policy.

¹⁵⁸ Mandaraka-Sheppard *supra* note 46 at 184.

¹⁵⁹ Force and Davies *supra* note 101 at 46.

¹⁶⁰ *Ibid.*

¹⁶¹ Mandaraka-Sheppard *supra* note 46 at 185. Another solution might be that, absent any deliberate delays, the court make the stay of proceedings in the non-selected forum conditional upon the defendant's waiver of the time bar in the contractually stipulated forum, so as not to deprive the claimant of his/her day in court.

¹⁶² J Hare 'Shopping for the best admiralty bargain' in M Davies (ed) *Jurisdiction and forum selection in international maritime law: essays in honor of Robert Force* (2005) 137 at 160.

court, perfect maritime claims *in rem* and/or *in personam*,¹⁶³ and/or guarantee security against their claims.¹⁶⁴ In the context of this present study, if the parties previously agreed under the contract of carriage to have the *merits* of any claims litigated elsewhere, then the defendant is free to challenge the jurisdiction of the court where the ship has been arrested or attached to found jurisdiction by arguing, *inter alia*, that it would be a breach of the exclusive jurisdiction agreement to allow the claim to carry on there. However, once again, the question arises: which of the two jurisdictions should prevail? Should the merits of the case be argued in the arrest or attachment jurisdiction, as prescribed by the Arrest Convention 1952,¹⁶⁵ or should the court seized instead give recognition to the parties' freedom to

¹⁶³ W Tetley 'Arrest, attachment, and related maritime law procedures' (1999) 73 *Tul LR* 1895-1985. Available at <http://www.mcgill.ca/maritimelaw/maritime-admiralty> [Accessed 1 February 2011]:

In common law countries whose maritime law is primarily derived from the admiralty law of England, the action *in rem* is the basic procedure on which creditors rely for pre-judgment security and post-judgment enforcement. The arrest of the ship or other res (eg cargo or freight) in the action *in rem* places the res under judicial detention pending adjudication of the claim. It usually also secures the appearance in the action of the defendant shipowner and it establishes the jurisdiction of the court. If the court subsequently allows the claim, the judgment is then enforceable against the arrested res (by judicial sale) or the security given to take its place.

In civil law jurisdictions, where no action *in rem* exists, the action *in personam* may be combined with a "*saisie conservatoire*", or conservatory attachment. The *saisie* permits any property of the debtor (including ships) to be seized and detained under judicial authority pending judgment. The subsequent judgment, if favourable to the plaintiff, may then be enforced against the attached property or the security replacing it.

The United States, in a sense, has the best of both worlds, because American maritime law affords the creditor both the arrest *in rem* and the maritime attachment [both of which can be pled concurrently or in the alternative].

Note that both procedures are also available under South African maritime law (attachments as a result of the Roman-Dutch law, and arrests as a result of the English law), per the Admiralty Jurisdiction Regulation Act, 1983.

¹⁶⁴ According to Tetley *ibid*, the ship is usually released upon issuance of security in the form of bail bonds, payment of money into court, bank guarantees or letters of indemnity.

¹⁶⁵ International Convention Relating to the Arrest of Sea-Going Ships, Brussels, 10 May 1952, which applies to both arrest and attachment. (Note that as of 1 February 2011, the latest Arrest Convention, the International Convention on the Arrest of Ships, 1999, is not yet in force (it requires the consent of 10 states, but only has the consent of 9). See <http://r0.unctad.org/ttl/ttl-docs-legal.htm> [Accessed 1 February 2011].

contract as they see fit by enforcing the jurisdiction agreement and referring the case to the selected forum?

As expected, common law courts may choose to exercise their discretion to stay or dismiss proceedings where a ship is located and refer the case to the contractually stipulated forum, provided that the jurisdiction clause is valid, exclusive and enforceable under the law applicable, and that there exist no strong reasons or good cause to set aside the agreement. Some courts have held that the non-availability of arrest *in rem* in the contractually selected forum does not render the jurisdiction clause unreasonable or provide sufficient reason to set aside the agreement in favour of proceedings in the non-selected forum.¹⁶⁶ To avoid the needless costs and complications associated with multiple proceedings, 'the dominant trend appears to be restriction of parallel or successive litigation of the same dispute'¹⁶⁷ and upholding valid and effective jurisdiction agreements.

In Europe, any conflict between jurisdiction established under the Arrest Convention and exclusive jurisdiction agreements is resolved as follows:

[W]hen there are proceedings brought in a court of a Member State, which is seised of the matter first under any of the specialised Conventions by virtue of Art 71 [of the EC Jurisdiction Regulation], and in the court of a Member State which the parties chose for their disputes, the court first seised will determine (by virtue of Art 27) issues as to the validity and scope of the agreement and, subject to that, it may decide to decline jurisdiction in favour of the agreed exclusive jurisdiction. Alternatively, it is always open to a party to the jurisdiction agreement to submit to the jurisdiction of the other court.¹⁶⁸

¹⁶⁶ *Fireman's Fund Ins Co v MV DSR Atlantic* 131 F 3d 1336, 1337-38 (9th Cir 1997) (CA); *The Spartan-Runner* 1991 (3) SA 803 (N) at 807B-C.

¹⁶⁷ Y Shany *Regulating jurisdictional relations between national and international courts* (2007) 156.

¹⁶⁸ Mandaraka-Sheppard *supra* note 46 at 238. See also Tetley *Marine cargo claims supra* note 38 at 1926-27. Note that in accordance with art 71(1) of the EC Jurisdiction Regulation,

Thus, when a vessel is properly arrested or attached prior to suit being brought in the contractually stipulated forum, the conflict is to be resolved by the court first seized, that is, the arrest or attachment forum. Where the court seized finds that the jurisdiction clause is valid, exclusive and effective, then the arrest or attachment forum may decline to exercise its jurisdiction in favour of the other forum.¹⁶⁹

Recall that under Article 21(2) of the Hamburg Rules, when a ship or sistership is arrested in a port state that is subject to the Rules, an action may be instituted in that location, notwithstanding the fact that it is not one of the places enumerated in the first paragraph of the Article. The defendant may petition to have the action transferred from the *forum arresti* to the foreign jurisdiction, so long as sufficient security is provided to ensure payment of a subsequent judgment. And, under Article 70 of the Rotterdam Rules:

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless: (a) The requirements of this chapter are fulfilled; or (b) An international convention that applies in that State so provides.

It would seem therefore that arrest of a vessel, 'wherever it may be found'¹⁷⁰ is permitted for the purpose of obtaining security, even though the merits of the claim may very well be heard elsewhere in accordance with a foreign jurisdiction clause.¹⁷¹ As for arrest for the purpose of founding

the Regulation does not affect the applicability of the Arrest Convention where Member States are parties to it. See also Baatz 'The conflict of laws' *supra* note 56 at 21-23.

¹⁶⁹ Mandaraka-Sheppard *ibid* at 240. According to Jackson *supra* note 49 at 414, a stay of proceedings in favour of a contractually selected forum may be made conditional upon the provision of security.

¹⁷⁰ Sturley 'Jurisdiction under the Rotterdam Rules' *supra* note 44 at 34.

¹⁷¹ A/CN.9/591 Report of the UNCITRAL Working Group III (Transport Law) on the work of its sixteenth session at 14-15:

jurisdiction, the ship must either be located within one of the permissible forums listed at articles 66 or 68 of the Rules, or it must be permitted under the national law implementing the Arrest Convention. Any conflicts between the Rotterdam Rules and the Arrest Convention should be resolved in accordance with the interpretation of principles contained in the Vienna Convention on the Law of Treaties, 1969, which is applicable to international sales contracts.¹⁷²

2.5 Forum Shopping amidst Competing Interests at Maritime Law

[T]he differences that can occur in one jurisdiction rather than another, due to different maritime conventions which States are parties to... creates an incentive to forum shop.... If one jurisdiction is more advantageous to one party, the other party would probably prefer to litigate in the other available jurisdiction and this may create a race between the parties to commence proceedings first in the jurisdiction of choice.¹⁷³

2.5.1 Forum Shopping Under International Maritime Carriage Contracts

Forum shopping is generally permissible and encouraged in the maritime industry.¹⁷⁴ It not only promotes party autonomy and self-determination in

There was support for the view that, whatever the treatment given to jurisdiction under the Arrest Conventions, it should not result in a broadening of the list of general bases for jurisdiction in actions against the carrier contained in draft article 75 [Actions against the carrier – art 66 in the final version]. It was suggested that the issue of jurisdiction regarding the merits of the arrest case should be considered as a matter of conflict of conventions....

¹⁷² Note that unlike the European Jurisdiction Regulation, the Rotterdam Rules do not contain provisions to deal with procedural matters such as *lis pendens* and *concursum*. According to Von Ziegler *supra* note 4 at 112, the inclusion of provisions on these procedural matters 'would trespass into an area of national and international procedural law and would constitute a substantial difficulty for States that have promulgated well-established rules on the above issues.'

¹⁷³ Baatz 'The conflict of laws' *supra* note 56 at 1-2.

¹⁷⁴ Hare 'Shopping for the best admiralty bargain' *supra* note 162 at 174:

[S]hopping for an advantageous limitation regime is only part of a much larger selection of jurisdictional "special offers": litigants will always look for advantage in the many other facets of a suit that give or remove tactical advantage. And there is no philosophical or jurisprudential reason why they should not. Bar and bench reputations, punitive interest rates and damages, discovery and inspection procedures, contingency fees, jury trials, class actions, domestic consumer protection laws are some of the many "special offers" that result in a decidedly

legal matters,¹⁷⁵ but also generates litigation and competition between courts, compelling jurisdictions to improve the quality of their work and procedures to attract more business.¹⁷⁶ That said, forum shopping must be kept in check: ‘while some forms of forum shopping should be tolerated, abusive forum shopping is prohibited under international law as it conflicts, by definition, with the general principle of law prohibiting abuse of rights (*abus de droit*).’¹⁷⁷

It has been said that the only way to *curtail* forum shopping ‘for the best bargain’ is through the harmonization of laws on jurisdiction to govern all international maritime contracts alike.¹⁷⁸ And yet, the truth is that although such rules may indeed reduce the need to forum shop, they will never outright prevent it¹⁷⁹ because ‘no unification or harmonization is able to avoid

unlevel playing field on which forum shoppers play court games. Fair play it all is, unless parties engage in “abusive forum shopping” [emphasis added].

See also Solimine *supra* note 145 at 68. Compare to W Tetley *International conflict of laws: common, civil and maritime* (1994) 163 and 804:

Forum shopping in order to obtain a higher limitation fund is common practice and should be opposed.... Forum shopping is the improper choice of jurisdiction by the manipulation of connecting factors, in order to prevent the court of the proper jurisdiction from hearing a claim.

Some other reasons why lawyers may “shop around” for the forum that is most beneficial to their client’s interests include: availability of higher or lower limitation of liability, availability of recovery *in rem* and/or *in personam*, time bars, sister ship arrest provisions, costs of litigation, judicial efficacy and speed in dispute resolution, legal climate, differences in private international law rules, enforceability of desired decision.

¹⁷⁵ Sparka *supra* note 42 at 147 explains that ‘self-determination in legal matters is an important structural element of every free society and a prerequisite of individual freedom.’

¹⁷⁶ Shany *supra* note 167 at 154.

¹⁷⁷ *Ibid* at 155. See generally R Shuz ‘Controlling forum shopping: the impact of *MacShannon v Rockware Glass Ltd* (1986) 35 *ICLQ* 374 for the English point of view.

¹⁷⁸ Hare ‘Shopping for the best admiralty bargain’ *supra* note 162 at 173; Tetley *International conflict of laws supra* note 174 at 804.

¹⁷⁹ See generally F Ferrari ‘Forum shopping despite international uniform contract law conventions’ (2002) 51 *ICLQ* 689.

diverse jurisprudence, deriving from court decisions within individual and national—if not regional—jurisdictions....¹⁸⁰

Thus, despite the creation of international conventions such as the Rotterdam Rules, shopping for the best forum to litigate disputes continues to be an important strategic matter, which most certainly has a bearing on the outcome of claims.¹⁸¹ Generally speaking, in the absence of a jurisdiction clause, maritime litigants are at liberty to shop around and commence proceedings in a *reasonable* forum of their choice. However, when they choose to negotiate or be bound by a contract of carriage containing an exclusive jurisdiction clause, their freedom to forum shop may very well be restricted (if the clause is enforced), which 'will greatly affect the commercial value of the transaction itself.'¹⁸²

2.5.2 Competing Interests Affecting the Enforcement of Jurisdiction Clauses

2.5.2.1 *National Self-Interest versus Comity of Nations*

It has been argued that if, as a result of foreign jurisdiction clauses, maritime claims worldwide are always brought before the same forums, such as the United Kingdom or the United States, then other less popular or powerful ones will consistently be short changed of adequate caseload to build their own reputable practice and develop their own body of maritime law.¹⁸³ This

¹⁸⁰ Von Ziegler *supra* note 4 at 87-88. Not to mention the fact that some of these conventions that contain provisions on jurisdiction permit contracting parties to make reservations, or opt out of certain rules (eg jurisdiction provisions in Rotterdam Rules), which further increases the divide.

¹⁸¹ Shany *supra* note 167 at 152.

¹⁸² Von Ziegler *supra* note 4 at 88. According to Sparka *supra* note 42 at 150, 'choice of forum clauses ... help to ensure the application of the chosen law, curb ex-post opportunism in the form of forum shopping and thereby increase predictability. This in turn allows the parties properly to [sic] assess the risks and thus the true costs of the transaction.'

¹⁸³ B Oland 'The premature demise of section 46 or the law giveth and the lords taketh away.' Available at <http://www.cmla.org> (reports & papers link) [Accessed 1 February 2011].

has prompted countries such as Australia and New Zealand to outlaw clauses restricting jurisdiction altogether, and other countries such as South Africa and Canada to enact legislation limiting their legal effect.¹⁸⁴

Yet, an important feature of private international law, which contributes to building stronger relations between nations, commercial and legal certainty in contracts, and potentially greater coherence in international law,¹⁸⁵ is the contemporary principle of comity of nations:

“Comity” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one national allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.¹⁸⁶

In the context of choice of jurisdiction clauses, the principle of international comity implies that a court seized with a dispute ought to respect the parties’ choice to litigate in a particular forum by enforcing valid and exclusive jurisdiction clauses and declining to exercise its own jurisdiction. Per Longmore LJ:

It goes without saying that any court should pay respect to another (foreign) court but, if the parties have actually agreed that a foreign court is to have sole jurisdiction over any dispute, the true role of comity is to ensure that the parties’ agreement is respected. Whatever country it is to the courts of which the parties have agreed to submit their disputes is the country to which comity is due.

¹⁸⁴ Whereas Australia and New Zealand outright ban foreign jurisdiction clauses that preclude or limit the jurisdiction of their national courts (rendering the purported ouster of jurisdiction null and void), South Africa does not. That said, under section 3 of the South African Carriage of Goods by Sea Act, 1986, any person carrying on a business in the Republic, as well as consignees or holders of contracts of carriage of goods inbound to South Africa, may bring suit before a competent court of the Republic notwithstanding the existence of an exclusive jurisdiction clause. Canada’s statutory restriction, as it is currently interpreted, is less onerous. See Chapter 3.

¹⁸⁵ Y Shany *supra* note 167 at 166.

¹⁸⁶ *Hilton v Guyot* 159 US 113 (1895) (US Supreme Ct) at 163-164. See Briggs *Agreements on jurisdiction supra* note 9 at 538.

The corollary of this is that a party who initiates proceedings in a court other than the court, which has been agreed with the other party as the court for resolution of any dispute, is acting in breach of contract [emphasis added].¹⁸⁷

This “dialogue” between courts by way of international comity, compelling nations to respect parties’ jurisdiction agreements, is ‘likely to improve the quality of judicial outcomes, and, in consequence, increase their legitimacy.’¹⁸⁸

2.5.2.2 *Freedom of Contract versus Protectionism*¹⁸⁹

As previously discussed, English carriers first introduced foreign jurisdiction clauses in contracts of carriage as a trade war tactic, to ensure that disputes were settled exclusively before British courts, which tended to favour shipowners’ interests. The main impetus behind the US Harter Act and International Hague Rules thereafter was to remedy the injustices and inequities arising out of the unequal bargaining power between UK carriers and shippers worldwide. In exchange for limitation of liability and exculpatory exemptions, carriers agreed to provide seaworthy ships and restrict their freedom of contract by adhering to mandatory liability provisions or minimum standards of conduct to protect cargo interests. However, the regulation of jurisdiction clauses contained in international contracts of carriage was left entirely to nations, and has yet to be effectively treated in a uniform manner (with perhaps the exception of the European Community): whereas some nations forbid or restrict their use, others deem these clauses presumptively valid.

¹⁸⁷ *OT Africa Line v Magic Sportswear Corp* [2005] 2 Lloyds Rep 170 (CA) at paras 32-33. Sparka *supra* note 42 at 151:

[J]udicial intervention diminishes the legal certainty offered by choice of forum agreements, and it lessens the incentive for shippers to shop around and thereby weakens the disciplining force of the market. Whenever a choice of forum agreement results from unwise business, the courts should refrain from stepping in and relieving a party from a bad bargain.

¹⁸⁸ Shany *supra* note 167 at 167.

¹⁸⁹ See generally *Von Ziegler supra* note 4 at 93-101; Sparka *supra* note 42 at 9-12.

This raises the question: are mandatory rules outlawing or restricting the use of foreign jurisdiction clauses contained in standard form contracts of carriage justifiable in the modern age of transport, or should parties rather be permitted to benefit from the commercial and legal certainty of freely bargaining for jurisdiction clauses as they see fit? According to Withers:

[T]he freedom to choose a forum for the resolution of disputes is a fundamental component of party autonomy.... It enables parties to formulate expectations not only as to the location of litigation in the event of a dispute, but as to the likely costs and associated juridical advantages and disadvantages which flow from proceedings in the chosen court Where the meaning and effect of a jurisdiction clause is clear from its wording, it is difficult to see how the consumer is not in a position where he can make an informed choice [emphasis added].¹⁹⁰

As Von Ziegler explains, it is no longer tenable in today's commercial climate to argue that shippers have the weaker bargaining power and require special legislative protection against carriers.¹⁹¹ Even though it is the carriers, and not the shippers, who typically draft and issue bills of lading, which contain standard terms such as jurisdiction clauses that are said to favour carriers,¹⁹² that does not mean that shippers have weaker bargaining

¹⁹⁰ C Withers 'Jurisdiction clauses and the unfair terms in consumer contracts regulations' 2002 *LMCLQ* 56 at 61.

¹⁹¹ Von Ziegler *supra* note 4 at 95:

Even if one could establish that at the time of the confiscation of the Harter Act and the subsequent Hague Rules the commercial balance between shippers and shipowners was strongly in favour of the shipowners, the reality of trade has clearly shifted in modern times. Shippers nowadays are powerful multinational companies who have also gained substantial bargaining power vis-à-vis the shipping industry. Often, it is the shipper who dictates the terms for the shipments, and it is for the shipping industry to follow the demands of the customers. A small shipper can protect its interests by using a freight forwarder, who in turn acts as a big shipper in relation to the shipping industry and the carriers. To provide for customer/consumer protection in favour of shippers is not justified, particularly when one considers that the law of carriage of goods by sea is an element of commercial law, which should not rely on notions of consumer protection but rather on freedom of contract, on commercial negotiations between commercial entities, and on the laws of the markets [emphasis added].

¹⁹² Sparka *supra* note 42 at 13 and 149. According to Tetley in *Marine cargo claims supra* note 38 at 2006:

The forum selection clause is usually a "boilerplate" term of the bill, seldom negotiated or expressly consented to by the shipper or the consignee. In addition,

power. On the contrary, in the current competitive market, most maritime shippers gain the upper hand by shopping around for the best bargain, in other words by embarking in a joint venture with 'a carrier who contracts on terms more favourable than others, for example by designating a neutral forum instead of a forum at the carrier's principal place of business.'¹⁹³

Furthermore, as Laurent reminds her readers, it is important to keep in mind that even though it may be expensive to litigate overseas, it is usually the sophisticated and deep-pocketed insurance companies, not the individual cargo holders, who pursue these carriage claims.¹⁹⁴

Thus, it would seem that in the current commercial climate, where parties have freely bargained for and consented to the contractual terms, it would only be fair and reasonable that valid and exclusive jurisdiction clauses be enforced whether by way of a stay of proceedings or an anti-suit injunction, depending on the circumstances of the case.¹⁹⁵

the designated jurisdiction frequently has little, if any, connection with the parties and their contract and is typically more convenient to the carrier than to cargo.

But according to Sparka *ibid* at 150:

[S]tandard clauses in bills of lading are a product of extended negotiations between the representatives of the commercial interests involved which have been adopted because they facilitate the conduct of trade. This is also true of choice of forum clauses, which help to ensure the application of the chosen law, curb ex-post opportunism in the form of forum shopping and thereby increase predictability. This in turn allows the parties properly to assess the risks and thus the true costs of the transaction [emphasis added].

¹⁹³ Sparka *ibid* at 149.

¹⁹⁴ *Supra* note 119 at 160. The author also points out *ibid* that it is important to consider that in cases where there is a threat of multiple suits resulting from overly protectionist legislation, this may translate into higher expenses for the carrier defending those multiple claims, which in turn may indirectly lead to increased freight costs for the shipper. In other words, she believes that '[e]conomic interests of both the shipper and the carrier are best served by allowing choice, and enforcing foreign jurisdiction clauses.' Concur Sparka *ibid* at 13-14 and 150.

¹⁹⁵ According to Laurent *ibid* at 125, this is especially true in light of the fact that a contract's price may very well have been adjusted to reflect the cost of litigation in particular jurisdiction. Judicial interference may lead to higher costs to parties, which 'demonstrates disregard for economic fairness and efficiency.'

But what about situations where the bill of lading is made to the order of a consignee, or where it is negotiable and eventually transferred to a third (or fourth) party? Should mandatory rules on jurisdiction protect these “innocent” parties against the effect of jurisdiction clauses?

As Sparka explains, regardless of the terms of sale, ‘third parties are typically affected by the original contract of carriage when shipping documents are transferred to them, or when they are named as consignee....’¹⁹⁶ It follows that a third party holder of a bill of lading will usually be bound by a valid and exclusive jurisdiction clause contained in the transport document or incorporated by reference in a charterparty bill, when litigating a claim,¹⁹⁷ even though that third party may not have negotiated or necessarily been privy to the terms of the original contract of carriage¹⁹⁸ when concluding the contract of sale.

That said, lack of negotiation between third parties and carriers in contracts of carriage is not normally viewed as an obstacle to the enforcement of valid jurisdiction clauses.¹⁹⁹ Generally speaking, so long as third parties are ‘apprised of or consent to the jurisdiction clause in the bill of lading,’²⁰⁰ they will be treated as original parties to the agreement.²⁰¹

¹⁹⁶ Sparka *supra* note 42 at 170.

¹⁹⁷ *Ibid.*

¹⁹⁸ Peel ‘Exclusive jurisdiction agreements’ *supra* note 48 at 218.

¹⁹⁹ Sparka *supra* note 42 at 185-86: ‘What is important is not whether both parties negotiated over the terms of the contract, but whether they freely entered into the contract based on the expectation that the benefits of the transaction would exceed the cost.’

²⁰⁰ Tetley *Marine cargo claims supra* note 38 at 1992. Sparka *ibid* at 186:

The requirement of specific assent, which may be characterized as a pick and choose approach, contravenes fundamental doctrines of contract law and is likely to increase transaction costs.... In any case, requiring specific assent would defeat the contractual expectations of the carrier and encourage opportunistic behaviour.

²⁰¹ Peel ‘Exclusive jurisdiction agreements’ *supra* note 48 at 218.

In terms of formal validity of clauses through adequate knowledge and consent, many common law nations believe, particularly in an age of modern technology, that it behoves third parties to inform themselves of the standard contract terms (or get the information from the seller) in order to make informed decisions, as any ordinary businessman would, before signing agreements.²⁰²

Von Ziegler says that arguably the only “innocent” third parties in contracts of carriage that warrant protection are C-terms buyers under INCOTERMS 2000²⁰³, but even then, he says they are not so “innocent”:

[The consignee] has contracted, as buyer, with the seller/shipper that apart from providing the purchased goods such seller shall provide for transportation at its own costs. Such a buyer – for its own commercial reasons (which will normally affect the purchase price) – preferred that the seller undertake such arrangements. The buyer allows the seller to be the shipper and to contract with the carrier of seller’s choice on terms agreed by the seller. This decision is taken as part of a negotiation of the sales contract and is independent from any negotiation with the carrier. It assumes that the buyer will get from the seller not only the goods as delivered at the port of shipment, but also the carriage to destination and – depending on the terms of the sale agreement – insurance cover. Such a buyer is far from innocent, and not even really a third person but a receiver of goods, who must expect to find contractual language and, therein, jurisdiction clauses [emphasis added].²⁰⁴

Perhaps a useful indication of the future trend and attitude in maritime industry vis-à-vis the use of mandatory rules as a means to regulate international contracts is contained in the new and groundbreaking

²⁰² Von Ziegler *supra* note 4 at 116-17; agree Sparka *supra* note 42 at 186.

But see Force and Davies *supra* note 101 at 27ff (re ‘binding the plaintiff to an unseen forum selection clause’), where these authors explain (and Von Ziegler *ibid* would agree) that in cases where the bills are negotiable and endorsed by multiple buyers, the situation is less than straightforward and can lead to injustice, in particular where the jurisdiction clause is not clearly stipulated in the bill, but rather incorporated by reference.

²⁰³ ‘Under the “C”-terms (CFR, CIF, CPT and CIP), the seller has to contract for carriage, but without assuming the risk of loss or damage to the goods or additional costs due to events occurring after shipment or dispatch’ (Available at <http://www.iccwbo.org/incoterms/id3040/index.html> [Accessed 1 February 2011]).

²⁰⁴ Von Ziegler *supra* note 4 at 115.

Rotterdam Rules: these rules envisage a broad contractual freedom for all parties to certain contracts of carriage to negotiate their agreements, including jurisdiction clauses, as they see fit. Unlike the Hague or Hague-Visby Rules before it, this latest maritime Convention empowers consenting parties negotiating volume contracts²⁰⁵ to ignore the minimum standard obligations set by the Rules²⁰⁶ and instead set their own standards, including their own minimum level of liability.²⁰⁷ We shall have to wait and see whether the Rules are adopted, and if so, how the international judiciaries react to these laissez-faire provisions, in order to fully assess their impact.

2.5.3 Main Reasons For and Against the Enforcement of Jurisdiction Clauses

In modern contracts of carriage by sea, forum selection clauses serve a broader, albeit no less contentious,²⁰⁸ purpose than they did during the time preceding the Harter Act, when the carriers ruled the shipping industry. Various scholars have advanced a number of reasons both for and against the judicial enforcement of these restrictive clauses.

Reasons for the enforcement of such clauses include:²⁰⁹ to promote party autonomy in negotiating contracts of carriage, as is the common commercial practice in the maritime industry; to make contractual relationships, terms of contracts and outcomes of possible lawsuits more predictable; to benefit from a familiar forum applying familiar law, or to benefit from a neutral forum and ensure impartiality of judgment; to benefit from a convenient, competent and experienced forum; to tailor litigation to

²⁰⁵ For more on volume contracts under the Rotterdam Rules, see Chapter 5.

²⁰⁶ There are a few key exceptions, including the obligation to exercise due diligence to provide a seaworthy ship and the obligation to provide complete instructions and documentation for the carriage of goods are non-negotiable.

²⁰⁷ Transport Canada International Marine Policy *supra* note 77 at 3.

²⁰⁸ Sparka *supra* note 42 at 6.

²⁰⁹ See Born *supra* note 49 at 3-4; Force and Davies *supra* note 101 at 3; Sparka *ibid* at 5.

parties' specific needs (whereby enhancing the commercial value of the dispute resolution procedure); to avoid multiplicity of proceedings over the same dispute, and minimize the risk of complicated and expensive litigation over the preliminary issue of jurisdiction; and to reduce difficulties often encountered in enforcing national court judgments abroad.

Reasons for not enforcing such clauses include:²¹⁰ to promote justice and equity by refusing to enforce one-sided or unreasonable clauses; to prevent abuses resulting from unequal bargaining power between carriers and shippers/third parties; to thwart defendant's attempts to shirk legal obligations and deny claimant the right to a fair hearing on merits of the case;²¹¹ to protect economic interests of local traders; to avoid the inconvenience and the increased costs of litigation²¹² to plaintiffs forced to litigate in foreign jurisdictions (eventually resulting in lower settlement values); and to discourage judicial chauvinism of foreign—typically British—*fora* and permit national development of maritime expertise.

Given the many persuasive reasons both for and against the enforcement of jurisdiction agreements, there is unlikely to be any consistency in the approaches to enforcement amongst nations, as will be further elucidated in the following Chapter.

²¹⁰ Von Ziegler *supra* note 4 at 95; Sparka *ibid* at 6-8.

²¹¹ Force and Davies *supra* note 101 at 3:

Forum selection clauses should not be construed as a surrender of the right to redress... [but rather] as an affirmation of their right to seek redress ... [They] should never be manipulated or applied so as to deny an allegedly aggrieved party a remedy otherwise provided by law or worse yet to deny any remedy whatsoever.

²¹² R Herber 'Jurisdiction and arbitration—should the new Convention contain rules on these subjects?' 2002 *LMCLQ* 405 at 409: 'This is particularly true for claimants from civil law countries being forced to sue their debtor in common law jurisdictions where costs of court proceedings are many times higher than under their own system.'

CHAPTER 3: NATIONAL REGULATION AND ENFORCEMENT OF JURISDICTION CLAUSES

The treatment of jurisdiction clauses contained in international contracts of carriage by sea varies (at times significantly) from one maritime nation to the next, which hardly encourages international uniformity in the law, a highly desirable objective given the transnational nature of much of the shipping industry.

The gamut of national responses range from a complete and automatic statutory ban of foreign jurisdiction clauses that restrict the jurisdiction of local courts and limit the substantive and procedural rights of cargo interests, at one end of the spectrum, to a legislation-free virtually hands-off approach prioritizing commercial negotiations, economic growth, and certainty and expediency in the resolution of cargo claims, at the other end of the spectrum.

Other national responses fall somewhere in between these two extremes, where party autonomy, freedom of contract and comity between nations are balanced against the need to preserve and promote domestic judicial competence and authority, and protect cargo interests against possible abuses, especially in cases where cargo interests are third party consignees or bill of lading transferees with potentially weaker bargaining power and little or no choice in the matter. The balance is achieved, partly through statutory restrictions on the enforcement of foreign jurisdiction clauses imposed under national law, and partly through judicial interpretation (statutory and contractual), and/or the exercise of judicial discretion (in common law jurisdictions) to enforce or disregard foreign forum clauses,

depending on the circumstances of the case.²¹³ The following analysis aims to provide a summary of some of the principal national perspectives.

3.1 Australia's Bright Line Rule

According to **Section 11** of the **Australian Carriage of Goods by Sea Act 1991**, as amended by the **Carriage of Goods by Sea Regulations 1998 (No.2)**,²¹⁴ Australian State and Federal law is the proper law of the contract for all *export* shipments from Australia. Any agreement, such as an exclusive jurisdiction agreement, which attempts to restrict the jurisdiction of Australian courts in respect of outbound carriage, is of "no effect" by virtue of Subsection 11(2)(b).²¹⁵ Conversely, Australian law is not mandatory for all *import* shipments to Australia. That said, any agreement that attempts to restrict the jurisdiction of Australian courts in respect of inbound carriage is also of "no effect" by virtue of Subsection

²¹³ See generally Tetley *Marine cargo claims supra* note 38 at 1915-1920; see also Oland *supra* note 183.

²¹⁴ Section 11 of the Australian Carriage of Goods by Sea Act 1991 reads as follows:

- (1) All parties to:
- (a) A sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia [export]; or
 - (b) A non negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii) relating to such a carriage of goods; are taken to have intended to contract according to the laws in force at the place of shipment [Australian law applies].
- (2) An agreement (whether made in Australia or elsewhere) has no effect so far as it purports to:
- (a) Preclude or limit the effect of subsection (1) in respect of a bill of lading or document mentioned in that subsection; or
 - (b) Preclude or limit the jurisdiction of a court of the Commonwealth or of a State or a Territory in respect of a bill of lading or document mentioned in subsection (1); or
 - (c) Preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of:
 - i. A sea carriage document relating to the carriage of goods from any place outside Australia to any place in Australia [import]; or
 - ii. A non-negotiable document of a kind mentioned in sub-paragraph 10(1)(b)(iii) relating to such a carriage of goods [emphasis added].

²¹⁵ Laurent *supra* note 119 at 147 explains that:

[C]ombining the relevant law and jurisdiction for outbound goods ... ensures that Australian exporters are not exposed to carriers using a foreign law to contract out of their liability, [a] result that would probably be achieved anyway by virtue of the Hague-Visby Rules applying to carriage of goods from a contracting state.

11(2)(c). In short, Section 11 outlaws exclusive foreign jurisdiction clauses, regardless of the applicable law, when contained in contracts of carriage relating to the transport of goods to or from Australia.²¹⁶ It is, however, noteworthy that '[a] foreign court will not be under the same mandatory obligation to apply the statute. It will depend on whether the party asserting the application of the Australian statute can convince the foreign court that it

²¹⁶ *Hi-Fert Pty Ltd v United Shipping Adriatic Inc* (1998) 165 ALR 265 (Fed Ct) at 278. See eg *Brazin Ltd v Transarea China Ltd* [2007] FCA 610 (Fed CA): The first defendant in this case argued that the Australian courts lacked jurisdiction because of an exclusive Hong Kong jurisdiction clause. However, Allsop J of the Federal Court of Australia dismissed this argument, stating at para 3 of his judgment that 'Section 11 of the Carriage of Goods by Sea Act 1991 plainly avoids such an exclusive jurisdiction clause and ensures that courts in Australia have authority to hear cargo claims of this kind if brought by the plaintiff in Australia.' See also *Incitec Ltd v Alkimos Shipping Corporation* [2004] FCA 698 (another example where the Federal Court overruled the operation of an exclusive jurisdiction clause.)

In New Zealand, in accordance with Section 210(1) of the New Zealand Maritime Transport Act 1994, jurisdiction clauses contained in bills of lading, similar documents of title, or non-negotiable carriage documents that restrict the jurisdiction of New Zealand are also unenforceable. That said, as Laurent explains *ibid* at 137, the application of New Zealand law for international import and export contracts is *not* mandatory.

In South Africa, the common law *Eleftheria* principles and discretionary "strong cause" test to override *prima facie* valid and exclusive foreign jurisdiction clauses are generally followed (see eg *The Dien Danielson* 1982 (3) SA 534 (N); *The Spartan-Runner* 1991 (3) SA 803 (N); *The Achilles* 1992 (1) SA 324)), unless a claim is brought in accordance with s 3 (1) of the South African Carriage of Goods by Sea Act 1 of 1986, which states as follows:

3. Jurisdiction of courts

(1) Notwithstanding any purported ouster of jurisdiction, exclusive jurisdiction clause or agreement to refer any dispute to arbitration, and notwithstanding the provisions of the Arbitration Act, 1965 (Act 42 of 1965), and of section 7 (1) (b) [regarding the discretionary power of the court to stay proceedings] of the Admiralty Jurisdiction Regulation Act, 1983 (Act 105 of 1983), any person carrying on business in the Republic and the consignee under, or holder of, any bill of lading, waybill or like document for the carriage of goods to a destination in the Republic or to any port in the Republic, whether for final discharge or for discharge or for discharge for further carriage, may bring any action relating to the carriage of the said goods or any such bill of lading, waybill or document in a competent court in the Republic [emphasis added].

Thus, in cases where a cargo claimant (whether shipper, subrogated insurer, or otherwise) carries on business in the Republic, or where the claimant is a consignee or third party holder of a contract for the carriage of goods to a destination in the Republic, whether for final discharge or on-carriage, the foreign jurisdiction clause is of no effect. See generally Hofmeyr *supra* note 11 at 31-36.

should apply to the agreement.²¹⁷ Furthermore, Section 11 does not prohibit the application of the doctrine of *forum non conveniens* by Australian courts, which may grant a stay of proceedings at their discretion where it is proven that, on a balance of probabilities, the natural or more appropriate forum is elsewhere.

Kirby P in *The Krasnogrosk*²¹⁸ presents a number of persuasive reasons for the inclusion of protective provisions such as Section 11 of the Carriage of Goods by Sea Act 1991, which have been a part of Australian law ever since shortly after Federation, namely: considerations of national pride; the assertion of national jurisdiction, which had been a repeated phenomenon especially of United States jurisprudence for more than a century; the determination of the local legislature to protect the economic interests of local traders; a partial mistrust of overseas courts, tribunals and arbitrators and their laws; a reaction to the prevailing dominance of sea trade by certain foreign powers; and a recognition of the inconvenience and cost inherent in arbitrations [and by extension litigation] in distant places which might effectively put the determination of disputes on their merits beyond the pocket of local traders.²¹⁹

²¹⁷ Laurent *ibid* at 145. A court in the contractually stipulated forum may choose to ignore Australian COGSA or parallel proceedings in an Australian court, and may even attempt to interfere indirectly with the jurisdiction of the Australian court by granting an anti-suit injunction. See eg *Akai Pty Ltd v Peoples Insurance Co Ltd* [1998] 1 Lloyd's Rep 90, where Thomas J of the High Court of London ignored Australian COGSA and the decision rendered by Sheller JA of the High Court of Australia in *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 (High Ct Aus) (who held that the English law and jurisdiction clause were of no effect by virtue of s 11, and therefore the stay of Australian proceedings was declined), when he declined to stay a counterclaim in the English court (holding the parties to their bargain) and granted an anti-suit injunction.

²¹⁸ *Bulk Chartering & Consultants Australia Pty Ltd v T&T Metal Trading Pty Ltd* (1993) 31 NSWLR 18.

²¹⁹ *Ibid* at 22.

The question to ask, however, is whether these above-cited reasons continue to validate a nationalistic bright-line rule, especially given the current 'fertile soil of active global commerce, in a prevailing framework of freedom of international trade.'²²⁰ Or perhaps more significantly, even if Section 11 has some merit (because it protects small Australian traders who have weaker bargaining power, for instance), can it not also be said that its hard-line approach will only incite parallel proceedings, anti-suit injunctions and the non-recognition and enforcement of Australian judgments in foreign forums? If that is indeed the case, one must examine who really benefits from the application of these protectionist provisions.²²¹ Perhaps, as Laurent suggests, there is a more suitable (or less draconian) and commercially reasonable way of doing business.²²²

3.2 United Kingdom's Laissez-Faire Attitude and Strong Cause Test

When proceedings are brought in breach of a foreign jurisdiction clause, in cases where the EC Jurisdiction Regulation does not apply,²²³ English courts have the discretion to hold the parties to their bargain and grant a stay of proceedings, and they will usually exercise their discretion in favour of a stay, unless the claimant can prove that there are strong reasons why the exclusive agreement should nevertheless not be given effect.²²⁴ In other

²²⁰ J Allsop 'International commercial law, maritime law and dispute resolution: the place of Australia, New Zealand and the Asia Pacific region in the coming years' Frank Stuart Dethridge Memorial Address to the 33rd Annual MLAANZ Conference Sydney, 28 September 2006 (2007) 21 *A&NZ Mar LJ* 1 at 9.

²²¹ G Farnsworth 'Laws in conflict – OT Africa Line Ltd v Magic Sportswear Corp' MLAANZ Conference Paper, October 2006. Available at <http://www.nortonwhite.com/adm/new/documents/laws%20in%20conflict.pdf>. [Accessed 1 February 2011].

²²² Laurent *supra* note 119 at 158ff.

²²³ For more on the regulation and enforcement of jurisdiction clauses under the EC Jurisdiction Regulation, see Chapter 4.

²²⁴ *The Eleftheria* [1969] 1 Lloyd's Rep 237 at 242; *El Amria* [1981] 2 Lloyd's Rep 119 (CA) at 123-24; *The Sennar (No 2)* [1985] 1 Lloyd's Rep 521 (HL) at 527. Note that in cases where

words, under English law, foreign jurisdiction clauses are presumptively valid and, more often than not, they tend to be enforced.²²⁵

Interestingly enough, English courts have not always adopted a liberal pro-autonomy approach to the enforcement foreign jurisdiction clauses. The following oft-cited passage articulated by Lord Denning in *The Atlantic Star*²²⁶ bears witness to the “judicial chauvinism” of which the nationalistic English judiciary was often accused prior to its shift in attitude:

This right to come here [before the English courts] is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our Courts if he desires to do so. You may call this “forum shopping” if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of the service.²²⁷

But the decision of Brandon J (as he then was) in the ground breaking case *The Eleftheria*²²⁸ marked the beginning of a new way of thinking espoused by the English courts,²²⁹ and a new trend to stay English

there is an English forum selection clause, which the defendants seek to enforce by way of an anti-suit injunction in cases where there has been a breach of contract, there too the parties will usually be held to their bargain, unless the claimant proves a good or strong reason not to enforce the agreement. See *A/S D/S Svendborg v Wansa* [1996] 2 Lloyds Rep 559, affirmed [1997] 2 Lloyds Rep 87 (CA); *OT Africa Line Ltd supra* note 187: in both these English cases, an anti-suit injunction was granted. See generally Mandaraka-Sheppard *supra* note 46 at 260-63 (regarding the ‘breach of an English jurisdiction agreement falling outside the scope of the [EC Jurisdiction] Regulation’).

²²⁵ Peel ‘Exclusive jurisdiction agreements’ *supra* note 48 at 190. Examples of cases where clauses were enforced: *Donohue v Armco Inc* [2002] 1 Lloyds Rep 425 (HL); *The Chaparral* [1968] 2 Lloyd's Rep 158 (CA); *The Eleftheria ibid*; *The Sennar (No 2) ibid*; *British Aerospace Plc v Dee Howard Co* [1993] 1 Lloyds Rep 3; *Continental Bank NA v Aeakos Compania Naviera SA and Others* [1994] 1 WLR 588 (CA); *The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA); and *Akai Pty [UK] supra* note 217.

²²⁶ *The Atlantic Star* [1972] 2 Lloyds Rep 446 (CA).

²²⁷ *Ibid* at 451.

²²⁸ *Supra* note 224.

²²⁹ Per Lord Diplock in *The Abidin Daver* [1984] 1 Lloyds Rep 339 (HL) at 344:

My Lords, the essential change in the attitude of the English Courts to pending or prospective litigation in foreign jurisdictions that has been achieved step-by-step during the last 10 years as a result of successive decisions of this House... is that judicial chauvinism has been replaced by judicial comity...[emphasis added].

proceedings in favour of foreign jurisdictions agreements.²³⁰ The principles laid down in this judgment, which now constitute ‘the basic statement on the question,’²³¹ read as follows:

(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has the discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial [emphasis added].²³²

²³⁰ Tetley explains in *Marine cargo claims supra* note 38 at 1961, that ‘[a]t first this remarkable decision was not generally followed, but Brandon LJ himself repeated the principles in the Court of Appeal in *The El Amria* and his criteria laid down in that case have now been taken as the basic statement on the question.’ According to Fawcett in ‘Trial in England or abroad’ *supra* note 119 at 226:

[I]t is good commercial practice to insert a choice of jurisdiction clause in a contract; it provides the certainty which businessmen require as a prerequisite for good international business relations. To consistently allow jurisdiction in defiance of a foreign choice of jurisdiction clause would undermine this.

²³¹ Tetley *ibid.*

²³² *The Eleftheria supra* note 224. In Singapore, the same “strong cause” test of *The Eleftheria* is applied (*The Jian He* [2000] 1 SLR 8 (CA)), and the same factors are taken into account by a court when deciding whether to override a jurisdiction agreement (*Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1977] 2 MLJ 181 (CA); *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR 6 (CA)). For more on Singapore’s position regarding foreign exclusive jurisdiction agreements, see generally V Leow ‘Exclusively here to stay: the applicable principles to granting a stay on the basis of an exclusive jurisdiction clause’ 2004 *Singapore Journal of Legal Studies* 569-583. This is also true of Hong Kong (eg *Canavan v Battenfeld* [2010] 4 HKLRD 513), which is not surprising since its courts continue to follow the English Common Law tradition and apply common law cases from other jurisdictions as precedent. Not so in Nigeria and Canada, where legislation has departed from the old law based on *The Eleftheria*. Re Canada’s current position, see B Oland ‘Acceptance of jurisdiction and forum selection under Canadian maritime law’ 1 June

This list of factors taken into account by the courts is by no means exhaustive.²³³ Also, one of these factors alone may not be enough to constitute a strong cause tipping the balance in favour of an English court refusing to grant a stay.²³⁴ All the circumstances of the particular case must be taken into account. According to Mandaraka-Sheppard, generally speaking, to establish a strong cause or reason to refuse a stay of proceedings under English law, 'there must be either expert evidence in the English jurisdiction,²³⁵ or multiplicity of proceedings,²³⁶ or [sufficient] connecting factors such as those [listed in subsection (5) of *The Eleftheria* principles above, and those] described in *The Spiliada* decision [emphasis added].'²³⁷

2006. Available at <http://www.nsbs.org/librarydatabases> [Accessed 1 February 2011]. See also section 3.3 directly below. Re Nigeria's current position, see A A Olowoyin 'Forum selection disputes under bills of lading in Nigeria: a historical and contemporary perspective' (2004-2005) 29 *Tul Mar LJ* 257.

²³³ *Donohue v Armco supra* note 225 at para 24; Peel 'Exclusive jurisdiction agreements' *supra* note 48 at 189.

²³⁴ Mandaraka-Sheppard *supra* note 46 at 178; Peel *ibid* at 191. The deprivation of security for one's claim in the foreign court (eg *The Havhelt* [1993] 1 Lloyds Rep 523), the availability of factual evidence in England and inconvenience of having to take witnesses to the contractual forum (eg *The Makefjell* [1976] 2 Lloyds Rep 29), and a time bar in the contractual jurisdiction (eg *The MC Pearl supra* note 157) do not in themselves constitute strong causes to refuse a stay of proceedings. These are merely procedural advantages that an English court will *take into account* when deciding whether or not to override the jurisdiction agreement.

²³⁵ See eg *The El Amria supra* note 224: the fact that the expert evidence, which was central to the dispute, was more readily available in England than in Egypt, and it would have been hard to convey this expert evidence of a highly technical nature to an Egyptian judge through the use of an interpreter, was enough to convince the English court that, on balance, there was a strong cause for refusing to stay proceedings. See also *The Adolf Warski* [1976] 2 Lloyds Rep 241 (CA) at 244.

²³⁶ *The El Amria ibid*; *Citi-March v Neptune* [1997] 1 Lloyds Rep 72; *The MC Pearl supra* note 157.

²³⁷ *Supra* note 46 at 179. According to Peel, in 'Exclusive jurisdiction agreements' *supra* note 48 at 189:

[O]ne striking feature of *The Eleftheria* principles is the similarity between the particular factors which are to be taken into account when considering an application for a stay based on a foreign jurisdiction agreement and those... [taken into account] to stay or set aside jurisdiction in "ordinary" cases on the grounds of *forum non conveniens* [as per *The Spiliada supra* note 131, decided 18 years later].

See Section 2.4.2. For more on the connecting factors, see generally Peel *ibid* at 191-200.

Peel voices the following concerns regarding the presumptive validity of foreign jurisdiction clauses under English law and the court's discretion to override agreements in cases of abuse or unfairness:

[t]he negotiation of the jurisdiction clause, or lack of it [in the case of third party consignees for example], or the relative bargaining position of the parties has rarely seemed to concern the English courts....It could be argued that, in any case where the real concern of the courts is the lack of any negotiation between the parties, this problem should be considered in its own right by considering whether the clause is properly part of the contract or unenforceable. Instead, there is some evidence that it may occasionally influence the courts in the exercise of their discretion in accordance with *The Eleftheria* principles.... Since the argument against the courts retaining a discretion whether to stay their proceedings is based on the principle that the parties should be held to their agreement, it should be a relevant factor whether the jurisdiction clause reflects a genuine agreement between the parties.... Even if the courts are prepared to embark on an assessment of the fairness of a foreign jurisdiction clause, based on all the circumstances, including the other terms of the contract, it is difficult to envisage how such an assessment might sensibly be made. It seems hardly surprising, therefore, that the English courts are happy to proceed on the general presumption that foreign jurisdiction clauses are substantively fair [emphasis added].²³⁸

Perhaps, in light of the above concerns, instead of leaving the question of enforceability of *prima facie* valid foreign jurisdiction clauses entirely at the English courts' discretion in cases where the EC Jurisdiction does not apply, it might be more sensible to implement statutory safeguards which provide greater assurance of transparency in proceedings and fairness to cargo interests, without outright banning the use of these commercial clauses. It is unlikely, however, that such legislation will ever transpire since 'English contract law still strongly adheres to the ideal of

²³⁸ *Ibid* at 220-21. According to Sparka *supra* note 42 at 137, 'there do not seem to be any judgments invalidating jurisdiction clauses for contractual reasons which are related to the lack of bargaining power of one party or the unfairness of the contractually chosen forum.' He does, however, go on to explain that contractual grounds such as unconscionability and economic duress may be invoked to invalidate unfair clauses, though they are both difficult to prove.

freedom of contract'²³⁹ and England remains a strong carrier nation and popular forum for dispute resolution in standard form maritime contracts.

3.3 Canada's Statutory Restriction on Party Autonomy and How the Federal Court has Muddied the Waters

Canada is primarily a shippers' nation. Therefore, it seems only fitting that its Federal Legislature should prioritize safeguarding the rights of cargo interests through protectionist legislation. Yet, ever since the elimination of Section 5 of the Water Carriage of Goods Act 1910,²⁴⁰ and up until the coming into force of the Marine Liability Act²⁴¹ on August 8, 2001, no such statutory protection was in place. Even now, despite the Legislature's best efforts, the statutory protection is rendered virtually toothless as a result of recent judgments handed down by the Federal Court of Appeal. A review of the current legislation and relevant case law is de rigueur.

Until 2001, 'the practice of the Canadian courts closely resemble[d] that of the English courts':²⁴² the common law *Eleftheria* principles and discretionary "strong cause" test was the legal standard to override *prima facie* valid and exclusive forum selection clauses contained in contracts of carriage by sea,²⁴³ 'leading to an exodus of good Canadian maritime work to

²³⁹ *Ibid.*

²⁴⁰ Section 5 of the Water Carriage of Goods Act 1910 provided that 'any stipulation or agreement purporting to oust or lessen the jurisdiction of any court having jurisdiction at the port of loading in Canada in respect of the bill of lading or document shall be illegal, null and void, and of no effect.' This provision was not reinstated in the Water Carriage of Goods Act 1936 or in any subsequent Canadian maritime legislation thereafter.

²⁴¹ SC 2001, c 6. This recent legislation re-enacts provisions of the Hague-Visby Rules (with some modifications), with a view that these may eventually be replaced with provisions of the Hamburg Rules.

²⁴² Peel 'Exclusive jurisdiction agreements' *supra* note 48 at 213.

²⁴³ See eg *ZI Pompey Industrie v ECU-Line NV* [2003] 1 SCR 450 (Supreme Court of Canada). The claim in this case arose prior to the effective date of the Marine Liability Act, 2001, which the court decided did not have retroactive effect; therefore the Supreme Court of Canada declared *The Eleftheria* "strong cause" assessment to be the correct test.

other jurisdictions.’²⁴⁴ However, the enactment of the Marine Liability Act 2001, and in particular Section 46, changed the law.

Section 46 of the Marine Liability Act, 2001,²⁴⁵ which is based on but not identical to Articles 21 (on jurisdiction) and 22 (on arbitration) of the Hamburg Rules,²⁴⁶ gives cargo claimants *the option* to institute proceedings in Canada in a number of particular instances despite the foreign exclusive jurisdiction clause in the contract of carriage, where any one of the circumstances under subparagraphs (a), (b) or (c)) are met, and the tribunal in Canada would be competent,²⁴⁷ that is to say it ‘would have jurisdiction if the contract had referred the claim to Canada.’²⁴⁸

²⁴⁴ Oland ‘Acceptance of jurisdiction’ *supra* note 232 at 1.

²⁴⁵ Section 46 of the Marine Liability Act reads as follows:

- (1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant *may* institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where
- (a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;
 - (b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or
 - (c) the contract was made in Canada.

- (2) Notwithstanding subsection (1), the parties to a contract referred to in that subsection may, after a claim arises under the contract, designate by agreement the place where the claimant may institute judicial or arbitral proceedings.

²⁴⁶ *OT Africa Line Ltd v Magic Sportswear Corp* [2006] FCA 284 (Fed CA) at para 63 (per Evans JA):

Section 46 is similar, but no identical, to Article 21 of the Hamburg Rules. For example, Article 21 permits a claimant to commence proceedings in a forum on the ground that the defendant has a place of business in the jurisdiction but, unlike section 46, only if that is the defendant’s principal place of business or, failing that, habitual residence.

Note that the Hamburg Rules have been adopted under the Marine Liability Act, 2001, though they have not been proclaimed in force. Section 44 of the Act states: ‘The Minister shall, before January 1, 2005 and every five years afterwards, consider whether the Hague-Visby Rules should be replaced by the Hamburg Rules and cause a report setting out the results of that consideration to be laid before each House of Parliament.’ Note too that, as will be discussed in Chapter 5, in situations where the Hamburg Rules apply to the contract of carriage, the cargo claimant will have the *option* to sue in any of the locations stipulated under Article 21 of the Hamburg Rules.

²⁴⁷ *OT Africa Line* *ibid* at paras 26, 56 and 65; W Tetley ‘Jurisdiction and arbitration clauses in carriage of goods by sea in Canada – the new law’ (paper presented to the Carriage of

It does not, however, *prohibit* the effect of jurisdiction clauses in all export and import situations, unlike the COGSA statutes of Australia and New Zealand (for jurisdiction clauses only),²⁴⁹ nor does it *direct* a court in Canada that it *must* exercise its jurisdiction once one of the enumerated connecting factors is present. It merely gives the litigant the choice to sue in Canada.²⁵⁰

Parliament's intent in enacting Section 46 of the Marine Liability Act, 2001 was to provide a "long arm" statute allowing for Canadian litigation in particular circumstances, without the need for stay of proceedings applications.²⁵¹ In other words, Section 46 was meant to override the Federal

Goods by Sea Committee of the U.S. Maritime Law Association, New York City, May 3, 2006) at 2. Available at <http://www.mcgill.ca/maritimelaw/maritime-admiralty/> [Accessed on 1 February 2011].

²⁴⁸ *OT Africa Line* *ibid* at para 26.

²⁴⁹ Tetley 'Jurisdiction and arbitration clauses in carriage of goods' *supra* note 247 at 16:

It is interesting that the Nordic Countries [Sweden, Denmark, Finland, and Norway – all shipowning countries], Australia, New Zealand, South Africa and China have adopted more or less similar jurisdiction and arbitration provisions. The Canadian decisions in *Magic Sportswear*, in respect of sect 46(1), parallel the law as it is understood in those countries.

²⁵⁰ Oland 'Acceptance of jurisdiction' *supra* note 232 at 7.

²⁵¹ Oland 'The premature demise of section 46' *supra* note 183 at 14-16.

N Doyle 'Marine Liability Act, second reading, Canadian parliamentary debates online, House Hansard, 37th Session'. Available at

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=37&Ses=1&DocId=2332110#LINK198> [Accessed on 1 February 2011]:

One change that sparked debate in committee was the provision of clause 46 that would extend Canada's legal jurisdiction to deal with the cargo claims of Canada's importers and exporters. Representatives of the shipping lines did not want Canadian jurisdiction specified, preferring instead to have clauses on arbitration and judicial proceedings in their contracts of carriage.

Indeed a culture has grown up that sees most of these disputes resolved in British boardrooms and British courts. That suits the big shipping lines and the British legal profession just fine. However I would submit that a small Canadian exporter would be badly outclassed going up against the big boys in that kind of a setting, so we are supportive of asserting Canadian jurisdiction [emphasis added]

According to Y Baatz in 'An English jurisdiction clause does battle with Canadian legislation similar to the Hamburg Rules' 2006 *LMCLQ* 143 at 145, '[t]he rationale for s 46 included giving Canadian importers and exporters the right to pursue cargo claims in Canada and an attack on what was perceived to be a monopoly of the UK courts over such claims.'

Court's discretionary power under **Section 50 of the Federal Courts Act**²⁵² to enforce foreign exclusive jurisdiction clauses and stay proceedings in cases where the claimant opted to commence action in Canada in accordance with this provision.²⁵³

And yet, as Oland explains, it would appear that despite this clearly stated purpose and direction, a recent thread of Federal Court decisions²⁵⁴ (rendered by Justices lacking maritime expertise according to the author) have watered down the effect of the protectionist provision and confused the situation by 'tak[ing] us back to the old *forum non-conveniens* arguments and stay of proceedings applications that took up so much court time in prior cases,'²⁵⁵ in other words by incorrectly importing the law of *forum non conveniens* into the interpretation of Section 46(1) of the Marine Liability Act, 2001.

²⁵² RSC 1985, c F-7. Section 50(1) of the Federal Courts Act reads as follows:

The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter
 (a) on the ground that the claim is being proceeded with in another court or jurisdiction; or
 (b) where for any other reason it is in the interest of justice that the proceedings be stayed.

²⁵³ *ZI Pompey Industrie supra* note 243 at paras 37 and 38:

Section 46(1) of the Marine Liability Act, which entered into force on August 8, 2001, has the effect of removing from the Federal Court its discretion under s.50 of the Federal Court Act to stay proceedings because of a forum selection clause where the requirements of s.46 (1)(a), (b) or (c) are met.... Indeed, s.46 (1) would appear to establish that, in select circumstances, Parliament has deemed it appropriate to limit the scope of forum selection clauses by facilitating the litigation in Canada of claims related to the carriage of goods by water having a minimum level of connection with this country [emphasis added].

See also *Incremona-Salerno Marmi Affini Siciliani snc v The Castor* [2002] FCA 479 (Fed CA) at para 13; *Tetley Marine cargo claims supra* note 38 at 1977.

²⁵⁴ *Ford Aquitaine Industries SAS v The Canmar Pride* [2005] FC 431 (Fed Ct); *OT Africa Line supra* note 246; *Mitsui OSK Lines Ltd v Mazda Canada Inc ("The Cougar Ace")* [2008] FCA 219 (Fed CA).

²⁵⁵ 'Acceptance of jurisdiction' *supra* note 232 at 16.

Indeed, in *The Cougar Ace*, the most recent case on topic delivered by the Federal Court of Appeal, Evans JA states:

Subsection 46(1) merely gives Canadian litigants a chance to choose Canada initially, where heretofore they were automatically barred from doing so by the usual jurisdiction clauses employed in most shipping contracts. The wording of the legislation and the jurisprudence based on it make it clear that subsection 46(1) does not grant Canadian courts jurisdiction; it only allows Canadian courts, if chosen by the plaintiff pursuant to subsection 46(1), to consider whether Canada is the most appropriate forum employing the usual *forum non conveniens* factors [emphasis added].²⁵⁶

In order to remedy this confusing state of affairs, he suggests rewriting Section 46 to make clear that where a claimant establishes one of the enumerated connecting factors, the court *must* exercise its statutory jurisdiction, and the foreign jurisdiction clause shall be declared null and void and of no effect. In the meantime, he expresses the hope that the next time the Federal Court has the occasion to re-interpret Section 46, it will do so correctly, that is to say in the way it was intended, by 'mov[ing] away from the *forum non conveniens* catalogue of arguments.'²⁵⁷ Of course, this proposed legislative overhaul may do nothing more than continue to discourage international comity and encourage parallel proceedings, anti-suit injunctions and the non-recognition or enforcement of Canadian judgments in foreign forums.²⁵⁸

²⁵⁶ *The Cougar Ace supra* note 254 at para 22.

²⁵⁷ Oland 'The premature demise of section 46' *supra* note 183 at 11.

²⁵⁸ One cannot help but wonder whether the Federal Court's reluctance to overrule foreign exclusive jurisdiction clauses in cases such as *OT Africa* and *The Cougar Ace* intimates an attempt by the Court to remedy the international incongruence resulting from lack of comity given by foreign courts, in particular English ones, refusing to recognize protectionist provisions such as s 46 of the Marine Liability Act, 2001 in Canada and Section 11 of the Carriage of Goods by Sea Act, 1991, in Australia, as they are deemed to go too far and discourage party autonomy in commercial contracts. See J Allsop in 'International maritime arbitration: legal and policy issues', Paper presented to World Maritime University Malmö 14 May 2007 and to the Australian Maritime and Transport Arbitration Commission, Sydney 4 December 2007 at 22. See eg *Akai Pty Ltd [UK] supra* note 217; *OT Africa Line Ltd [UK] supra* note 187. In both cases, protective legislation was ignored, and anti-suit injunctions

3.4 Domestic Discord in the Regulation and Enforcement of Jurisdiction Clauses in the United States

The United States has experienced an uneven history in its treatment of foreign jurisdiction clauses in contracts of carriage by sea.²⁵⁹ As the birthplace of the Harter Act, the first legislation to protect cargo interests by imposing minimum standards of conduct on carriers, it seems hardly surprising that ‘American hostility towards forum selection agreements was ubiquitous.’²⁶⁰ And yet, as Marcus explains:

Admiralty courts from as early as the nineteenth century have enforced [jurisdiction] clauses in cases between aliens... as part of a doctrinal response to practical problems created by the intersection of a mobile litigant pool with an expansive jurisdictional grant.²⁶¹

Ever since 1967, and until 1995, most US admiralty courts have generally followed Judge Friendly’s ruling in the *Indussa*,²⁶² according to which choice of forum clauses contained in contracts of carriage are invalid and “of no effect” as contrary to Section 3(8) of the United States Carriage of Goods by Sea Act.²⁶³ The learned Justice explained that:

From a practical standpoint, to require an American plaintiff to assert his claim only in a distant court lessens the liability of the carrier quite

were granted in England to restrain proceedings in Australia (in *Aka*) and Canada (in *OT Africa*).

²⁵⁹ M Sturley ‘Overruling Sky Reefer in the international arena: a preliminary assessment of forum selection and arbitration clauses in the new UNCITRAL transport law Convention’ (2006) 37 *JMLC* 1. See generally D Marcus ‘The perils of contract procedure: a revised history of forum selection clauses in the Federal Courts’ (2007-2008) 82 *Tul LR* 973; C Hooper ‘Choice of forum clauses and forum non conveniens’, 2006. Available at <http://www.nsbs.org/librarydatabases> [Accessed on 1 November 2010]; Tetley *Marine cargo claims supra* note 38 at 1935-58.

²⁶⁰ PJ Borchers ‘Forum selection agreements in the Federal Courts after Carnival Cruise: a proposal for congressional reform’ (1992) 67 *Wash L Rev* 55 at 60.

²⁶¹ Marcus *supra* note 259 at 993-94.

²⁶² *Indussa Corp v SS Ranborg* 377 F 2d 200 (2d Cir 1967) (CA).

²⁶³ Carriage of Goods by Sea Act of 1936, Title 46 United States Code §1303(8):

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties or obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

substantially, particularly when the claim is small. Such a claim puts “a high hurdle” in the way of enforcing liability, and thus is an effective means for carriers to secure settlements lower than if cargo [owners] could sue in a convenient forum [citation omitted].²⁶⁴

It is true that by its 1972 decision in *The Bremen*,²⁶⁵ the US Supreme Court ruled that jurisdiction clauses ‘are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be “unreasonable” under the circumstances.’²⁶⁶ But, that was a towing contract case, and as is commonly acknowledged, *The Bremen* ruling does not apply to cargo claims, that is to say to cases in which the US COGSA is applicable.²⁶⁷

Then, the tides turned in the *Sky Reefer*,²⁶⁸ when the Supreme Court overruled *Indussa* and held that in the absence of legislation specifically stipulating otherwise, foreign forum selection clauses are presumptively valid and enforceable.²⁶⁹ According to Judge Kennedy, the mere fact that the cargo claimant was American and the arbitration clause, Japanese was not enough to establish that the provision was unreasonable,

²⁶⁴ *Indussa supra* note 262 at 203.

²⁶⁵ *The Bremen v Zapata Off-Shore Co* 407 US 1 (1972) (US Supreme Ct).

²⁶⁶ *Ibid* at 10.

²⁶⁷ Schoenbaum *supra* note 15 at 592; R Goldberg ‘Attempts to avoid foreign forum selection clauses post *Vimar Seguros v M/V Sky Reefer*’ in The Fourth International Conference on Maritime Law, Conference Papers, Session 6, October 24-26 2000, Shenzhen, China at 658. Contra Sparka *supra* note 42 at 128. The US COGSA apply ‘to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade [emphasis added]’ (46 USC App § 1312) and according to Schoenbaum *ibid* ‘to contracts of carriage of goods between US ports if the parties expressly so stipulate in the bill of lading.’

²⁶⁸ *Vimar Seguros y Reaseguros SA v M/V Sky Reefer* 515 US 528 (1995) (US Supreme Ct).

²⁶⁹ In actual fact, the *Sky Reefer* case dealt with a foreign arbitration clause contained in a bill of lading, but because the Court declared *ibid* at 534 that ‘foreign arbitration clauses are but a subset of foreign forum selection clauses in general,’ this decision has consistently been upheld in cases involving forum selection clauses contained in bills of lading. See eg *Mitsui & Co (USA) v M/V Mira* 111 F 3d 33 (5th Cir 1997) (CA); *Fireman’s Fund supra* note 166; *Talatala v Nippon Yusen Kaisha Corp* 974 F Supp 1321 (D Hawaii 1997) 1.

and that it lessened or weakened the party's ability to recover.²⁷⁰

Furthermore, and most importantly, he found that COGSA 3(8) was never meant to be interpreted so as to apply to jurisdiction and arbitration clauses:

The liability imposed on carriers under Cogsa §3 is defined by explicit standards of conduct, and it is designed to correct specific abuses by carriers...Nothing in [Section 3(8)] suggests that the statute prevents the parties from agreeing to enforce] substantive obligations, such as the obligation to exercise due diligence to make the ship seaworthy and properly man, equip, and supply the ship before and at the beginning of the voyage] in a particular forum. By its terms it establishes certain duties and obligations, separate and apart from the mechanisms for their enforcement [emphasis added].²⁷¹

Then, in a clear attempt to promote international comity and commercial practice, he went on to advise that:

If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements. That concern counsels against construing COGSA to nullify foreign arbitration clauses because of inconvenience to the plaintiff or insular distrust of the ability of foreign arbitrators to apply the law.²⁷²

²⁷⁰ *M/V Sky Reefer* *ibid* at 536-37 and 540.

²⁷¹ *M/V Sky Reefer* *ibid* at 535. Judge Stevens, in his dissenting opinion at 543ff, reminds the Court that historically, jurisdiction clauses contained in bills of lading (which he calls contracts of adhesion) were one-sided clauses inserted by British shipowners to force shippers to settle disputes in London, in accordance with English law, which tended to uphold exemption of liability clauses. Eventually this imbalance led to the creation of the Harter Act, and COGSA 1936 thereafter. He then links the imbalance or unequal bargaining power to 3(8) Cogsa, citing precedent to support his position (including *Indussa*), and explains how forum clauses impose prohibitive costs on shippers, which in effect lessens or relieves the carrier's liability.

M Sturley 'Proposed amendments to the Carriage of Goods by Sea Act' (1996) 18 *Hous J Int'l L* 609 at 647:

Although there is substantial support in COGSA's legislative history for the view that subsection 3(8) was never intended to cover forum selection clauses, it is equally clear that the international convention does not require the enforcement of forum selection clauses. The delegates simply left the issue to national law. Some nations responded to this situation by enacting an explicit statute to prohibit forum selection clauses in bills of lading; other nations simply left the issue to be determined by general principles. Either course is consistent with the Hague Rules.

²⁷² *M/V Sky Reefer* *ibid* at 539.

Thus, as a result of this landmark decision, jurisdiction clauses in contracts of carriage are presumed valid and enforceable under US law, much like UK law, even if contained in boilerplate terms and conditions written on the back of bills of lading. And since the *Sky Reefer*, in many (though certainly not all)²⁷³ cargo claim disputes relating to foreign forum selection agreements, jurisdiction clauses have been upheld and motions to dismiss claims for improper venue²⁷⁴ have been granted.²⁷⁵

This arguably one-sided outcome, bemoaned by American cargo advocates, influenced the US Maritime Law Association COGSA Committee in its crafting of draft provisions on jurisdiction, which formed part of the proposed amendments to COGSA, commonly referred to as COGSA 1999.²⁷⁶

For the most part, **Section 7(i)(2) COGSA 1999**²⁷⁷ mirrors the Hamburg Rules,²⁷⁸ in that it gives claimants to which COGSA apply²⁷⁹ the

²⁷³ See eg *Nippon Fire & Marine Ins Co v M/V Spring Wave* 92 F Supp 2d 574 (EDLA 2000). According to Tetley in *Marine cargo claims supra* note 38 at 1948-49 and 1951:

[T]he party challenging the contractually agreed foreign venue has a heavy burden of proof to make in order to convince the American court not to enforce the clause because of its incompatibility with sect. 3(8) of U.S. COGSA (46 U.S.C. Appx. 1303(8)). Although such efforts usually fail, they can still be successful on occasion.... One point is very clear in this regard, however: mere speculation that the foreign law as applied by the foreign court may reduce the carrier's liability below what COGSA guarantees is inadequate; there must be proof positive that the foreign court, apply its law, will in fact lessen the carrier's responsibility below the COGSA threshold.

²⁷⁴ In accordance with Rule 12(b)(3) of the Federal Rules of Civil Procedure, 2009.

²⁷⁵ See eg B Brogen et al (eds) 'Forum selection clause survey 2007-2008' (2008) 33 *Tul Mar LJ* 661. In this survey alone, most forum selection agreement disputes were resolved in favour of enforcing the jurisdiction clauses.

²⁷⁶ Carriage of Goods by Sea Act of 1999, 106th Cong, 1999 - not in force.

²⁷⁷ Section 7(i)(2) COGSA 1999 reads as follows:

Notwithstanding a provision in a contract of carriage or other agreement to which this subsection applies that specifies a foreign forum for litigation or arbitration of a dispute to which this Act applies, a party to the contract or agreement, at its option, may commence such litigation or arbitration in any appropriate forum in the United States if one or more of the following conditions exists:

option to commence suit in a number of appropriate and reasonable American locations, notwithstanding any foreign forum provision contained in the contract of carriage. Of course, nothing precludes parties from agreeing to resolve their dispute by litigation in a foreign forum if such agreement is executed *after* the claim has arisen.²⁸⁰

Thus, it seems that this protective legislation may signal the way ahead for the United States. But, as Bursanescu explains, though the COGSA 1999 amendment proposal was adopted by the MLA in 1996, it has yet to receive universal support in American maritime industry.²⁸¹ She adds that 'even in legal circles, the project has received lukewarm reception both from US professionals and foreign ones.'²⁸² In any case, this domestic bill has been put on hold, while the world shifts its focus towards the highly

A. The port of loading or the port of discharge is, or was intended to be, in the United States.

B. The place where the goods are received by a carrier or the place where the goods are delivered to a person authorized to receive them is, or was intended to be, in the United States.

C. The principal place of business or, in the absence thereof, the habitual residence of the defendant is in the United States.

D. The place where the contract was made is in the United States.

E. A forum specified for litigation or arbitration under a provision in the contract of carriage or other agreement is in the United States [emphasis added].

²⁷⁸ One noted difference is that whereas the Hamburg Rules apply "tackle to tackle", the Cogsa 1999 apply "door to door" (to include circumstances of multimodal transport), which is also true of the Rotterdam Rules. This broadens the scope of optional jurisdictions to commence suit to include a place (versus merely a port) of receipt and delivery.

²⁷⁹ As mentioned, US COGSA apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade.

²⁸⁰ Section 7(i)(3) COGSA 1999.

²⁸¹ *Supra* note 47 at 14. W Tetley 'Professor Tetley's comments on Senate COGSA '99 (sixth US Senate Staff Working Draft Bill of September 24, 1999)' 1 February 2001.

Available at <http://www.mcgill.ca/maritimelaw/maritime-admiralty/tetley-cogsa> [Accessed on 1 February 2011]:

[Cogsa 99 was] [p]repared by the MLA Committee on the Carriage of Goods ... and approved at the AGM of the US MLA in New York on May 3, 1996. [It was then] presented by the MLA to the US Senate... The original Senate COGSA was subsequently amended several times by the US MLA, working in consultation with the staff of the US Senate. "Senate COGSA 1999" ... is the sixth re-write by the Senate staff of the draft Carriage of Goods by Sea Bill, dated September 24, 1999.

²⁸² Bursanescu *ibid.*

anticipated Rotterdam Rules, which have to date been signed by the United States and 22 other nations.

3.5 France's Protection Against Unequal Bargaining Power and the "Special Acceptance" of Jurisdiction Clauses by Third Parties

Bonassies and Scapel acknowledge that even though the uniform rules under the Hague and Hague/Visby Rules apply to all international contracts of carriage subject to the conventions alike, French courts tend to treat carriers much more harshly under the Rules than their English counterparts, which might explain a carrier's incentive to send claims arising under the contract of carriage elsewhere.²⁸³

In French cargo claims to which the European Jurisdiction Regulation does not apply,²⁸⁴ French internal law will govern the regulation and enforcement of jurisdiction clauses or "clauses attributive de juridiction" contained in contracts of carriage. Under the French law, and other civil law jurisdictions such as Germany, a court does not exercise judicial discretion to stay or dismiss proceedings on grounds of *forum non conveniens* or breach of a jurisdiction clause.²⁸⁵ Rather, a French court either has *compétence* (ie jurisdiction) under the codified rule or not.

As is the case under the Hague and Hague/Visby Rules, neither the domestic **Law of June 18, 1966** nor **article 54 of the Decree of December 31, 1966**, both of which comprise French rules on jurisdiction

²⁸³ *Supra* note 99 at 794 para 1152.

²⁸⁴ For example, where neither party to the contract is domiciled in a Member State, or where both parties to the contract are domiciled in France 'even if there is an international element to the contract' (Tetley *Marine cargo claims supra* note 38 at 1983). See Chapter 4.

²⁸⁵ According to Sparka *supra* note 42 at 138, 'even though introduction of the *forum non conveniens* doctrine or similar discretionary rules has occasionally been suggested [in Germany], it is not surprising that [it] remains unknown to German civil procedure.'

applicable to contracts of carriage, expressly prohibit the use of foreign jurisdiction clauses. In the absence of specific rules, the common law rules (including rules of civil procedure) govern the validity and enforceability of jurisdiction clauses.²⁸⁶

The general rule under French civil procedure is that a jurisdiction clause which infringes upon the territorial jurisdiction of French courts²⁸⁷ is deemed unwritten, with the exception that ‘a [foreign] jurisdiction clause validly agreed upon by two *commerçants* (merchants) will be recognized by a court which has jurisdiction to hear the case, in which case the [French] court will declare itself *incompétente* (without jurisdiction).’²⁸⁸ This rule is codified at **Article 48** of France’s **Nouveau code de procédure civile (NCPC)**,²⁸⁹ which stipulates that:

Any clause that infringes upon the rules of territorial jurisdiction, whether directly or indirectly, is deemed unwritten, unless the clause has been agreed upon by parties acting in a commercial capacity and has been clearly specified in the agreement (translation)[emphasis added].

Since contracts of carriage are typically concluded between commercial parties, issues of enforceability under French law generally

²⁸⁶ Bonassies and Scapel *supra* note 99 at 794-95 para 1153.

²⁸⁷ “Competent” territorial jurisdictions under French law include French courts located in any one of the following forums:

- (a) French port of loading or discharge (article 54 of the Decree of December 31, 1966);
- (b) defendant’s domicile (article 42 NCPC); and
- (c) wherever merchandise is delivered (article 46 NCPC).

See generally Bonassies and Scapel *ibid* at 790-92.

²⁸⁸ Tetley *Marine cargo claims supra* note 38 at 1978.

²⁸⁹ The New Code of Civil Procedure (translation) established by Decree No 75-1123 of December 5, 1975.

hinge on concerns over the formal or substantive validity of jurisdiction clauses contained in bills of lading or other transport documents.²⁹⁰

Issues of form are pretty standard (as discussed in Chapter 2) and no longer present a particular issue under French law, especially now that the law conforms with internationally recognized customs and practice of maritime law,²⁹¹ which undoubtedly has a lot to do with the influence of European law,²⁹² and the fact that the Cour de Cassation has now decided that the requirements of Article 48 NCPC no longer apply to *international* contracts, including bills of lading.²⁹³

The real issue under French law centres on substantive validity, that is to say the quality of consent and acceptance of jurisdiction agreements by shippers and, in particular, third party consignees or transferees of bills of lading.

In France, the rule used to be relatively straightforward: once the shipper signed the bill of lading, it bound not only itself, but also the third party consignee or transferee to all rights and obligations arising under the bill, which included any stipulation restricting jurisdiction.²⁹⁴ That is no longer

²⁹⁰ See generally M Remond-Gouilloud 'Des clauses de connaissements maritimes attribuant compétence à une juridiction étrangère: essai de démystification' (1995) 549 *DMF* 339.

²⁹¹ Bonassies and Scapel *supra* note 99 at 796-97. Case in point, boilerplate clauses on the back of bills are no longer invalid simply because they are in small print.

²⁹² Remond-Gouilloud *supra* note 290 at 344-45.

²⁹³ Cour de Cassation, 17 December, 1985 (1986) *Revue critique de droit privé* 537, note H Gaudemet-Tallon (re international contracts generally); Cour de Cassation, 25 November, 1986 (1987) *DMF* 706 (re international bills of lading). See also Bonassies and Scapel *supra* note 99 at 797; Tetley *Marine cargo claims supra* note 38 at 1980.

²⁹⁴ Bonassies and Scapel *ibid* at para 1157; Tetley *ibid* at 1986:

It used to be held in France that the shipper, in concluding the bill of lading with the carrier, was deemed to represent the consignee through an implicit mandate, so that

the case as a result of the decision rendered by the Cour de Cassation in *The Nagasaki*.²⁹⁵ Today, a jurisdiction clause will be enforceable against a shipper (but only a shipper) if accepted by that shipper no later than when the contract of carriage is concluded.²⁹⁶ In terms of enforceability against third parties, however, it is an altogether different story.²⁹⁷

Under the English common law, and European Law,²⁹⁸ a third party holder of a bill of lading (whether consignee or transferee) continues to be vested in all the same rights and subject to all the same obligations as the shipper under the contract of carriage, including the forum selection clause, as soon as property in the goods passes or transfers to the third party, despite there being no privity of contract between carrier and third party, and despite the lack of express consent and acceptance of contractual terms. But under French law, the courts' position vis-à-vis the enforceability of jurisdiction clauses against third parties is far more nuanced and uncertain.²⁹⁹

the latter was, or was deemed to be, bound by the terms of the bill, including the jurisdiction clause.

²⁹⁵ (1995) *DMF* 209, Court de Cassation, 29 November 1994, note P Bonassies.

²⁹⁶ Bonassies and Scapel *supra* note 99 at para 1158. Note that by the Decree of 12 November 1987, the signature of a shipper is no longer required (which brings the French law in line with international commercially accepted practice).

²⁹⁷ See generally E Du Pontavice 'Sur la clause attributive de juridiction d'un connaissance venu de Chine' (1994) 544 *DMF* 739; Y Tassel 'La forme en laquelle doit être convenue, en matière internationale, une clause attributive de juridiction et la liberté d'interprétation des juges du fond s'agissant d'une clause rédigée en une langue étrangère' (1995) 548 *DMF* 289; Remond-Gouilloud *supra* note 290; Bonassies and Scapel *ibid* at 798-805; Tetley *Marine cargo claims supra* note 38 at 1986-87.

²⁹⁸ See eg *The Tilly Russ* [1984] ECR I-2417, Case C-71/83; *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumphy SpA* [1999] ECR I-1597, Case C-159/97.

²⁹⁹ Note that this is not true in Germany, where, according to Sparka *supra* note 42 at 177, 'it is commonly held that a consignee is bound by a jurisdiction agreement contained in a bill of lading when he accepts the goods. That said '[a]greements between the carrier and shipper which are not set out in the bill of lading ... do not affect the consignee.'

The Commercial Court of the Cour de Cassation in *The Nagasaki* distinguished acceptance of consignees and transferees from that of shippers, holding that in order to be enforceable against third parties, jurisdiction clauses need to be *expressly* accepted by them no later than when they take delivery of the cargo, whereby adhering to the contract of carriage.³⁰⁰ A year later, in *The Chang Ping*,³⁰¹ the Court elaborated on its position in *The Nagasaki* by stating that the mere possession of the bill of lading did not in and of itself constitute proof of acceptance. And then again, in 1998, in the case *The Silver Sky*,³⁰² the Court further held that “accomplishment” of the bill (in other words presentation of the bill to the carrier in exchange for delivery of goods) also did not suffice to constitute the “special acceptance” required.³⁰³ Thus, it seemed settled that under French law, jurisdiction clauses required some form of “special acceptance” to be determined ‘by a case-by-case analysis of the facts in each suit,’ in order to be enforceable against third parties, whether consignee, transferee of subrogated insurer.³⁰⁴

But then, in 2001, the First Civil Chamber of the Cour de Cassation in *The Bonastar II*³⁰⁵ adopted a different view, ruling that foreign jurisdiction clauses *did* in fact form part of the “economy” of international contracts of

³⁰⁰ *Supra* note 295. Tetley explains in *Marine cargo claims supra* note 38 at 1987 that ‘because [jurisdiction clauses] are “derogatory” of the general civil law and not an integral part of the “economy” of the contract of carriage, [they] must be expressly accepted by the consignee or endorsee’ to be enforceable.

³⁰¹ (1996) *DMF* 393, Cour de Cassation, 16 January 1996, note P Bonassies.

³⁰² (1999) *DMF* 1007, Cour de Cassation, 8 December 1998, note P Nicolas.

³⁰³ Tetley *Marine cargo claims supra* note 38 at 1987.

³⁰⁴ *Ibid*; Bonassies and Scapel *supra* note 99 at 801 para 1162.

³⁰⁵ (2001) *DMF* 994, Cour de Cassation, 12 July 2001, note Ph Delebecque.

carriage, and were *ipso facto* binding on third parties³⁰⁶ upon delivery of the goods, without the requirement of a “special acceptance”.³⁰⁷

Since *The Bonastar II*, the Commercial Chamber of the Court de Cassation has reiterated its position in *The Nagasaki*, on more than one occasion.³⁰⁸ Meanwhile other French courts have applied *The Bonastar II* doctrine.³⁰⁹ Thus, as it stands, it appears that in cases where the French internal law applies, the High court’s opinion regarding the enforceability of jurisdiction clauses against third parties remains somewhat unclear. From a carrier standpoint, it is perhaps advisable to insist, where possible, that shippers, or other parties negotiating with consignees or transferees of bills of lading, bring jurisdiction clauses contained in carriage contract to their particular attention upon concluding contracts for the sale of goods or shortly thereafter, so as to minimize the risk of unenforceable foreign jurisdiction clauses down the road.

3.6 Nordic Countries’ Hamburg Hybrid of Limited Application

As is the case under the Hague and Hague/Visby Rules, the old Nordic Maritime Codes made no mention of jurisdiction or arbitration clauses.³¹⁰ But

³⁰⁶ In *The Bonastar II* *ibid*, it was the consignee’s subrogated insurer who brought the claim against carrier as third party to the claim.

³⁰⁷ For criticism on the First Civil Chamber’s position, see Bonassies and Scapel *supra* note 99 at 800-801 para 1162.

³⁰⁸ *The Apt Mariner* 2003 DMF 41, Cour de Cassation, 25 June 2002, note Ph Delebecque; *The Jerba* (2005) DMF 133, Cour de Cassation, 7 December 2004, note JP Remery.

³⁰⁹ See eg *The M/V Johnny* (2006) DMF 1, Cour de Rouen, 23 June 2005, note Ph Delebecque cited in Bonassies and Scapel *supra* note 99 at 801 footnote 111.

³¹⁰ Note that though the Nordic countries are party to the Hague/Visby Rules, and though the new Nordic Codes (updated in 1994) adhere to those Rules, A Philip explains in ‘Scope of application, choice of law and jurisdiction in the new Nordic law of carriage of goods by sea’ in G Melander (ed) *Modern issues in European law: Nordic perspectives: essays in honour of Lennart Palsson* (1997) 173, that ‘the provisions in the Codes on carriage of general cargo are strongly influenced by the Hamburg Rules,’ as are the rules on choice of law and jurisdiction. Iceland has not participated in the new legislative initiative, and retains the old Nordic Maritime Code.

in time, provisions corresponding to Article 21 of the Hamburg Rules were introduced into the new Nordic Maritime Codes, revised in 1994,³¹¹ which have restricted commercial parties' freedom of contract by providing cargo claimants with "options" for suit, and arguably, have made '[t]he regulation concerning jurisdiction clauses ... very complicated.'³¹²

The provision on jurisdiction can be found at **Chapter 13, Section 60 of the Swedish/Finnish Maritime Code**, and **Section 310 of the Norwegian/Danish Maritime Code**.³¹³ As is the case under Article 21 of

³¹¹ W Tetley 'The Demise of the Demise Clause?' (1999) 44 *McGill LJ* 807 at 845 footnote 193:

The structure of the Finnish and Swedish versions of the Code are identical, with the provisions divided into chapters and sections. The carriage of goods by sea is treated in Chapter 13, ss 1-61. The Danish and Norwegian versions of the Code are identical, with the provisions divided into sections. The carriage of goods by sea is treated at ss 251-311 inclusive.

Despite the difference in numbering, the Codes are essentially the same in substance, and may be referred to collectively as the "Nordic Maritime Code."

³¹² I Kuusniemi 'Nordic maritime codes', *Neptun Juridica*, 22 September, 1994. Available at http://www.neptunjuridica.com/arc_nmc.html [Accessed on 1 February 2011].

³¹³ Section 60 of the Swedish/Finnish Maritime Code and Section 310 of the Norwegian/Danish Maritime Code read as follows:

Any agreement in advance which limits the right of the plaintiff to have a legal dispute relating to the carriage of general cargo according to the present Chapter settled by legal proceedings, is invalid in so far as it limits the right of the plaintiff at his own discretion to bring an action before the Court at the place where:

- a) the defendant's principal place of business is situated, or place of residence if the defendant has no principal place of business;
- b) the contract of carriage was concluded, provided the defendant has a place of business or an agent there through whom the contract was concluded;
- c) the place of receipt for carriage according to the contract of carriage is situated; or
- d) the agreed or actual place of delivery according to the contract of carriage is situated. The provisions in paragraph one does not prevent an action from being brought before the Court of the place designated in the contract of carriage with a view to legal proceedings. After a dispute has arisen, the parties may agree on how to settle it.

If a bill of lading is issued pursuant to a charter party which contains a provision concerning the settlement of disputes by legal proceedings or

the Hamburg Rules, claimants are given *the option* to commence suit in any one of a number of locations.³¹⁴ However, unlike the Hamburg Rules, which clearly prioritize cargo interests, the practical application of this provision is much more restricted and uncertain. According to Philip, this protectionist provision is ‘of limited interest’ for a number of important reasons:

- It does not apply unless the agreed port of loading or the agreed or actual port of discharge is in one of the Nordic countries;
- It does not apply if it would be contrary to the [Brussels] Convention or, with respect to Sweden, Finland and Norway, to the Lugano Convention [in other words, these Conventions trump national legislation];
- It applies only if the defendant is a shipowner or cargo owner living outside [EU or EFTA] countries and jurisdiction has not been conferred upon a court in one of [those countries]. In such cases it makes it possible for a Nordic cargo owner who receives cargo in a Nordic port or ships cargo from such a port to sue the shipowner there, even if the transport document contains a jurisdiction clause;
- [It] only applies to the carriage of general cargo; and
- If carriage is governed by a charterparty which contains jurisdiction clauses and bills of lading are issued and sold, [this section only] applies if the purchaser does not know nor ought to know the charterparty and the bill of lading contains no express incorporation of the jurisdiction clause.³¹⁵

arbitration, but the bill of lading does not expressly state that the provision is binding on the holder of the bill of lading, the carrier cannot invoke the provision against a holder of the bill of lading who has acquired it in good faith.

In this Kingdom an action concerning a contract for the carriage of general cargo in trade between two States can in any case be brought at the place or at one of the places to which the case has such a nexus as mentioned in paragraph one or at another place in this Kingdom agreed on by the parties.

The provisions of paragraphs one and four do not apply if neither the agreed place of delivery nor the agreed or actual place of delivery ... is located in Norway, Denmark, Finland or Sweden, or if the Lugano Convention of 2007 provides otherwise. The provisions of this Section do not preclude that decisions on provisional or protective measures are made in this Kingdom.

Note that an English translation of the Norwegian Maritime Code is available at www.lovdato.no/info/lawdata.html.

³¹⁴ Note, however, that after a dispute has arisen, under both the Nordic Maritime Code and Hamburg Rules, parties are free to restrict jurisdiction by agreement, and bring suit in a jurisdiction of their mutual choice (Philip *supra* note 310 at 178.)

³¹⁵ Philip *ibid* at 178-79.

3.7 China's Rule on Reciprocity Limiting Party Autonomy

According to Kong and Minfei, 'the principle of party autonomy gives parties the right to choose which court exercises jurisdiction over disputes between them. Both Chinese law and practice acknowledge this autonomy as a general rule.'³¹⁶ In the People's Republic of China (PRC), forum selection agreements (sometimes referred to as "agreed selection jurisdiction" in English)³¹⁷ are regulated by **Article 244** of the new **Civil Procedure Law (CPL)**.³¹⁸ From this provision, one gleans that forum selection agreements between parties to a dispute are enforceable under the CPL where they pertain to foreign contracts or foreign property rights and interests; both parties agree to resolve their dispute in a particular forum, and this agreement is made in writing; and the court selected is a place with an actual connection to the dispute.

Whereas the old law of civil procedure in the PRC apparently permitted foreign parties to conclude such forum selection agreements in cases involving a dispute over "economic relations, trade, transportation and maritime matters", the new law of 1991 now restricts such agreements to

³¹⁶ Q Kong et al 'The Chinese practice of private international law' (2002) 3(2) *Melbourne Journal of International Law* Section C (page number unknown). Available at <http://mjil.law.unimelb.edu.au/go/issues/issue-archive/volume-3-2> [Accessed on 1 February 2011].

³¹⁷ See H Du 'An overview of choice of jurisdiction and law of foreign-related cases in China' (2009) 4(4) *Journal of Cambridge Studies* 72 at 77.

³¹⁸ Article 244 of the PRC's CPL reads as follows:

Parties to a dispute over a contract involving a foreign element or over property rights and interests involving a foreign element may, through written agreement, choose the court of the place which has [an actual] connection with the dispute to exercise jurisdiction. If a People's Court of the People's Republic of China is chosen to exercise jurisdiction, the provisions of this Law on jurisdiction by forum level and on exclusive jurisdiction shall not be violated.

English Translation of Article 244 provided in P Murray 'China: an emerging jurisdiction' in M Davies (ed) *Jurisdiction and forum selection in international maritime law: essays in honor of Robert Force* (2005) 119 at 124. A different version of the English Translation is available at <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/civil-proceedings/law-of-civil-procedure-of-the-peoples-republic-of-china-1991.html>.

disputes involving foreign contracts or property rights, which includes maritime contract disputes,³¹⁹ but is unlikely to include maritime torts.³²⁰

Furthermore, the CPL does not define “actual connection” in the context of forum selection agreements, leaving it to the courts to determine.

Tang does, however, offer the following clarification:

[T]o satisfy the “actual connection” requirement, a valid PRC or foreign forum choice may include a place where either the plaintiff or the defendant is domiciled or incorporated, or has a regular place of abode, or where the contract is signed or performed ... or where the subject matter of the action is located, or where either the plaintiff or the defendant has a business establishment or office.³²¹

Tetley suggests that the word “court” in the first sentence of Article 244 may actually be referring to a court of the People’s Republic of China having a real connection to the case, and not a foreign court. That said, he argues that ‘the article does not expressly preclude selection of a foreign forum.’³²² But Wang takes a different stance:

[T]he Civil Procedure Law contains no article that authorizes parties to a dispute, domestic or foreign-related, to select a non-Chinese forum for litigation. Nor has the Supreme Court issued any Opinions or Interpretations to elucidate the matter. The very silence of the law on this subject may tempt parties to include a contractual dispute resolution clause agreeing to litigation in a non-Chinese court of law. Unfortunately, ... in the absence of an explicit provision legitimizing such a selection, a Chinese court will likely find the clause invalid and simply look to the relevant sections of the Civil Procedure Law to assess its potential jurisdiction.

...

In the final analysis, unless enforcement is to take place entirely outside of China, drafting a dispute resolution clause explicitly calling for litigation in a non-Chinese forum will ultimately prove to be a fruitless and frustrating exercise [emphasis added].³²³

³¹⁹ Tetley *Marine cargo claims supra* note 38 at 1918 footnote 40.

³²⁰ Z Tang ‘Maritime jurisdiction of the People’s Republic of China: legal framework, recent developments, and future prospects’ (1994) 25(2) *JMLC* 251 at 273.

³²¹ *Ibid* at 274.

³²² *Marine cargo claims supra* note 38 at 1918 footnote 40.

³²³ M Wang ‘Dancing with the dragon: what U.S. parties should know about Chinese law

Another important factor that maritime courts of the PRC will take into account in deciding whether to enforce a foreign jurisdiction clause contained in a carriage contract is whether there is reciprocity between China and the foreign nation concerned, that is to say only 'where the foreign jurisdiction concerned recognizes Chinese (PRC) jurisdiction clauses in bills of lading.'³²⁴ In the absence of such reciprocity, foreign jurisdiction clauses will simply not be enforced.

Thus, it would seem that courts of the PRC are reluctant to enforce foreign forum selection clauses.³²⁵ That said it does not seem to be altogether out of the question. For instance, in 1996, the Higher People's Court of Fujian Province overruled a decision rendered by the lower Maritime Court of Xiamen and held that a Hong Kong jurisdiction clause contained in the freight payment agreement had the effect of excluding jurisdiction of any courts other than the agreed upon court, that is to say, the Hong Kong High Court.³²⁶

Wang warns parties against litigating in China. He says that '[a]lthough the government has taken measures to address issues, inefficiency, corruption and local protectionism continue to plague China's court system.'³²⁷ On the contrary, Murray says that because of the low cost of litigation in China and its increasingly proficient and professional maritime

when drafting a contractual dispute resolution clause' (2009) 29 *Northwestern Journal of International Law & Business* 309 at 323.

³²⁴ Tetley *Marine cargo claims supra* note 38 at 1918 footnote 40.

³²⁵ Tang *supra* note 320 at 274: 'Forum selection clauses in bills of lading have proven to be the most vulnerable to jurisdictional attacks.' The same is not true of the treatment of foreign arbitration agreements in the PRC. According to Tetley *ibid*, article 257 CPL, which regulates foreign arbitration clauses, is far more liberal.

³²⁶ Supreme People's Court, Selected Cases of People's Courts (1996) 2015-19 (Higher People's Court of Fujian Province, 1994) in Kong *supra* note 316.

³²⁷ Wang *supra* note 323 at 322.

bench and bar, parties should in fact consider litigating cargo claims in China, and think twice before fighting to avoid its provisions in favour of litigating elsewhere.³²⁸

3.8 Conclusion

In the absence of a harmonized approach to the treatment of jurisdiction clauses contained in international maritime carriage contracts, it is not surprising that their regulation under national law and judicial interference with commercial parties' freedom of contract varies, at times significantly, from jurisdiction to jurisdiction.

Australia and New Zealand are categorical: they simply refuse to enforce forum clauses in carriage contracts that restrict their jurisdiction. That is also the case in South Africa, but only where the cargo claimant carries on business in the Republic, or the claimant is a named consignee or third party holder of a contract for the carriage of goods to a destination in the Republic.

In England, on the other hand, commercial freedom prevails. A jurisdiction agreement is presumptively valid and enforced unless a party resisting the clause, guided by the *Eleftheria* principles, shows strong cause why it should nevertheless not take effect.

In Canada, claimants are given the option to sue in the jurisdiction where the port or intended port of loading or discharge is in Canada, the defendant resides or has a place of business in Canada, or the contract is made in Canada. But because recent Federal Court of Appeal decisions

³²⁸ Murray *supra* note 318 at 130-32. Concur J Allsop 'Maritime law - the nature and importance of its international character' (2010) 34 *Tul Mar LJ* 555 at 588.

rendered by judges without a maritime background have watered down the effect of this protectionist provision by importing the discretionary doctrine of *forum non conveniens* into their analysis, the state of the law is now unclear.

The current position in the United States is that in the absence of legislation specifically stipulating otherwise, foreign jurisdiction clauses are presumptively valid and enforceable, and in many (but not all) cargo claims relating to these agreements, jurisdiction clauses have been upheld and claims have been dismissed for improper venue. Displeased pro-cargo lobbyists of the US MLA have reacted by including jurisdiction provisions similar to those of the Hamburg Rules in their proposed draft of the COGSA 1999. But these provisions have not received universal support in the American maritime industry.

Jurisdiction clauses restricting French jurisdiction are deemed unwritten unless they are agreed upon by parties acting in a commercial capacity and specified in the agreement. The French are particularly concerned with protecting third-party cargo interests and have at times required express agreement on their part before allowing a jurisdiction agreement to take effect.

The jurisdiction provisions under the Nordic Codes are similar to those of the Hamburg Rules, in that they give claimants the option to commence suit in any one of a number of locations. However, unlike the Hamburg Rules, which clearly prioritize cargo interests, the application of the Nordic jurisdiction rule is much more restricted and uncertain. For example, it only applies where the port of loading or discharge is located in one of the Nordic countries, if it does not conflict with the Lugano Convention or EC Jurisdiction Regulation, and the claim pertains to general cargo. And finally,

in the PRC, though the law does not specifically prohibit foreign jurisdiction agreements, it does not allow them either. Furthermore, there must be a reciprocity agreement between the PRC and the foreign jurisdiction concerned for the forum clause to take effect; that is to say, the foreign jurisdiction must recognize PRC jurisdiction clauses in its bills of lading before China will be willing to reciprocate. Historically the PRC has not enforced these restrictive clauses, which send cargo claims elsewhere.

In all nations except England, it seems that legislatures aim to give importers/exporters and/or third party interests who have not consented to jurisdiction agreements the option to pursue cargo claims in their jurisdiction notwithstanding the foreign forum clause where there is a real link to the jurisdiction, which is interpreted quite differently from nation to nation. They also seek to develop their own body of maritime law, and fight back against the monopoly of the (predominantly) English courts, typically selected as the forum of choice for cargo claims in standard form bills of lading.

The English and American courts favour holding parties to their agreement, and will only disturb party autonomy in extreme cases. The cargo-friendly French are preoccupied with third party interests, and tend not to enforce clauses without clear and formal consent of the “weaker bargaining power”. The treatment of foreign jurisdiction clauses in Canadian, Chinese and Nordic courts is highly incoherent and unpredictable, mostly as a result of poorly drafted or incomplete protective provisions, which only confuse matters.

This incongruous treatment of foreign jurisdiction clauses is unsatisfactory, and arguably does not make good business sense. It induces

parties to engage in offensive forum shopping tactics, and commence parallel proceedings leading to conflicts of jurisdiction problems, which is not a cost-effective and efficient means of resolving commercial disputes. Europe, meanwhile, has made great headway with its regional harmonization of rules on jurisdiction, in the form of the EC Jurisdiction Regulation, which combines procedural and substantive rules, and is applicable to all Member States alike.

CHAPTER 4: EUROPEAN REGULATION AND ENFORCEMENT OF JURISDICTION CLAUSES

The EC Jurisdiction Regulation, which contains substantive rules on jurisdiction and forum selection agreements, and procedural rules to deal with problems of conflicts of jurisdiction, provides a pre-eminent example of the supranational harmonization of rules on jurisdiction. It replaces the Brussels Convention 1968³²⁹ and applies to all proceedings commenced on or after March 1, 2002 that are brought before any court of a European Union Member State.³³⁰ The Regulation does not require implementing national legislation to come into force, as 'it is automatically part of national law in each Member State.'³³¹

³²⁹ Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968.

³³⁰ There are currently 27 Member States of the European Union (Source: The official website of the European Union, available at http://europa.eu/about-eu/member-countries/index_en.htm) [Accessed on 1 February 2011]. Note that until recently, Denmark continued to apply the Brussels Convention but on 19 October 2005, it entered into a separate agreement with the European Community extending the application of the EC Jurisdiction Regulation to it (Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). Thus, as of 1 July 2007 (date the agreement between EC and Denmark entered into force), the Regulation now applies to all cases between all Member States of the European Union commenced after March 1, 2002, and the Brussels Convention only applies to old cases before March 1, 2002 (Sparka *supra* note 42 at 25). Note too that Iceland, Norway and Switzerland (members of the European Free Trade Association, but not the European Community) apply the Lugano Convention, 2007 (with the exception of Iceland, which continues to apply the older Lugano Convention of 1988 since it has yet to ratify the newer Convention as of the date of submission of this dissertation). That said, according to Honka *supra* note 50 at 268, '[t]he substance in Regulation 44/2001, the Brussels Convention and the Lugano Convention[s] is largely the same, but not to some details.' The following analysis deals solely with rules under the EC Jurisdiction Regulation. For more on the Brussels and Lugano Conventions, see Jackson *supra* note 49 at 102-05 and Chapter 8; Briggs *The conflict of laws supra* note 49 at 56-58.

³³¹ Honka *ibid* at 267; Tetley *Marine cargo claims supra* note 38 at 1922.

Baatz sheds some light on the main aim of the EC Jurisdiction Regulation, which applies to both “civil and commercial matters,”³³² including cargo claims:³³³

The EC Jurisdiction Regulation seeks to determine the international jurisdiction of the courts of the EC Member States so that all Member States are bound by the same rules and will therefore recognize and enforce each other’s judgments speedily. It provides for certain and predictable rules with very little discretion [emphasis added].³³⁴

Recital 2 in the Preamble to the Regulation further clarifies that:

Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential [emphasis added].

Thus, the EC Jurisdiction Regulation has been enacted in an effort to promote the sound operation of the internal European market, which it seeks to facilitate through a harmonized system of rules governing conflicts of jurisdiction (in civil and commercial matters) that strive to be straightforward and easy to apply, certain and predictable (hence the limited discretion), and encourage rapid and simple recognition and enforcement of judgments amongst Member States.

Recitals 16 and 17 to the Preamble of the Regulation intimate that this system of uniform rules is based on the principle of “mutual trust”, which implies that no one contracting State is in a better position to rule on issues of jurisdiction (including the validity of jurisdiction clauses), and therefore it is not open to the courts of other contracting States to call into question, review

³³² Per Article 1 of the EC Jurisdiction Regulation.

³³³ Honka *supra* note 50 at 268. That is not true of the Hague Choice of Court Convention (the ‘Convention on Choice of Court Agreements of 30 June 2005’), which does not apply to disputes over the carriage of goods by virtue of Article 2(2)(f) of the Convention.

³³⁴ Baatz ‘The conflict of laws’ *supra* note 56 at 5.

or ignore a decision rendered by a European court seized with such a dispute on preliminary issues.³³⁵

Whether this system of uniform rules achieves these stated purposes with satisfactory results, in particular in terms of regulating jurisdiction agreements, is open for debate. Baatz says that ‘the application of the EC Jurisdiction Regulation among EC Member States has not been all plain sailing’³³⁶ and has sometimes led to complex, protracted and costly litigation over preliminary issues.³³⁷ The European Commission reports that though generally speaking, ‘the Regulation is considered to be a highly successful instrument, which has facilitated cross-border litigation through an efficient system of judicial cooperation based on comprehensive jurisdiction rules, coordination of parallel proceedings, and circulation of judgments,’³³⁸ there is room for improvement in the functioning of the Regulation.³³⁹ The following

³³⁵ *Turner v Grovit supra* note 150 at paras 24 and 25:

At the outset, it must be borne in mind that the Convention [and by extension the Regulation] is necessarily based on the trust which the Contracting States accord to one another’s legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments

It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them [case citation omitted].

³³⁶ Baatz ‘Jurisdiction and arbitration’ *supra* note 78 at 276.

³³⁷ Baatz ‘The conflict of laws’ *supra* note 56 at 11.

³³⁸ Commission of the European Communities ‘Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee of 21 April 2009 on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters’ at 3. Available at http://www.ipex.eu/ipex/cms/home/Documents/doc_COM20090174FIN [Accessed on 1 February 2011]. See also Green Paper accompanying Commission’s Report. Available at http://www.ipex.eu/ipex/cms/home/Documents/doc_COM20090175FIN. See also Green Paper accompanying the European Commission’s Report of 21 April 2009. Available at http://www.ipex.eu/ipex/cms/home/Documents/doc_COM20090175FIN.

³³⁹ *Ibid.*

analysis provides an overview of the rules relating to jurisdiction agreements and resolving conflicts of jurisdiction under the EC Jurisdiction Regulation, and follows with a brief criticism on some of their shortcomings.

4.1 Rules on Jurisdiction Clauses under the EC Jurisdiction Regulation

In accordance with the basic rule, stated at **Article 2** of the **EC Jurisdiction Regulation**, defendants domiciled in a Member State³⁴⁰ shall, regardless of their nationality, be sued in the courts of that Member State, unless of course one of the special subject-matter regimes,³⁴¹ specific exceptions,³⁴² or other provisions³⁴³ applies. The claimant, on the other hand, need not be domiciled in a Member State for the EC Jurisdiction Regulation to take effect.³⁴⁴

³⁴⁰ Mandaraka-Sheppard explains *supra* note 46 at 200 that '[t]he domicile of an individual is to be determined at the time the proceedings are issued by the law of the Member State whose court is seised of the matter.'

Jackson *supra* note 49 at 179:

[N]either in the Convention nor Regulation is there a Community concept of domicile of an individual. The internal law of the forum is to determine whether an individual is domiciled in the forum, and the law of any other State to determine if there is a domicile there. National laws may not be at one as to the concept or any one law may provide for domicile in more than one state. In such circumstances the plaintiff would have a choice [emphasis added].

In accordance with Article 60(1) of the EC Jurisdiction Regulation, 'a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business' [emphasis added]. See generally Jackson *ibid* at 147-51.

³⁴¹ Relating to insurance, consumer or individual employment contracts.

³⁴² Mandaraka-Sheppard *supra* note 46 at 200:

The Regulation is not limited to claims against defendants domiciled in a Member State; for example, a court of a Member State may have exclusive jurisdiction, regardless of domicile, by virtue of Art 22, which allocates jurisdiction to the court of a Member State where the property is situated with regard to proceedings whose object is rights in immovable property.

³⁴³ Honka *supra* note 50 at 265 at 271 explains that cargo claimants might instead choose to bring a claim before the courts for the place of performance of the obligation (under Article 5.1 of the Regulation) or the place where the harmful event occurred or may occur (under Article 5.3 of the Regulation), amongst other alternatives. See generally Jackson *supra* note 49 at 187ff.

³⁴⁴ Baatz 'The conflict of laws' *supra* note 56 at 5; Mandaraka-Sheppard *supra* note 46 at 200.

One of the exceptions to the basic rule arises when parties conclude a jurisdiction agreement, conferring exclusive jurisdiction (unless the parties stipulate otherwise) upon the court or courts of a Member State to settle disputes. In accordance with **Article 23(1) of the EC Jurisdiction Regulation**,³⁴⁵ where at least one of the parties to a contract of carriage is domiciled in a Member State (whether defendant or claimant), and the parties select the court or courts of a Member State to settle their disputes arising out of the contract, and where the agreement is valid (that is to say, the claimant establishes that there is a “good arguable case” that the jurisdiction clause satisfies certain formalities),³⁴⁶ then it must be enforced, and jurisdiction may not be declined.³⁴⁷

³⁴⁵ Article 23(1) of the EC Jurisdiction Regulation provides that:

If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

- (a) in writing or evidenced in writing; or
- (b) in a form which accords with practices which the parties have established between themselves; or
- (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Note that Article 23 of the EC Jurisdiction Regulation corresponds to Article 17 under the EC Jurisdiction Convention.

³⁴⁶ *Bols Distilleries BV v Superior Yacht Services Ltd* [2007] 1 WLR 12 (Privy Council) at para 28:

[I]f the standard of “a good arguable case” is properly understood and applied, there is no risk that the effectiveness of the Regulation will be impaired. The rule is that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction [emphasis added].

According to Jackson *supra* note 49 at 133-34:

The concept of an agreement conferring jurisdiction is a rule of Community law and that which is required to constitute it and its scope are matters for that law and not for the private international law of member States ... But the standard of proof required for each aspect of the validity, scope and enforceability of the agreement appears to be the national law [emphasis added].

Put simply by L Merrett in ‘Article 23 of the Brussels I Regulation: a comprehensive code for jurisdiction agreements?’ (2009) 58 *ICLQ* 545 at 546-47, ‘questions as to the *interpretation*,

Baatz explains that the formalities under Article 23(1) are imposed as a means to ensure real consent between parties.³⁴⁸ That said, as per Article 23(1)(c) of the EC Jurisdiction Regulation, consent will be presumed in international trade or commerce when it ‘accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.’ She goes on to explain that the validity of a jurisdiction clause contained in a bill of lading must be assessed by reference to the original parties to the contract of carriage, that is to say, the shipper and carrier.³⁴⁹ It follows that the consent of third party bill of lading holders will be presumed in cases where the rights and obligations of shippers have succeeded to them under the applicable national law.³⁵⁰

and therefore the scope of the jurisdiction agreement, remain a question of national law, namely the applicable law.’

³⁴⁷ Jackson *ibid* at 135.

Briggs *Agreements on jurisdiction supra* note 9 at 238-39:

There are certain circumstances in which, according to the Regulation, the agreement will not be effective to produce this result. Where a court in a Member State has exclusive jurisdiction regardless of domicile [art 22], an agreement on jurisdiction may not contradict it. Where the defendant is willing to appear before a court to which he has been summoned by the claimant, that court has jurisdiction and the agreement is disregarded. Where the agreement is made in the context of an insurance contract, a consumer contract or an employment contract, it will have to satisfy further conditions to be effective. And where the same cause of action, between the same parties, is already pending before the court of another Member State, the agreement will not confer jurisdiction. Otherwise, the jurisdiction agreement must be given effect....

³⁴⁸ Baatz ‘The conflict of laws’ *supra* note 56 at 8. According to Jackson *supra* note 49 at 134, ‘[w]hether or not there is agreement will be adjudged on the intention of the parties on the basis of the contents of the provision, the sole purpose of the formal requirements being to ensure that the consensus of the parties is established.’

³⁴⁹ *Castelletti v Trumpy supra* note 298 at para 42.

³⁵⁰ *Coreck Maritime GmbH v Handelsveem BV C-387/98 [2000] ECR I-09337* at para 27:

[A] jurisdiction clause agreed between a carrier and a shipper which appears in a bill of lading is enforceable against a third party bearer of the bill of lading if he succeeded to the rights and obligations of the shipper under the applicable national law when he acquired the bill of lading. If he did not, it must be ascertained whether he accepted that clause having regard to the requirements laid down in the first paragraph of Article 17 of the Convention [now Article 23(1) under the Regulation].

Additionally, in accordance with **Article 23(3)** of the **EC Jurisdiction Regulation**,³⁵¹ where neither party to the contract is domiciled in a Member State and they select the court or courts of a Member State to settle their disputes, the courts of other Member States shall have no jurisdiction unless the chosen jurisdiction, under its own national procedural law and case law, declines to exercise its jurisdiction.³⁵² In English courts, for example, the exclusive jurisdiction agreement will be enforced unless there are strong reasons for staying proceedings, in which case it may exercise its discretion (contrary to the rule under 23(1) of the Regulation, in cases where at least one of the parties is domiciled in a Member State).³⁵³

In cases of *lis pendens*, where multiple proceedings brought before courts of different Member States involve the same cause of action³⁵⁴

In France, for example, where the succession of rights and obligations does not occur merely upon the delivery of goods and the bill of lading, it used to be that the consent of third party bill of lading holders subject to the EC Jurisdiction Regulation was not presumed. Rather, consent to a jurisdiction clause needed to be explicit; some form of special acceptance was required (as per procedural rules under internal French law – see Chapter 3, Section 3.5.) But in light of recent decisions rendered by the Cour de Cassation, the succession of rights and obligations is now to be determined in accordance with the law applicable to the contract of carriage, the determination of which can be difficult to make even at the best of times according to Bonassies and Scapel *supra* note 99 at 801-05, who clearly regret these latest confusing decisions.

³⁵¹ Article 23(3) of the EC Jurisdiction Regulation reads as follows:

Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

³⁵² See generally Baatz 'The conflict of laws' *supra* note 56 at 23-30.

³⁵³ Whereas it is not open to the court of a Member State to exercise discretion and stay proceedings notwithstanding the jurisdiction clause once it finds the agreement to be valid and effective under 23(1) of the Regulation, that is not necessarily true under 23(3), in cases where neither party to the dispute is domiciled in a Member State, and the validity and enforcement of jurisdiction clauses depends entirely on the chosen State's procedural laws and policies.

³⁵⁴ According to Baatz in 'The conflict of laws' *supra* note 56 at 8 and 12, the courts will look at the substance of the matter and not just the form, in order to determine whether proceedings involve the "same cause of action". Note, for example, that whereas an action for a declaration of non-liability and an action for asserting contractual liability over a particular contract of carriage would be considered proceedings over "the same cause of

between the same parties,³⁵⁵ then the “first come first served” rule of **Article 27** of the **EC Jurisdiction Regulation**³⁵⁶ will apply, whereby minimizing the risk of conflicting judgments, and preventing the use of offensive forum-shopping tactics, such as the grant anti-suit injunctions, which are deemed incompatible with the system of the Regulation based on mutual trust.³⁵⁷

According to this rule ‘based clearly and solely on the chronological order in which the courts involved are seized,’³⁵⁸ it is up to the court first seized to establish its jurisdiction. It does not matter if proceedings brought by a defendant before the court second seized were commenced pursuant to an exclusive jurisdiction clause contained in the bill of lading.³⁵⁹ In those circumstances, it is not open to the second court to examine the jurisdiction of the first. Rather, the court second seized must, of its own motion, stay

action” under Article 27, that would not be the case in an action asserting contractual liability on the one hand, and an action seeking to limit liability under a Limitation Convention on the other (see Baatz *ibid*). Jackson *supra* note 49 at 311: ‘Whether or not proceedings are based on the same cause of action is a matter for European and not national law.’

³⁵⁵ The Rule will only apply where the parties in the different proceedings are identical. See Baatz *ibid* at 12; Jackson *ibid* at 313-14. Note that where a subrogated insurer brings a claim against carrier X for contractual damages in the name of the insured, on the one hand, and carrier X brings an action against insured for a declaration of non-liability, on the other, the identity of interest of the insurer and insured are considered the same, and therefore the requirement is met (Jackson *ibid*).

³⁵⁶ Article 27 of the EC Jurisdiction Regulation states as follows:

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.

2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.

³⁵⁷ See *Turner v Grovit supra* note 150 at paras 19-31. But, as Mandaraka-Sheppard explains *supra* note 46 at 225, ‘ironically forum shopping is unintentionally encouraged, and litigants will make an even more careful note of dates for invoking jurisdiction in a Member State of their preference.’

Note that Article 27 of the EC Jurisdiction Regulation corresponds to Article 21 under the EC Jurisdiction Convention.

³⁵⁸ *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-4693, Case C-116/02 at para 47.

³⁵⁹ See generally *Erich Gasser GmbH ibid* at paras 28-54.

proceedings notwithstanding the “agreement conferring jurisdiction”,³⁶⁰ and allow the court first seized to verify the existence and validity of the exclusive agreement, and only then decline jurisdiction if such an agreement is established.³⁶¹ Thus, Article 23 is subject to Article 27 of the EC Jurisdiction Regulation.³⁶²

But what of the situation where a claim is brought first under the Arrest Convention, pursuant to Article 71 of the EC Jurisdiction Regulation,³⁶³ and second under an exclusive jurisdiction agreement, pursuant to Article 23 of the Regulation? There again, the court first seized would determine if the jurisdiction agreement is valid and effective, and if it

³⁶⁰ The second court must stay proceedings even if the plaintiff in the court first seized ‘is acting in bad faith with a view to frustrating the existing proceedings’ (*Turner v Grovit supra* note 150 at para 31). This tactic is also referred to as an “Italian torpedo” in the European Community (where a party domiciled in a Member State, acting in bad faith, in breach of an exclusive jurisdiction agreement, runs to a court of a jurisdiction, such as Italy, which is known for its sluggish legal process, in an attempt to delay proceedings to the other party’s detriment.

The “first come first served” rule will also apply even though ‘the duration of proceedings before ... the court first seized... is excessively long’ (*Erich Gasser GmbH supra* note 358 at para 73).

³⁶¹ *Erich Gasser GmbH ibid* at para 49. For a brief review and criticism of the decision, see Y Baatz ‘Who decides on jurisdiction clauses’ [2004] *LMCLQ* 25. Note that in cases where the Rule under Article 27 does not apply because, for example, the proceedings are not over the same cause of action, or the parties to the actions are not identical, then the court second seized may nevertheless stay its proceedings where the actions are related (per Article 28 EC Jurisdiction Regulation).

³⁶² Mandaraka-Sheppard *supra* note 46 at 202.

³⁶³ According to Article 71(1) of the EC Jurisdiction Regulation:

This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

On a separate but related note, as per Article 71 of the EC Jurisdiction Regulation, in cases where Member States ratified the Hamburg Rules prior to 1 March 2002 (date when the EC Jurisdiction Regulation came into force), the Hamburg Rules on jurisdiction (article 21 – providing claimants with options for suit and overruling pre-emptive jurisdiction clauses – see Chapter 5) trump the EC Jurisdiction Regulation (article 23 – enforcing jurisdiction clauses where valid). Sparka explains *supra* note 42 at 191 that this particularity applies to Austria, the Czech Republic, Hungary and Romania, which are mostly land-locked nations.

was, it would have to decline its jurisdiction under the Arrest Convention in favour of the chosen forum.³⁶⁴

4.2 Criticism of the European Regulation of Jurisdiction Clauses

Without question, the European Union has made significant inroads into achieving greater harmonization of rules on jurisdiction in civil and commercial matters with the enactment of the EC Jurisdiction Regulation, and the Brussels Convention before it. But, as the European Commission and numerous others have acknowledged, there is definitely room for improvement and future development of the law. Most relevantly for our present purposes, certain rules pertaining to jurisdiction clauses under the Regulation need to be fine-tuned to make their application more consistent, just, and in line with international commercial practice.

4.2.1 The Validity of Jurisdiction Clauses under Article 23 of the Regulation

In his judgment in *Castelletti*,³⁶⁵ the Advocate General P Leger had the following to say about the aim of the provision on exclusive jurisdiction agreements:

[The aim of Article 17 of the Convention, now Article 23 of the Regulation, is] to ensure that there [is] real consent on the part of the persons concerned so as to protect the weaker party to the contract by avoiding jurisdiction clauses, incorporated in a contract by one party, going unnoticed.

Article 23 has been criticized, *inter alia*, for its lack of clarity in regulating the validity of jurisdiction clauses, in particular material validity.³⁶⁶ In fact, it has been suggested that once the alleged agreement meets the

³⁶⁴ Mandaraka-Sheppard *supra* note 46 at 238-40.

³⁶⁵ *Castelletti v Trumpy* *supra* note 298 at para 19.

³⁶⁶ See generally Briggs *Agreements on jurisdiction* *supra* note 9 at Chapter 7; Merrett *supra* note 346 at 545. See Section 2.3 on the contractual validity of jurisdiction clauses.

requirements of form at paragraphs (a), (b) or (c) of Article 23(1),³⁶⁷ then the inquiry ends there, and the exclusive jurisdiction clause *must* be enforced.³⁶⁸ In other words, 'the formal requirements guarantee consensus and may not be supplemented or contradicted by other legal tests of validity.'³⁶⁹

Briggs explains that the problem stems from a concern that if it were open to a party to argue, for example, that an agreement in writing or evidenced in writing (thus meeting the formal validity requirement) should nevertheless not be binding on him for want of consent, he would need to rely on rules of national law to support this contention.³⁷⁰ The risk then would be that the validity of the agreement would depend entirely on the national law of the court seized, or seized first,³⁷¹ whereby missing the point of a uniform approach to the enforcement of jurisdiction clauses, which is what Article 23 aims to achieve. In its study of 2009, the European Commission reported that:

[I]n some instances, besides the uniform conditions laid down in the Regulation, the consent between the parties is made subject, on a residual basis, to national law, determined either by reference to the *lex fori* or to the *lex causae*. This leads to undesirable consequences, in that a choice of court agreement may be considered valid in one Member State and invalid in another.³⁷²

Yet, at the same time, a plain reading of Article 23 would seem to reveal that the agreement to litigate in a particular Member State and the requirement that certain formalities be met are indeed two separate notions

³⁶⁷ According to Merrett *ibid* at 546, 'national laws may not supplement the provisions of Article 23.... For example, there is no scope for an additional formal requirement, derived from national law, that the jurisdiction agreement must be expressed in a particular language.' But see Jackson and Merrett comments *supra* note 346.

³⁶⁸ Briggs *Agreements on jurisdiction supra* note 9 at 245-46; Merrett *ibid* at 545 at 546.

³⁶⁹ Briggs *ibid* at 246.

³⁷⁰ Briggs *ibid* at 246 and 248.

³⁷¹ In cases of *lis pendens*, as previously discussed.

³⁷² Commission of the European Communities 'Report from the Commission to the European Parliament' *supra* note 338 at 5.

and conditions.³⁷³ To subsume one requirement into the other, or reduce consensus to form alone, falls short of the common legal understanding of agreement under contract law, regardless of the jurisdiction. And, as Briggs rightfully contends, unless a party actually admits to the agreement, ‘a court has to have some basis for dealing with a submission, credibly advanced, that, whether there is writing or otherwise, there was no agreement to the jurisdiction in question’ [emphasis added].³⁷⁴ The difficult question remains: how may a party raise this argument without relying on a national court’s individual notion of what constitutes an agreement? Put differently, in the absence of uniform rules of contract to govern jurisdiction clauses,³⁷⁵ what legal basis may a European Court rely upon to confirm the material validity of these agreements under European law?

The European Commission suggests prescribing a standard choice of court clause as a starting point. It also proposes combining this option with other solutions, such as permitting parallel actions to proceed, or reversing the priority rule under Article 27, but only in situations where jurisdiction agreements take the aforementioned standard form prescribed by the Regulation.³⁷⁶ The Commission also presents the idea of ‘a harmonized conflict rule to ensure uniform application of the rules of the Regulation’.³⁷⁷

³⁷³ Agree Briggs *Agreements on jurisdiction supra* note 9 at 248; Compare Merrett *supra* note 346 at 550:

[T]he correct approach is that there is simply one question and that the requirements of Article 23 are both necessary and sufficient conditions for the enforceability of the jurisdiction agreement. There is simply no role for national law or indeed any additional Community idea of ‘consensus’ separate from that set out in the Article 23 requirements themselves.

³⁷⁴ Briggs *ibid.*

³⁷⁵ Note that ‘choice of court agreements is excluded from the scope of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I)’ (Green Paper on the review of Council Regulation (EC) No 44/2001 *supra* note 338 at 5 footnote 8).

³⁷⁶ Green Paper *ibid* at 6.

³⁷⁷ Green Paper *ibid* at 5 footnote 8.

In addition, Briggs and Merrett propose incorporating the notion of bad faith (or breach of good faith) in cases where there is a written agreement, but lack of consent:

If a court is presented with facts which would otherwise satisfy the requirement of an agreement in writing or evidenced in writing, but there is a credible basis for the contradictory submission that it is contrary to the requirements of good faith for this to be asserted, it ought to be open to the court to resolve the jurisdictional challenge on this basis.... [I]t will acknowledge that the validity of an agreement on jurisdiction, and the permissible contradictory arguments, are located within the proper interpretation of Article 23.³⁷⁸

Merrett specifies that 'a Community notion of good faith is the appropriate way to deal with such cases' [emphasis added].³⁷⁹

4.2.2 Jurisdiction Clauses and *Lis Pendens*

The simple and inflexible "first come first served" rule of Article 27, designed to promote legal certainty and avoid conflicts of jurisdiction in parallel proceedings, is by no means perfect, but it is definitely a good start. It is premised on the notion that no Member State is in a better position to determine jurisdiction, since the Regulation is common to all contracting states alike and 'may be interpreted and applied with the same authority by each of them.'³⁸⁰

This rule, as interpreted by the European Court of Justice in *Erich Gasser v MISAT Srl*³⁸¹ and *Turner v Grovit*,³⁸² has been criticized, mostly by the English, for a number of reasons, namely that it: encourages parties to engage in offensive forum shopping; risks slowing down proceedings, sometimes for years, costing parties time and money (and

³⁷⁸ Briggs *Agreements on jurisdiction supra* note 9 at 252; Merrett *supra* note 346 at 546.

³⁷⁹ Merrett *ibid* at 564 (see generally 559-64.)

³⁸⁰ *Erich Gasser GmbH supra* note 358 at para 48.

³⁸¹ *Ibid*.

³⁸² *Turner v Grovit supra* note 150.

even at times leading to the spoliation of evidence); fails to adequately protect exclusive jurisdiction agreements as it requires the court second seized to suspend proceedings until the court first seized establishes or declines jurisdiction (unlike where neither party is domiciled in a Member State under 23(3)), in which case the reverse is true, and the court chosen will apply its discretionary common law rules to determine whether the jurisdiction clause is valid and enforceable);³⁸³ tolerates “Italian torpedoes” (where a party wishing to buy itself time runs first to the court, in bad faith, contrary to a jurisdiction agreement, in order to benefit from the sluggish procedure of the court first seized); leaves no room for the operation of judicial discretion, precluding the grant of anti-suit injunctions, as well as the application of *forum non conveniens* doctrine, even in cases where a non-contracting forum is the natural/more appropriate forum.

The European Commission has proposed a number of possible solutions to “improve” the rule,³⁸⁴ so as to afford greater protection to exclusive jurisdiction agreements. First it proposes releasing the chosen court from its obligation to stay proceedings under the *lis pendens* rule, the downside to this solution of course being that it may lead to parallel proceedings and conflicting judgments, contrary to the underlying intention of the Regulation.

Second it proposes reversing the priority rule in cases where

³⁸³ Baatz ‘The conflict of laws’ *supra* note 56 at 27:

[W]here the English courts apply their common law rules, a litigant will usually be able to rely on an exclusive English jurisdiction clause, even if proceedings have already been commenced in a non-Member State.

...

If the EC Jurisdiction Regulation applies, however, the litigant can only rely on the exclusive English jurisdiction clause or indeed an exclusive jurisdiction clause choosing the courts of any Member State, if the court chosen is also first seised, or once the court first seised, but not chosen, declines jurisdiction.

³⁸⁴ Green Paper *supra* note 338 at 5-6.

jurisdiction clauses are concerned. This would allow the designated jurisdiction to decide on the validity of the jurisdiction agreement, and the other court seized would stay proceedings until the former decided whether to enforce the clause or decline jurisdiction in favour of the latter. This reverse priority rule would have the effect of standardizing the rule, which already applies in cases where neither party is domiciled in a Member State, and 'align[ing] to a large extent the internal Community rules with the international rules.' On the downside, where agreements are invalid, the party wishing to deny the agreement would first have to prove its invalidity in the designated forum before being able to proceed in the otherwise competent court.

Third it proposes maintaining the existing "first come first served" rule, but improving communications and cooperation between the two courts by incorporating such notions as deadlines to decide questions on jurisdiction, regular reporting obligations to the court second seized, and damages for breach of jurisdiction agreement arising for instance in cases where proceedings are unduly delayed by "Italian torpedoes".

Fourth it proposes excluding the rule altogether 'in situations where the parallel proceedings are proceedings on the merits on the one hand and proceedings for (negative) declaratory relief on the other hand or at least to ensure a suspension of the running of limitation periods with respect to the claim on the merits in case the declaratory relief fails.'³⁸⁵

³⁸⁵ Green Paper *ibid* at 6. The purpose of this exclusion would be to prevent from completely blocking proceedings on the merits.

4.3 Conclusion

The European Jurisdiction Regulation has made significant inroads in standardizing the treatment of jurisdiction clauses contained in commercial carriage contracts by including not only substantive rules on jurisdiction, but also procedural ones, in the hopes of minimizing conflicts of jurisdiction problems, and protracted and costly litigation on preliminary matters. It strives to be fair, straightforward and easy to apply, certain and predictable, and encourage the rapid and simple recognition and enforcement of judgments amongst Member States. It is a system of rules based on mutual trust and international comity, and unlike the Hamburg Rules, it generally encourages freedom of contract and holding parties to their bargains, and therefore recognizes validly formed exclusive jurisdiction agreements.

Despite the many advances achieved by this contemporary regional Regulation, some of its jurisdiction provisions are criticized for being overly simplistic, inadequately drafted, and containing loopholes, which allow offensive forum shoppers—at times bad faith claimants—to bend the rules, and the application of national law to infiltrate where it should not, whereby somewhat defeating the purpose of creating a fair, predictable and certain system of rules. It was hoped that the drafters of the Rotterdam Rules would learn from these mistakes and shortcomings, by creating a greater and more coherent system of international rules on jurisdiction to govern all international maritime contracts alike, but alas, in light of Chapter 14's voluntary nature, it is unlikely to have much of an impact or contribute towards the greater international harmonization of rules in this matter.

CHAPTER 5: REGULATION AND ENFORCEMENT OF JURISDICTION CLAUSES UNDER THE HAMBURG AND ROTTERDAM RULES

Historically, the regulation of forum clauses contained in international maritime carriage contracts was deliberately left out of maritime carriage regimes, to be regulated and enforced by national jurisdictions. This often meant that cargo interests, which had the weaker bargaining power at the time, were either required to bring their claims in distant forums under standard form bills of lading, or forced to abandon claims or underbid settlements. Thus, to protect cargo interests against the carrier's abuse of market power, the drafters of the Hamburg Rules included provisions on jurisdiction, and became the first international regime to regulate jurisdiction in the maritime context. But these provisions and the Hamburg Rules as a whole were too one-sided to be commercially realistic and embraced by seafaring nations.

In any case, it is no longer tenable in today's commercial climate to view the average shipper, and indeed the average third party consignee or transferee bill of lading holder, as a weaker bargaining power without any say in the matter. The Rotterdam Rules recognizes this reality, and aims to achieve greater commercial relevance and certainty by encouraging party autonomy and the enforcement of jurisdiction clauses under specific circumstances. The Convention's innovative rules on jurisdiction are influenced both by the Hamburg regime and the EC Jurisdiction Regulation (minus Europe's procedural rules governing conflict of jurisdiction problems), and represent the culmination of years of work and heated debate.

5.1 Hamburg Rules

As discussed in Chapter 2, the Hague Rules and Visby amendment were meant to address the imbalance between carriers and cargo interests by imposing, *inter alia*, minimum standards of liability for carriers in exchange for certain exemptions. However, many felt that these Conventions did not go far enough to protect cargo interests, especially in view of the ‘large number of exceptions [carriers are able to raise,] which either defeat or considerably delay the settlement of cargo claims.’³⁸⁶

In time, the maritime community responded with the Hamburg Rules, which undertook to bring about significant changes to the existing maritime regime, and propel the “pendulum of liability” for cargo loss and damage hard over towards carriers.³⁸⁷ One such groundbreaking change was to include, for the very first time, provisions on jurisdiction and arbitration,³⁸⁸ in an effort to harmonize the application of jurisdictional rules in the international context of maritime transportation.³⁸⁹ **Article 21(1)** of the **Hamburg Rules** states that:

³⁸⁶ Hare *Shipping law and admiralty supra* note ??? at 489.

³⁸⁷ *Ibid.* The initiative leading to the Hamburg Rules was not aiming to reach a compromise position between carriers and shippers, unlike the Hague and Hague/Visby initiatives. Rather its main objective was to level out the playing field. This clear shift to protection of cargo interests perhaps explains why the Hamburg Rules did not achieve widespread acceptance.

³⁸⁸ Von Ziegler explains *supra* note 4 at 90 that ‘[t]hose provisions are very much inspired by the respective provisions regulating other transport modes.’

³⁸⁹ Some of the other important changes include increase in per kilo/package limitation, rules applying “inwards” and “outwards” (as per US Cogsa, but contrary to Hague and Hague/Visby Rules, which only apply outwards), rules applying “port to port” (versus “tackle to tackle” under Hague and Hague/Visby Rules), 2-year prescription (versus 1-year under Hague and Hague/Visby Rules), presumption of liability against the carrier, claims in delict and tort against the carrier permitted (whereas they are avoided under Hague and Hague/Visby Rules), distinction made between carrier and “actual carrier”, provisions not applicable to charterparties unless specifically stipulated in bill of lading, stipulation that first carrier responsible for complete carriage (through-carriage provision), removal of exclusion of liability for nautical fault, broader definition of contract of carriage (to include sea waybills, non-negotiable receipts and e-bills). For more on changes under Hamburg Rules, see

In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

- (a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or
- (b) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
- (c) the port of loading or the port of discharge; or
- (d) any additional place designated for that purpose in the contract of carriage by sea³⁹⁰ [emphasis added.]

Thus, under Article 21(1), the claimant has *the option* to sue in any one of a finite list of reasonable forums,³⁹¹ all of which have 'a significant connection with the transaction or the carrier.'³⁹² This provision does not, however, allow parties to agree to limit their choice of forum in advance. So even if a contract of carriage contains a jurisdiction clause, the plaintiff is free to override the contractual provision and select one of the aforementioned forums, provided of course that the court selected is competent under the national law applicable.

This rule restricting the autonomy of parties to stipulate an exclusive choice of forum in contracts of carriage stems from a preoccupation with unequal bargaining power and the imposition of adhesion contracts.

According to Sparka:

The purpose of this provision is to avoid the imposition of exclusive jurisdiction clauses by carriers who were presumed to be in a better bargaining position than the shipper. Furthermore, this provision constitutes a compromise between those countries who would have liked to ban

generally Hare *Shipping law and supra* note 16 at 490-93; Tetley 'The Hamburg Rules – a commentary' [1979] *LMCQ* 1-20.

³⁹⁰ Article 21(1)(d) essentially allows parties to include non-exclusive jurisdiction clauses in their contracts of carriage, providing claimants with yet another optional forum for suit.

³⁹¹ William Tetley *Marine cargo claims* 4ed (2008) 1913: 'The Hamburg Rules at art. 21(1) set out rules governing where suit may be taken and limiting the right of contracting parties or of the court to agree to other jurisdictions.' Article 21(3) limits proceedings to places specified in 21(1) and (2).

³⁹² Sturley 'Jurisdiction under the Rotterdam Rules' *supra* note 44 at 4. Note that this wide choice of jurisdiction applies not only to claims by cargo claimants against carriers, but also to claims by carriers seeking a declaration of non-liability against shippers.

jurisdiction agreements altogether and others who would have preferred no regulation of jurisdiction agreements at all.³⁹³

This so-called “compromise” has the effect of removing legal certainty and quantifiable exposure to risk, ostensibly in the name of promoting procedural fairness. That said, defendants may seek recourse under the doctrine of *forum non conveniens*, since it would appear that this discretionary remedy is not forbidden under the Hamburg Rules ‘so long as the doctrine is part of the national legal system.’³⁹⁴ Thus, a party seeking to apply this common law doctrine would need to convince the court seized with the dispute that notwithstanding the choice of forum per Article 21 of the Rules, the forum selected in the carriage agreement is in fact the more convenient, appropriate or natural forum.

Article 21(2) of the Hamburg Rules provides that when a ship or sistership is arrested in a port state subject to the Hamburg Rules, an action may be commenced in this location, notwithstanding the fact that it is not one of the places enumerated at paragraph 1. However, a defendant may petition to have the action removed from this jurisdiction, and so long as sufficient security is provided, the claimant must then relocate the proceedings to one of the places enumerated at paragraph 1.

Article 21(4) of the Hamburg Rules bars parallel proceedings ‘between the same parties on the same grounds unless the judgment of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted.’

³⁹³ Sparka *supra* note 42 at 192.

³⁹⁴ *Ibid* at 193.

Article 21(5) of the **Hamburg rules** provides that ‘notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an actions, is effective [emphasis added].’

These and other new provisions under the Hamburg Rules have been highly criticized by maritime experts and scholars alike for being too radical and/or poorly drafted. Tetley sums up the problem best:

The Hamburg Rules in many respects are an improvement over the Hague Rules and the Hague-Visby rules but in other respects they are retrograde. They are an advance in respect to defining some responsibility and in clarifying certain problems of past law but they are at other times retrograde in the placing of responsibility, in the creation of new complicated technical procedures and in confusing drafting. Most important of all, if they come into force, they will not be universal but will create a third carriage of goods by sea convention existing simultaneously with the Hague Rules and Hague-Visby Rules on the shipping lanes of the world. The ensuing contradictions and disputes will frustrate carriers and shippers, confound Admiralty lawyers, ensnarl the courts of the world and only please the occasional professor of conflicts of law.³⁹⁵

In essence, the shift in risk allocation ‘squarely onto the shoulders of the carrier’³⁹⁶ is considered too drastic to be acceptable to major shipping nations, which probably explains why none of them have ratified the Hamburg Rules to date. Though the Rules have not been widely ratified, they are significant, as they have inspired national jurisdictions such as Canada and the Nordic countries to incorporate the notion of optional jurisdictions for suit under their rules, with certain national modifications, and

³⁹⁵ ‘The Hamburg Rules’ *supra* note 389. See also J Sweeney ‘UNCITRAL and the Hamburg Rules – the risk allocation problem in the maritime transport of goods’ (1991) 22 *JMLC* 529-30.

³⁹⁶ Hare *Shipping law and admiralty supra* note 16 at 490.

have served as a starting point for jurisdiction provisions under the Rotterdam Rules.³⁹⁷

5.2 Rotterdam Rules

Unlike the Hamburg Rules or the Hague and Hague/Visby Rules before them, '[the] UNCITRAL Convention is neither in favour of the [ship]owners nor in favour of the shippers: ... [it] does not seek to protect any socio-professional category.³⁹⁸ It aims to realise a balance between both interests.'³⁹⁹ However, much like the EC Jurisdiction Regulation and Hamburg Rules, its rules on jurisdiction (at Chapter 14) incorporate the notion of optional forums for suit by plaintiffs, at the same time recognizing commercial parties' freedom to contract as they see fit, under particular circumstances.⁴⁰⁰

³⁹⁷ Tetley *Marine cargo claims supra* note 38 at 1914 and 1919-20.

³⁹⁸ P Mukherjee et al 'A legal and economic analysis of the volume contract concept under the Rotterdam Rules: selected issues in perspective' (2009) 40(4) *JMLC* 579 at 581-82:

Since the time of the Harter Act the debate on contractual imbalance has revolved around the need to protect cargo interests by certain mandatory minimum liability rules for the carrier. The contractual imbalance, it is alleged, is attributable to the philosophy underlying the Hague Rules or the Hague-Visby Rules which dominate current carriage transactions. With the demise of colonialism and the emergence of independent sovereign states which were at the time referred to as the third world states, the Hamburg Rules were developed to accommodate their interests. From a macro perspective, the imbalance is recognized as a function of the conflict between states whose international trade is based on cargo owning interests, namely shipper or consignee, and states whose international trade is based on carrier interests, i.e., shipowners, charterers and the like.

...

It is also to be noted that states which identify themselves primarily with cargo owning interests may also be major flag states regardless of whether they operate in an open or closed registry system or any other alternative type of registry.

Therefore, the assumption that there is an irreconcilable divide between traditional maritime states as representing carrier interests and developing countries with primarily cargo owning interests is no longer valid. The advent of multiple registry types leading to varieties of flag states has in practical terms obliterated the original polarized characteristics of states opting for the Hague/Hague-Visby regimes or the Hamburg regime.

³⁹⁹ Delebeque *supra* note 71 at 276.

⁴⁰⁰ Some of the key changes under the Rotterdam Rules include "door to door" application of the rules; 2-year prescription; removal of the exemption for nautical fault; liability of maritime performing parties (bringing them essentially into the same regime as contracting carriers); shipper liability provisions; exception from mandatory application of rules for

As a general rule, cargo claimants may choose to litigate in a competent⁴⁰¹ court located in any one of the following forums:

- The domicile of the carrier;
- The place of receipt agreed in the contract of carriage;
- The place of delivery agreed in the contract of carriage; or
- The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.⁴⁰²

Alternatively, a claimant may opt to bring suit in a court of competent jurisdiction designated by an agreement between the shipper and the carrier.⁴⁰³ Furthermore, instead of filing suit against the contractual carrier, a

volume contracts; e-commerce rules; ongoing duty to make vessel seaworthy; increased limitation of liability. See generally F Berlingieri 'Multimodal aspects of the Rotterdam Rules' Colloquium of the Rotterdam Rules 2009, De Doelen, Rotterdam, 21 September 2009. Available at <http://www.rotterdamrules2009.com/cms/index.php?page=text-speakers-rotterdam-rules-2009> [Accessed 1 February 2011]; Report to Industry by Australian Government Delegation 'Summary for Australian industry of United Nations convention on contracts for the international carriage of goods wholly or partly by sea' [2009] 23 *Austl & NZ Mar LJ* 116.

⁴⁰¹ Per Article 1(30) of the Rotterdam Rules: "Competent court" means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute [emphasis added].

⁴⁰² Article 66(a) Rotterdam Rules. For an excellent overview on each of these permissible forums, see generally Sturley 'Jurisdiction under the Rotterdam Rules' *supra* note 44 at 11-20. Article 66 makes it clear that the plaintiff that has "the option" under this provision is a cargo claimant/shipper/subrogated cargo insurer, not a carrier seeking a declaration of non-liability (unlike the Hamburg Rules and EEC Jurisdiction Regulation, which do not make this specification).

A/CN.9/WG.III/WP.34 Report of the UNCITRAL Working Group III (Transport Law) on the work of its twelfth session, Proposal by the United States at para 31:

[The list at Article 66(a)] differs from the Hamburg Rules list in two principal respects. It uses the places of receipt and delivery in addition to the ports of loading and discharge. This change simply recognizes the Instrument's potential door-to-door application (in contrast with the Hamburg Rules' port-to-port application). The place of contracting is also omitted from the list. In today's era of electronic contracting, the place of contracting is often difficult to determine, and is generally irrelevant to the transaction even when it can be determined. Furthermore, it can easily be manipulated if there is any advantage to doing so.

⁴⁰³ Article 66(b) Rotterdam Rules. The fact that the plaintiff is at liberty to ignore the agreement and choose any of the other places listed at Article 66(a) suggests that unless the agreement fulfils the requirements of Article 67 (see below), the agreement envisioned under Article 66(b) will be non-exclusive; it is but an additional jurisdictional basis amongst the list of permissible forums from which the plaintiff may choose (A/CN.9/572 Report of the

claimant may file suit against the maritime performing party;⁴⁰⁴ however, the claimant is limited to filing in a competent court situated within one of the following places: the domicile of the maritime performing party, the port where the goods were received or delivered by the maritime performing party, or the port in which the maritime performing party performs its activities with respect to the goods.⁴⁰⁵

Thus, the basic rule is that cargo claimants may choose to litigate in any one of the locations from the list of permissible forums.⁴⁰⁶ An exception exists when parties to a volume contract include an exclusive jurisdiction agreement in their contract of carriage. **Article 67(1)** of the **Rotterdam Rules** states that:

The jurisdiction of a court chosen in accordance with article 66, subparagraph b), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

- (a) Is contained in a volume contract that clearly states the names and addresses of the parties and either
- (i) is individually negotiated or

UNCITRAL Working Group III (Transport Law) on the work of its fourteenth session at para 132.) See Section 2.3 on the construction of jurisdiction clauses.

⁴⁰⁴ Eg stevedore, terminal operator or ocean carrier – see Article 1(6) and 1(7) Rotterdam Rules.

⁴⁰⁵ Per Article 68 Rotterdam Rules. Bursanescu *supra* note 47 at 70 explains that '[t]his article ensures that a maritime performing party who is not otherwise a party to the contract of carriage will only be sued either at its domicile, at the port of loading or discharge (if it is an ocean carrier), or at the port where it performs its activities (if it is a stevedore, terminal operator, etc.)'

⁴⁰⁶ The list of permissible forums at Article 66 forms a *numerus clausus*; it is exhaustive and cargo claimants may not bring suit against carriers in any other jurisdictions (see Article 69 Rotterdam Rules), unless one of the following exceptions applies: there is an exclusive jurisdiction agreement contained in a volume contract (Article 67, discussed below); the claimant has arrested the vessel *in rem* (Article 70); the parties conclude a jurisdiction agreement *after* the dispute has arisen (Article 72 – same as Hamburg Rules); the carrier is a charterer, and therefore the Rotterdam Rules do not apply to it (Article 6), which means that parties to charterparty agreement or bill of lading may litigate wherever they choose. Note too that Chapter 14 'shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention...whether adopted before or after this Convention' per Article 73(3) Rotterdam Rules. Thus, in cases of conflict, the EC Jurisdiction Regulation will prevail over provisions of the Rotterdam Rules.

- (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and
- (b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State [emphasis added].

Therefore, the first important limitation is that a jurisdiction clause is only exclusive and binding under the Rotterdam Rules if it is contained in a volume contract⁴⁰⁷ (otherwise known as a “service contract” in the United States),⁴⁰⁸ defined at **Article 1(2) of the Rotterdam Rules** as ‘a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time.’⁴⁰⁹

A unique feature of the Rotterdam Rules is the introduction of ‘wide contractual freedom for shippers and carriers to negotiate shipping contracts outside the Convention’.⁴¹⁰ In particular, parties are given a certain level of contractual freedom when customizing “volume contracts” to negotiate terms

⁴⁰⁷ This is a clear departure from the definition of jurisdiction clauses under the EC Jurisdiction Regulation.

⁴⁰⁸ C Hooper ‘Forum selection and arbitration in the draft convention on contracts for the international carriage of goods wholly or partly by sea, or the definition of *fora conveniens* set forth in the Rotterdam Rules’ (2009) 44(3) *Texas international law journal* 417 at 420-21.

⁴⁰⁹ M H Carlson ‘US participation in the international unification of private law: the making of the UNCITRAL draft carriage of goods by sea convention’ (2007) 31 *Tul Mar LJ* 617 at 634-35:

For the United States, a forum selection provision that incorporates these two points—one favouring the shipper, and one the carrier—is a “deal-breaker” issue. It is unlikely that the United States would become a party to the new convention if it does not include these two rules

In UNCITRAL, it was clear from the beginning that delegations had irreconcilably different views. Many preferred that forum selection clauses be enforced in all cases, even if they appeared in the boilerplate clauses of a liner bill of lading. Others preferred that exclusive choice-of-forum clauses never be enforced, thus guaranteeing that cargo interests would have access to convenient forums to resolve their claims against carriers.

...

The text that the Working Group eventually accepted in principle was the result of a joint proposal of the United States and the European Commission.

...

The Joint Proposal was a compromise that harmonized the law to the extent possible, but offered optional choice to the extent necessary to reach an agreement.

⁴¹⁰ Transport Canada International Marine Policy *supra* note 77 at 3.

and conditions as they see fit, providing for 'greater or lesser rights, obligations and liabilities than those imposed by [the] Convention.'⁴¹¹

However, they may not derogate from two important obligations: the carrier's continued obligation to exercise due diligence in making the ship seaworthy, and the shipper's obligation to provide complete instructions and documentation on carriage of goods.⁴¹² Unsurprisingly, many maritime industry experts are critical of the rather vague concept of volume contracts,⁴¹³ which allows parties to operate outside the framework of the Convention, and empowers 'carriers to offer volume deals at a set rate, covering a certain volume of shipments per year, on the basis that the shipper effectively opts out of the provisions of the rules.'⁴¹⁴

⁴¹¹ Article 80 Rotterdam Rules, re special rules for volume contracts. In order for the derogation from the Rules to be binding, the shipper must be given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with the Rules' standard without any derogation.

⁴¹² Other obligations that may not be amended or omitted under volume contracts: obligations regarding crewing and equipping the ship, obligations regarding dangerous goods, liability in relation to any of these above issues, and the loss of the right to limit liability, generally speaking (Article 80(4) Rotterdam Rules.)

⁴¹³ See Mukherjee et al *supra* note 398; Report to Industry by Australian Government Delegation *supra* note 399 at 9:

Critics have argued that if one of the objects of the Rotterdam Rules is to bring back legal uniformity to contracts for the carriage of goods by sea, such an exemption, enabling them to be derogated from almost entirely, should not be allowed. Additionally, the definition that has been adopted for such contracts is so wide that it could potentially include small contracts, in which equal bargaining power is unlikely to exist - even with the limitations provided for.

The impact of this provision could be significant. It is estimated that currently 90% of containerised cargo in the world moves under 'service contracts'. It could therefore be estimated that a similar percentage of cargo will be moved under volume contracts, which could mean that the vast majority of the world's cargo could be shipped in a completely unregulated fashion for the first time since the early 20th century, prior to the introduction of any internationally agreed regulation.

⁴¹⁴ N Smith 'Rotterdammerung, or twilight of the COGSA (and the Hague-Visby Rules).' Available at <https://www.bimco.org/Members/News/2009/2009.aspx> [Accessed on 1 February 2011]. But see D Amodeo 'Le contrat de volume des règles de Rotterdam peut-il être un piège pour les chargeurs?' Newsletter du Centre de Droit Maritime et des Transports, May 2010. Available at http://www.droitmaritime.com/article.php3?id_article=528 [Accessed on 1 February 2011]:

It is doubtful that the concept of volume contracts under the Rotterdam Rules was meant to apply to smaller shippers, and even if it did, it would seem that they are well protected by the wording of the provisions. Only time will really tell how

Thus, in keeping with the broad contractual freedom bestowed upon parties to volume contracts, these commercial entities are free to agree to litigate wherever they choose, so long as (1) they agree to the exclusive jurisdiction clause; (2) the agreement contained in the volume contract (which clearly states the names and addresses of the parties) is either individually negotiated (in other words, is not contained in a contract of adhesion), or contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and (3) the court or courts of a contracting state are clearly designated.

Third parties to volume contracts, such as consignees and transferee bill of lading holders (but not maritime performing parties), are also bound by exclusive jurisdiction agreements that fulfil the requirements of Article 67(1), but only if certain additional conditions are met, which are designed to provide a higher protective standard and prevent third parties from suffering hardship.⁴¹⁵

The exclusive jurisdiction agreement must respect the form requirements of **Article 3 of the Rotterdam Rules**, that is to say the agreement must be in writing, in order to bind a third party to the volume contract. Also, in accordance with **Article 67(2) of the Rotterdam Rules**:

A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:

- (a) The court is in one of the places designated in article 66, subparagraph (a);
- (b) That agreement is contained in the transport document or electronic transport record;

maritime professionals intend to make use of volume contracts; but for now, it would seem that these contracts are primarily geared towards larger shippers, which have equal bargaining power to carriers, and hope to escape the mandatory provisions of international conventions in order to contract as they see fit [translation].

⁴¹⁵ See generally A/CN.9/576 Report of the UNCITRAL Working Group III (Transport Law) on the work of its fifteenth session at paras 164-168.

- (c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and
- (d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

Thus, third parties to volume contracts may only be bound to an exclusive jurisdiction agreement if the place designated is one of the permissible forums at Article 66(a), which, '[a]s a practical matter, [is] most likely [to be] ... the carrier's domicile' according to Sturley, since 'only the carrier's domicile would be the same in each transaction.'⁴¹⁶ Furthermore, the jurisdiction agreement must be repeated in the transport document or electronic record, and not merely incorporated by reference.⁴¹⁷ What is more, notice of the court and of its exclusive jurisdiction must be given to the third party in a timely and adequate manner. Finally, the court seized must apply its own national law (including choice-of-law rules), and not the law of the court named in the volume contract, to determine whether the third party may be bound by the exclusive jurisdiction clause.⁴¹⁸ In the end, therefore, the enforceability of exclusive jurisdiction clauses against third parties to volume contracts will essentially depend on national law.⁴¹⁹

⁴¹⁶ Sturley 'Jurisdiction Under the Rotterdam Rules' *supra* note 44 at 25.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid* at 27.

⁴¹⁹ *Ibid* at 27 and 28 footnote 128:

As a practical matter, article 67(2)(d) essentially gives a country the ability to opt out of article 67(2). A nation whose national law does not allow a third party to be bound by an exclusive choice-of-court agreement—or a nation that amends its national law so as not to allow a third party to be bound by an exclusive choice-of-court agreement in this situation—can choose to be bound by the rest of the jurisdiction chapter and limit article 67 to its effect on the immediate parties to a volume contract.

J Alcántara et al 'Particular concerns with regard to the Rotterdam Rules' (2010) 2(1) *Cuadernos de Derecho Transnacional* 5 at 11:

For third parties ... Article 67 adds even further complexity where the court seized must recognise that the third party may be bound by the exclusive choice of court agreement. Obviously, the law will differ from state to state as to whether such a third party is bound by such a clause (Article 67.2(d)) leading to further disputes and litigation. Potentially there will be different results in different contracting states, depending on whether they regard the question as one of procedural law or substantive contract law, leading to potential problems of enforcement. The third party will require preliminary advice as to whether they are bound by the exclusive

As one would expect, jurisdiction clauses agreed upon *after* a dispute has arisen⁴²⁰ are enforceable, whether oral or written, implicit (through conduct) or explicit,⁴²¹ so long as the selected court is competent in accordance with Article 1(30) of the Rotterdam Rules.⁴²² Furthermore, '[n]othing in the provisions of the Rotterdam Rules affects jurisdiction with regard to provisional or protective measures, including arrest *in rem* as per the Arrest Convention'.⁴²³

But as already mentioned, there is an important caveat to Chapter 14: **Article 74 of the Rotterdam Rules** (dubbed the "opt in" provision) states that '[t]he provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.' In other words, ratifying states may choose not to opt into the chapter on jurisdiction, and instead leave the question of jurisdiction to be determined by their national law or otherwise.⁴²⁴ Thus, whereas some contracting

choice of agreement which will depend on which law is applicable. This may, in turn, depend upon whether the procedural or substantive law of the contract is applicable.

⁴²⁰ That is, in 'the period following a voyage when the damage ha[s] already occurred, but a court ha[s] not yet been seized with the claim' (A/CN.9/591 Report of the UNCITRAL Working Group III (Transport Law) on the work of its sixteenth session at para 63).

⁴²¹ A/CN.9/591 Report of the UNCITRAL Working Group III (Transport Law) on the work of its sixteenth session at para 62.

⁴²² Whereas a jurisdiction agreement concluded before a dispute has arisen must be contained in a validly formed volume contract in order to be effective and override the plaintiff's choice of forum, arguably (upon a textual reading of Article 72) that is not the case for jurisdiction agreements concluded after a dispute has arisen. However, Articles 66 and 71 suggest otherwise. These provisions refer to 'an exclusive choice of court agreement that complies with/is binding pursuant to article 67 or 72.' Therefore, it would seem that a jurisdiction agreement reached after a dispute has arisen must also be contained in a "volume contract" to be binding.

⁴²³ Article 70 Rotterdam Rules.

⁴²⁴ A/CN.9/616 Report of the UNCITRAL Working Group III (Transport Law) on the work of its eighteenth session at para 246:

There was strong support for allowing for a reservation or 'opt in' clause to be provided for Contracting States in the draft convention with respect to the entire chapter on jurisdiction. A number of delegations that had originally expressed an interest during the sixteenth session in deleting the entire chapter on jurisdiction expressed their satisfaction with respect to this proposal and for the flexibility that it would grant to Contracting States.

nations may choose to declare themselves bound by these provisions, others will likely ignore them.⁴²⁵

The “opt in” provision was basically added at the eleventh hour because national opinions on the subject of jurisdiction were quite divergent, and therefore the inclusion of Chapter 14 (and Chapter 15 on Arbitration for that matter) was seen as a major obstacle to wide ratification of the Rotterdam Rules. As matters stand, it is unlikely that nations such as Australia, New Zealand, South Africa, and China, which would argue that the provisions on jurisdiction go too far, and others such as the United Kingdom and many Members of the European Union, which would argue that the provisions do not go far enough, will opt into Chapter 14. It is also debatable whether nations such as France, predominantly preoccupied with the interests of smaller shippers and third parties with weaker bargaining power, will ever agree to be bound by these uncertain broadly stipulated provisions. Indeed, upon reflection and review of the predominant maritime opinion, it seems rather unlikely that the Rotterdam Rules will be widely accepted and become “the” Convention to finally harmonize the treatment of jurisdiction agreements contained in international maritime carriage contracts.

According to Bursanescu *supra* note 47 at 72, ‘[t]his is hardly an acceptable disposition, as it essentially overrides all the work that was put in balancing the different interests under Chapter [14].’

⁴²⁵ Sturley ‘Jurisdiction Under the Rotterdam Rules’ *supra* note 44 at 8-9:

A nation choosing to be bound must make a formal declaration to that effect under article 91. A nation that simply ratifies the Convention without taking any further action, therefore, will not be bound by the chapter. A court in that nation will instead address these issues under the law that it would otherwise apply, which might be its own national law, the proper law of the contract, another international instrument, or even some combination of those sources.

Most nations making declarations under article 74 will presumably do so at the time they ratify the Convention, but article 91(1) permits the declaration to be made “at any time” and article 91(5) similarly permits a nation to withdraw its declaration “at any time”. Thus a nation could ratify the Convention immediately while postponing its decision on the jurisdiction chapter. Moreover, it may revisit its decision at any time, either accepting rules that it had previously rejected or withdrawing from the coverage that it had previously elected [emphasis added].

5.3 Conclusion

Despite the general lack of success of the Hamburg Rules, its pro-cargo jurisdiction provisions have served a significant purpose insofar as they have influenced the drafting of national provisions on jurisdiction, and have laid the foundation for the default rule on jurisdiction under the Rotterdam Rules. As for these latest Rules, it is generally believed that, despite the gargantuan effort that went behind drafting the carefully considered substantive rules on jurisdiction, in practice, carriers will continue to dictate jurisdiction in most instances, and the panoply of differing national opinions and laws will continue to govern the enforceability of jurisdiction clauses. But, as Sturley sensibly reminds his readers, all was not for naught:

[T]he jurisdiction chapter, like the Rotterdam Rules as a whole, achieved a broadly acceptable compromise that advanced international uniformity on some important (albeit not all) aspects of the subject. Ratifying the convention will be an important step toward restoring international uniformity to the rules governing the carriage of goods in maritime commerce.⁴²⁶

⁴²⁶ *Ibid* at 35-36.

CHAPTER 6: CONCLUDING REMARKS

In many ways, the maritime industry has come full circle in terms of regulating jurisdiction clauses contained in international maritime contracts with the advent of the Rotterdam Rules. Under this Convention, if commercial parties transport goods under service contracts or volume contracts, which apparently account for the majority of the worldwide cargo trade, then they are at liberty to contract as they see fit, 'in a completely unregulated fashion,'⁴²⁷ with only very limited restrictions. This shift in paradigm towards greater contractual freedom and market self-regulation appears to be sanctioned by most seafaring nations, particularly in light of the fact that it is no longer tenable to view the average shipper or third party as a weaker bargaining power warranting special protection.

Consistent with this trend, there is a growing international consensus that jurisdiction clauses contained in carriers' bills or other contracts of carriage should, as a general rule, be enforced. These standard form clauses are no longer considered an 'abuse of market power', but rather as 'an important element in international commercial transactions, allowing the parties to better calculate the risks of the transaction and helping to lower the overall costs of legal proceedings.'⁴²⁸ And yet, in spite of all that, a complete absence in regulation of jurisdiction clauses contained in contracts of carriage does not appear to be the answer, since it plays a crucial role, over and above ordinary principles of contract law, in protecting commercial parties against procedural and substantive abuses in this industry without borders. But, the question is, how best to regulate these jurisdiction clauses at maritime law?

⁴²⁷ 'SITPRO's Guide to the Rotterdam Rules' at 9. Available at www.sitpro.org.uk/rotterdamrules [Accessed on 1 February 2011].

⁴²⁸ Sparka *supra* note 42 at 222.

Some nations question the need for a unifying instrument to regulate jurisdiction issues and/or argue in favour of maintaining the status quo, that is to say leaving it 'up to national law to determine whether and under what conditions exclusive jurisdiction clauses would be upheld or held null and void.'⁴²⁹ To be sure, should states not take enough interest, national views remain too divergent, and/or there be an overwhelming 'persistence of nationalism',⁴³⁰ harmonization of jurisdiction rules may be altogether impossible. The solution to "do nothing" hardly seems satisfactory given the potential for lack of recognition and enforcement of national legislation and judgments on forum selection clauses by foreign jurisdictions (and concomitantly the risk of costly parallel proceedings),⁴³¹ and, most of all, given the international character of the general maritime law. Tetley reminds us of the importance of uniformity in this branch of international law, 'which knows no national boundaries':⁴³²

Uniformity of law enables the shipper who ships goods anywhere in the world to know the risks he is taking and the rights he possesses. Uniformity of law enables the carrier to know his rights and responsibilities no matter which port his vessel enters. The bill of lading, being a receipt for cargo, a contract of carriage and a document of title, and therefore an instrument of integrity, should have the same meaning no matter where it is issued.

...

[M]aritime law, being international law, is based on the *lex mercatoria* and *lex maritima* – laws which [know] no national boundaries. Maritime law and the law of carriage of goods by sea should be international and uniform, because goods and ships travel from one jurisdiction to another. Merchants, shippers, consignees and carriers (and their underwriters) can only have

⁴²⁹ Von Ziegler *supra* note 4 at 107.

⁴³⁰ Tetley 'Uniformity and international private maritime' *supra* note 51 at 810.

⁴³¹ According to P Myburgh in 'Uniformity or unilateralism in the law of carriage of goods by sea?' (2000) 31 *Victoria University of Wellington LR* 355, without uniformity in jurisdiction rules parties face the risk of multiple proceedings, which 'raises the spectre of multiple conflicting [remedies] in different jurisdictions, multiple anti-suit injunctions, and further conflicts of recognition and enforcement of awards; carriage claims will inevitably become even more complicated than they already are, as they become overlaid with increasingly complex conflicts of laws issues.'

⁴³² W Tetley 'Interpretation and construction of the Hague, Hague/Visby and Hamburg Rules' (2004) 10 *JIML* 30 at 55.

complete confidence in a contract if they are certain as to which law will apply and how it will be interpreted, no matter in what jurisdiction their claim or defence is heard.⁴³³

As previously stated, the harmonization of rules on jurisdiction at maritime law has the advantage of promoting legal certainty, coherency and fairness in the treatment of rules in this area of international law. This may be achieved at a regional and international level. The EC Jurisdiction Regulation is an example of a successful, albeit imperfect, regional initiative seeking to uniformize rules on jurisdiction in civil and commercial matters. But, as Paul Myburg cautions, 'regional initiatives are ... a double-edged sword, in the sense that, while harmonising the carriage liability regime in one region, they might exacerbate divergence and conflict of laws in relation to others.'⁴³⁴

At the international level, harmonization of rules on jurisdiction may be achieved in a number of different ways. One possibility is through the creation of international maritime conventions, such as the Hamburg Rules and Rotterdam Rules. Despite the tremendous amount of time, effort, and money spent by national delegations and various other maritime interests in drafting these elaborate rules to govern contracts of carriage, including the regulation of jurisdiction clauses, it is debatable whether these conventions will ever be effective, that is to say, whether they will be ratified or acceded to by a sufficient number of nations over the years to come so as to achieve international harmonization in this area of the law. There are a number of reasons standing in the way of attaining uniformity through these

⁴³³ *Ibid* at 41 and 55.

⁴³⁴ Myburg *supra* note 431 at 380.

conventions, including:⁴³⁵ over elaboration of the rules, creating endless opportunities for arguments and varying interpretations (and therefore uncertainty in the law);⁴³⁶ differences in political and social objectives;⁴³⁷ different standards resulting from differences in national wealth;⁴³⁸ refusal of some states to give up their legislative sovereignty;⁴³⁹ diverging transnational interests; indifference of certain governments: international private maritime law is rarely a 'top priority' of national lawmakers;⁴⁴⁰ and the fact that nations are simply all "conventioned out."⁴⁴¹ However, even if international conventions do not come into force, they may nevertheless contribute to the progressive harmonization and unification of international trade law by serving as 'a guide for the future.'⁴⁴²

⁴³⁵ See generally P Griggs 'Obstacles to uniformity of maritime law – the Nicholas J Healy lecture' (2003) 34(2) *JMLC* 191 at 198-208; Tetley 'Uniformity and international private maritime law' *supra* note 51 at 801-11.

G Bayraktaroglu 'Harmonization of private international law at different levels: communitarization v international harmonization' (2003) 5(1) *European Journal of Law Reform* 127 at 154:

Conventions are very much questioned since they become stumbling-blocks for new developments. This is not only caused by the slowness of the ratification or modification procedures of conventions, but also by the difficulty to obtain agreement on the new rules by all the members of an organization.

Also, and more importantly, it is very difficult to obtain not only unification in law but also in practice. However, uniform application requires uniform interpretation of the conventions. It has been emphasized by many authors that even if uniformity is achieved following adoption of a single text, uniform application is by no means guaranteed, since in practice many countries interpret the same words differently.

⁴³⁶ Griggs *ibid* at 203.

⁴³⁷ Tetley 'Uniformity and international private maritime' *supra* note 51 at 807.

⁴³⁸ *Ibid* at 808.

⁴³⁹ *Ibid* at 810.

⁴⁴⁰ *Ibid*; Griggs *supra* note 435 at 205.

⁴⁴¹ Griggs *ibid* at 208:

I definitely sense a certain inertia amongst national governments when it comes to ratifying or acceding to international conventions. This is probably due to a combination of many factors: availability of legislative time, availability of lawyers capable of drafting the necessary national legislation, discovery of national opposition to a particular instrument, etc. It may also be that, in certain respects, states relish the diversities of law. For example, I cannot see the South African government ratifying the 1999 Arrest Convention since it would require them to change their law and would circumscribe the current freedom of arrest in that country. There is no doubt that a beneficial legal regime can attract foreign business and therefore foreign currency.

⁴⁴² Tetley 'Uniformity and international private maritime' *supra* note 51 at 801.

Another possible means of achieving harmonization of rules on jurisdiction at the international level is through the amendment of existing contract of carriage regulations, which would take far less time to draft than a convention from scratch. The Hague and Hague/Visby Rules already enjoy wide ratification. It has been suggested that ‘a small number of very necessary amendments to the Hague regime would have been more acceptable and more likely to succeed.’⁴⁴³ Perhaps this solution might be combined with the “tacit acceptance procedure,”⁴⁴⁴ which would “fast track” the implementation of the new rules and prevent the delays usually associated with traditional methods of incorporating international rules into national law.

Another solution, arguably ‘more feasible than international conventions in terms of their negotiation and preparation,’⁴⁴⁵ is to harmonize rules on jurisdiction through the use of non-binding instruments such as rules, model laws, guidelines and general principles, often referred to as “soft” law.⁴⁴⁶

[T]he mandatory status of international conventions can raise the political stakes to the point where all that the parties can agree on is a mediocre instrument hedged about with problematic compromises. By contrast, the use of model laws or voluntary principles, industry clauses or guidelines can be considerably less threatening and achieve more effective harmonisation in the long term [emphasis added].⁴⁴⁷

⁴⁴³ D R Thomas ‘Editorial of the Journal of International Maritime Law’ (2008) 14 *JIML* at 190. Perhaps the only downside to this option is that the Hague and Hague/Visby Rules are in serious need of an overhaul (especially in view of the arrival of multi-modal transport and e-commerce) and therefore tacking on amendments or protocols to this outdated convention may prove to be exceedingly complicated and more trouble than its actually worth.

⁴⁴⁴ Tacit acceptance procedure: where an amendment to a given convention or protocol automatically comes into force on specified date, unless contracting state specifically objects to it by a specified date (see Tetley ‘Uniformity and international private maritime law’ *supra* note 51 at 818).

⁴⁴⁵ Bayraktaroglu *supra* note 435 at 154-55.

⁴⁴⁶ *Ibid* at 154-55; Allsop ‘International maritime arbitration’ *supra* note 258 at 10.

⁴⁴⁷ Myburg *supra* note 431 at 381-82.

Of course, the downside to “soft law” is that it does not have force of law, and therefore it may be totally ignored by the very persons it was intended to regulate.⁴⁴⁸

Finally, a further solution to the lack of uniformity of international rules of maritime law, and jurisdiction clauses contained in contracts of carriage in particular, is to rely on uniform conflict of law rules. ‘Since a complete harmonization of substantive law is utopian, harmonization of conflict rules is a very good way of solving legal divergences and bringing decisional harmony.’⁴⁴⁹ Uniform conflict of law rules already exist in Europe, with such conventions as the Rome Convention (applicable to contractual obligations), the Brussels Convention and Regulation (as seen in Chapter 5), and the Hague Choice of Court Convention (not applicable to contracts of carriage), and elsewhere, with the New York Convention (for recognition and enforcement of foreign arbitration), for example.⁴⁵⁰ According to Tetley, ‘[a] consistent international methodology to solve conflicts problems would be helpful to solve maritime law problems where international private maritime law is not uniform.’⁴⁵¹ Indeed, there is no reason why international rules similar to those in Europe should not be created to achieve a greater degree of certainty in dealing with conflicts problems relating to contracts of carriage, with a view of eliminating parallel proceedings through a strict *lis pendens* rule based on comity of nations, enforcing foreign exclusive jurisdiction agreements where reasonable, and recognizing and enforcing foreign judgments.

⁴⁴⁸ Griggs *supra* note 435 at 204.

⁴⁴⁹ Bayraktaroglu *supra* note 435 at 170.

⁴⁵⁰ Tetley ‘Uniformity and international private maritime law’ *supra* note 51 at 821-22.

⁴⁵¹ *Ibid* at 823.

At the end of the day, even with the existence of harmonized jurisdictional rules, whatever form they may take, it is not possible to completely avoid disharmony resulting from conflicting national jurisprudence and legislation, or get rid of opportunistic and aggressive forum shopping for the “best offer”.⁴⁵² And yet perhaps, as Burke-White suggests, international legal pluralism is not such a bad thing after all:⁴⁵³

[T]he pluralist conception of the international legal system recognizes—and possibly thrives on—the diversity of the system. A wide range of courts will interpret, apply, and develop the corpus of international law. States will face differing sets of obligations that may even be interpreted differently by various tribunals and may at times conflict. Possibly most significantly, national and international legal processes will interact and influence one another, resulting in new hybrid procedures, rules, and courts. Yet, these developments will occur within a common system of international law engaged in a constructive and self-referential dialogue that consciously seeks to maintain the coherence of the overall system.

The respect of legitimate difference inherent in such a pluralist conception may actually enhance the effectiveness of international law by increasing the legitimacy and political acceptability of international legal rules.

...

Admittedly, such a pluralist conception of the international legal system is not a cure-all for the dangers of fragmentation. The difficulties of conflicting obligations ... remain; further efforts at legal development will be needed to resolve them. Nonetheless, this pluralist vision does provide an alternative and potentially powerful means of conceptualizing the future development of international law. By ensuring uniformity while embracing legitimate difference, the international legal system can be made both more legitimate and more effective [emphasis added].⁴⁵⁴

⁴⁵² Von Ziegler *supra* note 4 at 86-87.

⁴⁵³ W Burke-White ‘International legal pluralism’ (2004) 25 *Michigan Journal of International Law* 963 at 978-79.

⁴⁵⁴ *Ibid.*

ANNEXURE A: Examples of Standard Form Jurisdiction Clauses in International Maritime Carriage Contracts

I. Bill of Lading

Mediterranean Shipping Company Bill of Lading. Accessed at http://www.mscgva.ch/bl_terms/bl.html.

10.3 **Jurisdiction** - It is hereby specifically agreed that any suit by the Merchant, and save as additionally provided below any suit by the Carrier, shall be filed exclusively in the High Court of London and English Law shall exclusively apply, unless the carriage contracted for hereunder was to or from the United States of America, in which case suit shall be filed exclusively in the United States District Court, for the Southern District of New York and U.S. law shall exclusively apply. The Merchant agrees that it shall not institute suit in any other court and agrees to be responsible for the reasonable legal expenses and costs of the Carrier in removing a suit filed in another forum. The Merchant waives any objection to the personal jurisdiction over the Merchant of the above agreed fora.

In the case of any dispute relating to Freight or other sums due from the Merchant to the Carrier, the Carrier may, at its sole option, bring suit against the Merchant in the fora agreed above, or in the countries of the Port of Loading, Port of Discharge, Place of Delivery or in any jurisdiction where the Merchant has a place of business [emphasis added].

APL Standard Bill of Lading. Accessed at http://www.apl.com/help_center/html/bl_terms.html

28. Law and Jurisdiction

- i. **Governing Law**
Insofar as anything has not been dealt with by the terms and conditions of this Bill of Lading, Singapore law shall apply. Singapore law shall in any event apply in interpreting the terms and conditions hereof.
- ii. **Jurisdiction**
All disputes relating to this Bill of Lading shall be determined by the Courts of Singapore to the exclusion of the jurisdiction of the courts of any other country provided always that the Carrier may in its absolute and sole discretion invoke or voluntarily submit to the jurisdiction of the Courts of any other country which, but for the terms of this Bill of Lading, could properly assume jurisdiction to hear and determine such disputes, but shall not constitute a waiver of the terms of this provision in any other instance.
- iii. **Notwithstanding Clause 28 i) and ii), if Carriage includes Carriage to, from or through a port in the United States of America, the Merchant may refer any claim or dispute to the United States District Court for the Southern District of New York in accordance with the laws of the United States of America.**

COGENBILL 2007 (Bill of Lading issued by BIMCO to be used by Charterparties). Accessed at http://editor.bimco.org/Corporate/Documents/BIMCO_Documents/Bill_of_Ladings.aspx

(1) All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause/Dispute Resolution Clause, are herewith incorporated.

CONLINEBILL 2000 (Bill of Lading issued by BIMCO). Accessed at http://editor.bimco.org/Corporate/Documents/BIMCO_Documents/Bill_of_Ladings.aspx

4. Law and Jurisdiction.

Disputes arising out of or in connection with this Bill of Lading shall be exclusively determined by the courts and in accordance with the law of the place where the Carrier has his principal place of business, as stated on Page 1, except as provided elsewhere herein.

II. Sea Waybill

LINEWAYBILL (Issued by BIMCO – non-negotiable sea waybill). Accessed at www.infomarine.gr/bulletins/chartering_forms/linewaybill.pdf

3. Law and Jurisdiction

Disputes arising under this Sea Waybill shall be determined by the courts and in accordance with the law at the place where the Carrier has his principal place of business.

III. Charterparty Agreement

Shelltime 4 Charterparty (Time Charter Party)

Law and Litigation

41(a) This charter shall be construed and the relations between the parties determined in accordance with the laws of England.

(b) Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties hereby agree.

(c) Notwithstanding the foregoing, but without prejudice to any party's right to arrest or maintain the arrest of any maritime property, either party may, by giving written notice of election to the other party, elect to have any such dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act 1950, or any statutory modification or re-enactment thereof for the time being in force.