



UNIVERSITY OF GOTHENBURG
SCHOOL OF BUSINESS, ECONOMICS AND LAW

Forum Shopping in the Carriage of Goods by Sea

Gabriella Svensson

Department of Law
Master of Laws programme
Master thesis in Maritime Law, 30 higher education credits
Supervisor: Paula Bäckdén

Table of Contents

Abstract.....	p. 4
1. Introduction	p. 5
1.2 Subject and purpose	p. 5
1.3 Outline	p. 6
1.4 Material and method	p. 6
1.5 Delimitations	p. 7
2. An Introduction to Forum Shopping	p. 8
2.1 What is forum shopping?	p. 9
2.2 How is forum shopping used?	p. 11
3. Court Jurisdiction.....	p. 11
3.1 Rotterdam Rules	p. 16
3.1.1 Jurisdiction	p. 16
The general rule	p. 16
Exceptions.....	p. 20
The performing party.....	p. 21
Recognition and enforcement	p. 23
3.1.2 Arbitration.....	p. 23
The general rule	p. 25
Exceptions.....	p. 26
3.1.3 Critique against the Rotterdam Rules	p. 27
Balancing the interests.....	p. 28
Making chapters 14 and 15 optional.....	p. 29
Predictions about the future of the Rotterdam Rules.....	p. 30
3.2 The EU and Brussels-I.....	p. 30
3.3 The Lugano Convention	p. 33
3.4 English law	p. 33
3.4.1 Forum non conveniens.....	p. 34
3.4.2 Anti-suit injunctions.....	p. 35
4. Forum Selection Clauses.....	p. 36
4.1 The treatment of forum clauses in international conventions	p. 36
4.2 Forum selection clauses in the EU.....	p. 36
One of the parties is domiciled in a EU member state and they have chosen a member state in their jurisdiction agreement	p. 37
None of the parties is domiciled in a EU member state but they have chosen a member state in their jurisdiction agreement	p. 37
The defendant is domiciled in a EU member state but they have chosen a non-member state in their jurisdiction agreement	p. 37
The defendant is not domiciled in the EU and they have chosen a non-member state in their jurisdiction agreement	p. 38
4.3 National mandatory rules in the protection of state	

jurisdiction: Australia and the US	p. 38
4.4 The treatment of forum clauses in England.....	p. 39
4.5 General rules on the validity of forum selection clauses.....	p. 39
5. Forum Shopping.....	p. 40
5.1 Should jurisdiction be regulated on an international level at all?.....	p. 40
5.2 Which forums would be permissible in such a list?	p. 41
5.3 Should forum clauses be allowed?	p. 42
5.4 Should rules about jurisdiction be mandatory?	p. 43
6. Final Remarks and Conclusion.....	p. 44
6.1 The Rotterdam Rules	p. 44
6.2 Forum shopping in general	p. 46
Sources	p. 48

Abstract

Choice of forum is an important matter in maritime litigation as it affects the judgement of disputes and is crucial to determine limits of liability. Furthermore it is also a mean to avoid timewasting and expensive judicial processes.

Since it can be used in an abusive way, forum shopping is restricted in international conventions and national law. There is a need to separate abusive forum shopping from forum selection, which is merely a strategic tool in litigation.

The parties in a maritime dispute have relatively good chances of affecting jurisdiction both before and after damage has occurred, but their acting space differs slightly under different regimes.

The Rotterdam Rules are not yet in force, but regulates jurisdiction and arbitration in an attempt to create a balance between the carrier and cargo interests and represents the possibility to restrict forum shopping through regulating jurisdiction on an international level. Additionally, if it comes into force and proves to be efficient it could offer a solution to the present scattered system of multiple regimes regulating the carriage of goods by sea.

1. Introduction

More than one state's law might be relevant in a maritime dispute. There are often many parties involved and the damage that caused the dispute might have several different connections to several different states. A possible scenario could for example be a Brazilian cargo owner that claims damages against a ship that is owned by Belgian and Dutch companies but is registered in Norway, based on a collision in English territorial waters.¹

Because of its international characteristic, jurisdiction is an important issue in maritime trade and litigation and the legal representatives need to make fast decisions before the time limit ends to protect the claimant's rights. The time limits too vary between jurisdictions and are relatively short in maritime law, which motivates why it is important to have knowledge about which jurisdictions that might be applicable and it motivates acting fast.²

Maritime law is harmonised to a great degree, but there are several conventions regulating the carriage of goods by sea and even if this area would have been completely harmonised, there should probably still be differences in application due to the geographical spread of the courts.³ Hence there will always be a need for special competence in maritime law in general and maritime jurisdiction in particular.

Another reason as to why it matters where a case is judged is that even though the rules about jurisdiction are procedural, jurisdiction does affect the outcome of maritime disputes in practice. If for example the parties access a forum that favours one of them, that might very well cause the parties to agree on a settlement rather than continuing the proceedings. Additionally the value of the settlement will reflect the parties' chances to succeed in the forum that accepted the case.⁴

The availability of more than one forum and the advantages and disadvantages among them have for a long time tempted practitioners in the maritime industry to bring their cases to the most favourable forum. This is commonly referred to as forum shopping and it is the subject for this thesis.

1.2 Subject and purpose

The purpose of this thesis is to clarify how forum shopping is currently treated in international carriage of goods by sea. Moreover, the purpose is to analyse whether the

¹ T Falkanger, HJ Bull, & L Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective*, Universitetsforlaget, 3rd edition (2011) p. 34

² 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*, Kluwer Law International, 2005, pp. 85-117, p. 85 and Y Baatz, *Maritime Law*, Sweet & Maxwell, 2nd edition, 2011, p. 3

³ von Ziegler p. 86-88

⁴ MF Sturley, T Fujita & G van der Ziel, *The Rotterdam Rules*, Sweet & Maxwell (Registered trademark of Thomson Reuters (Legal) Limited), 2010, p. 323

regulation suggested by the Rotterdam Rules is satisfactory and, if not, how it should be done.

What interests me about forum shopping is to what extent it is possible for the parties in a maritime dispute to affect where suit is brought. Additionally, it seems to me like forum shopping isn't looked well upon in the academic world while practitioners see it as a valuable instrument and the clash between these two perspectives made me want to know more about the subject.

The questions that this thesis answers are:

- What is forum shopping and what can you achieve by it?
- How do you act to select forum?
- How is forum shopping regulated?
- How good are the chances of affecting forum through forum clauses under different regimes?
- Are the Rotterdam Rules' provisions satisfactory, or how should forum shopping be controlled?

1.3 Outline

The answers to the above mentioned questions are presented continuously throughout the text and some of them are elaborated further in the last chapter. The thesis starts with a chapter introducing forum shopping. Chapter 3 gives an account of some of the regimes that regulate jurisdiction over the world in order to explain what borders a person selecting forum needs to stay within. Chapter 4 is dedicated to how forum selection clauses are treated by different regimes when used to bring suit. Finally chapter 5 and 6 are more discussion-based. The first focuses on presenting different scholars' opinions about forum shopping and the latter gives me an opportunity to further comment on my findings.

1.4 Material and method

Since I decided to write an "academic" text my main sources have been books and articles. Generally speaking the books have provided information about specific conventions while the articles have provided opinions.

"Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force" edited by Martin Davies has continuously been a cornerstone in my research and has offered me a better understanding of the subject of forum shopping. Another central source of mine has been compilations of texts about the Rotterdam Rules, especially the chapters about jurisdiction and arbitration. I have found *"The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea"* by Alexander von Ziegler, Johan Schelin, and Stefano Zunarelli as well as *"The Rotterdam Rules"* by Michael F. Sturley, Tomotaka Fujita and Gertjan van der Ziel particularly helpful.

I have searched *Lloyd's Maritime and Commercial Law Quarterly* for articles since it is well established and has a good reputation⁵, but naturally I have used other sources as well to avoid writing from a one-sided point of view. In order to keep an international perspective I have used sources from as many countries as possible, but language and availability have restricted me.

Some of the writers I have used, particularly Michael F. Sturley, Francesco Berlingieri and Alexander von Ziegler, were involved during the drafting process that led to the Rotterdam Rules, while others, like Yvonne Baatz and William Tetley are well recognized scholars in maritime commercial law.

The reader will notice that there is little case law among my sources. This was a deliberate choice mainly based on the fact that no cases have been judged using the Rotterdam Rules, since they aren't yet in force. Cases from the preceding conventions wouldn't add much, as the jurisdiction provisions in the Rotterdam Rules differ from them to a great extent. Instead I have used the preparatory work of the convention. I'm aware that the *travaux préparatoires* of international conventions are regarded as supplementary means of interpretation by the Vienna Convention⁶ art 32. However, according to Martin Dixon art 32 supports using preparatory work "*in all but the most clear-cut cases*".⁷ Hence I believe that under these circumstances the preparatory work can be used to substitute the absent case law.

The method I have used is comparative, as I have gathered as many sources as possible about the same matters and compared the result. I believe that it provides a better understanding to read about the same phenomenon in as many texts as possible since the different wordings can help explaining different parts. Moreover, I have compared existing conventions to get an opinion about forum shopping in general as well as the Rotterdam Rules.

1.5 Delimitations

I decided at an early stage to delimit the subject to forum shopping in carriage of goods to make the subject more manageable.

I have chosen to keep an international perspective and as a result I haven't delimited the subject geographically as much as I could have. Instead this thesis deals with how forum shopping is handled in some major international conventions, EU law and England. Writing about forum shopping it is inevitable not to also write a text quite dominated by jurisdiction, since that limits where it is possible to bring suit.

In my thesis the international conventions are dominated by the Rotterdam Rules, since I believe that it is easier to grasp and discuss the subject if you take a starting point in one convention. It might seem unnecessary to put so much energy into investigating a convention that hasn't entered into force and may not be obeyed by anyone in the end,

⁵ J Clarke, "Maritime Law Sources", *Legal Information Management*, Volume 8, Issue 3, 2008, pp. 166 – 171, p. 167

⁶ *The 1969 Vienna Convention on the Law of Treaties* ("The Vienna Convention"), Vienna, 23 May 1969

⁷ M Dixon, *Textbook on International Law*, Oxford University Press, 6th edition, 2007, p. 73-74

but I disagree. My reasons are first that there is still a chance that the Rotterdam Rules will enter into force and second that the convention offers an interesting foundation upon which to discuss jurisdiction. If jurisdiction should be regulated globally, the form suggested by the Rotterdam Rules would be an interesting way to realise it.

English law was included since such a large part of all arbitral litigations today are decided in London. I'd like to add that I'm presenting common law even though I have been taught in a civil law state and from the point of view of a civil law practitioner. Additionally EU law was included first since that is where I'm situated and second because it affects English law.

I have chosen to write from neither a carrier nor a cargo interest perspective, since I believe that it is important to know how your opponent can act, and not just what you're allowed to do yourself, in order to have success.

In the beginning of my research I had the intention to write about choice of law as well as choice of court, but that proved to be too comprising and so the first had to be excluded.

I'd like to underline that I have deliberately excluded the discussion about whether forum shopping is good or bad throughout the text. When it serves a point I have mentioned it, but the question is substantial enough to make a separate thesis and the discussion is therefore kept short. My starting point is that there are both good and bad sides to forum shopping and that it needs to be restricted to some extent.

2. An Introduction to Forum Shopping

In international private law it is common for the parties to try to bring suit under the most favourable jurisdiction among the forums somehow connected to the case. This is often referred to as forum shopping. Forum shopping is possible since suit mustn't necessarily be brought under the jurisdiction with the strongest connection to the matter; a common way to get the chance to bring suit under the jurisdiction of choice is for example to arrest the opponent's ship when it is situated within the preferred jurisdiction (see 1.6 Arrest).⁸ Another common strategy is to include a clause designating a forum for all disputes between the parties in the contract stipulating their commercial relation.

There is never only one applicable forum in international disputes, so the courts' task isn't so much deciding if they are *the* proper forum as deciding if it would be *permissible* to bring suit before them under the present circumstances. What makes the forum permissible depends on national law and international conventions to which the state in question is a party.

⁸ Falkanger, Bull & Brautaset p. 38

In the past, states have tried to protect their jurisdictions and have treated jurisdiction and arbitration clauses choosing another jurisdiction⁹ with dislike.¹⁰ One of the ways states try to restrict the practise of forum shopping is through creating international conventions with the purpose of harmonising maritime substantive law. This minimises the incentive to shop for forums, since there'd be no advantage suing in another jurisdiction if all laws were more or less identical.¹¹ However, as we shall see later on, there is no universal agreement about jurisdiction so in many cases the states may decide if they accept jurisdiction for the claims brought to them. In practice this means that it is often the party who acts first who gets to "choose" forum (presuming that the chosen court doesn't dismiss the case).¹² This creates a race between the parties to bring suit first, since advantage for one party automatically means disadvantage for the other.¹³

There are a number of reasons as to why some jurisdictions may be more favourable than others. For example the limitation of liability for a cargo claim varies depending on if the state is bound by the Hague Rules¹⁴, the Hague-Visby Rules¹⁵ or the Hamburg Rules¹⁶. Additionally different forums can award more interest or legal costs, have more favourable procedural rules or come to a decision faster.¹⁷

2.1 What is forum shopping?

There is no exact definition of forum shopping. The fear when it comes to forum shopping in all fields of law is that the plaintiff should somehow be able to determine the outcome of a case beforehand by choosing the most favourable forum. Therefore forum shopping has been described as "*a plaintiff who causes 'inconvenience and expense' to a defendant*".¹⁸

Generally when the plaintiff chooses where to bring suit the decision is ultimately motivated by convenience and economy. The more the plaintiff is motivated by getting an advantage, the closer the action gets to be considered forum shopping and not permissible.¹⁹ A development of the above definition is that forum shopping is "*taking*

⁹ Hereinafter foreign jurisdiction/arbitration clauses

¹⁰ W Tetley, "Jurisdiction Clauses and *Forum Non Conveniens* in the Carriage of Goods by Sea", in M Davies (ed.), *Jurisdiction and Forum Selection in International Maritime Law – Essays in Honor of Robert Force*, Kluwer Law International, 2005, pp. 183-263, p. 183

¹¹ Falkanger, Bull & Brautaset p. 38

¹² R Williams, *Gard Guidance on Maritime Claims and Insurance*, Gard AS, 2013, p. 373

¹³ Baatz, *Maritime Law* p. 3

¹⁴ *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* ("The Hague Rules"), Brussels, 25 August 1924

¹⁵ *The Hague Rules 1924 as Amended by the Brussels Protocol 1968* ("The Hague-Visby Rules"), Brussels, 21 December 1979

¹⁶ *United Nations Convention on the Carriage of Goods by Sea* ("The Hamburg Rules"), Hamburg, 31 March 1978

¹⁷ Baatz, *Maritime Law* p. 2-3

¹⁸ R Maloy, "Forum Shopping? What is Wrong With That?", *Quinnipiac Law Review*, Volume 24, Issue 1, 2005, pp. 25-62, p. 26

¹⁹ Maloy p. 39

*an unfair advantage of a party in litigation.*²⁰ After all, litigants are to a certain extent always required to take advantage of their opponents during trial. Courts often use the term “forum shopping” when they find that a party has done wrong, while they avoid using it when confirming that the plaintiff did indeed bring suit in a permissive forum.²¹ This observation supports requiring the advantage to be unfair. I would however like to underline that it is perfectly legal and even advisable to be aware of where it is more advantageous to bring suit within the limits of the law and to use that knowledge. The situation could be compared to the relationship between tax fraud and tax planning, so perhaps it would be more suitable to separate the situations by using the terms forum shopping and forum selection?²²

Both forum shopping and forum selection isn't just one way of acting. It can be acting once damage has occurred, but it can also be preventive activities. The parties in marine disputes regarding transport of goods can roughly be divided into cargo and carrier interests and they have different strategies to influence where to settle a dispute. While a cargo claimant will probably use the possibility to bring suit in a favourable forum after damage has occurred a carrier will try to prevent that by including a choice of court agreement in their contract or, if preventive actions aren't possible, apply for a declaration of non-liability or rely on forum non conveniens to get dismissed from the forum chosen by the claimant.²³ In this perspective the cargo interest has an advantage compared to the carrier. If the goods have been damaged it is more logical if the cargo interest initiates proceedings. If the carrier wants to “win the race” in this scenario she has to file for a declaration of non-liability and that is not as easy to get.²⁴ Finally, if the parties have equal bargaining power they commonly choose forum together.²⁵

One of the most essential reasons to try to manipulate the choice of forum is to gain some kind of limitation advantage. The claimant will prefer a forum where it is easy and cheap to arrest the opponent's ship as security for the claim. Additionally she will want a jurisdiction that doesn't demand high or any counter-security. These factors can be elaborated depending on the circumstances. If for example the arrested ship has a low value it will be important for the claimant to get a jurisdiction where the entire amount is secured and not just the amount covered by the value of the arrested ship.²⁶ Another important factor is whether it is likely or not that the shipowner caused the damage by fault or privity thus breaking the limitation of liability if proved correctly under some conventions^{27,28}

²⁰ Maloy p. 28

²¹ Maloy p. 27-28

²² These are the terms I will use to make a distinction throughout this thesis.

²³ Sturley, Fujita & van der Ziel p. 324

²⁴ Note particularly the Rotterdam Rules art 71(2)

²⁵ MD Güner-Özbek, *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the “Rotterdam Rules”*, Springer, 2011, p. 266

²⁶ 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*, Kluwer Law International, 2005, pp. 137-182, p. 163

²⁷ See for example the Hague-Visby Rules art IV bis and *The Convention on Limitation of Liability for Maritime Claims* (“LLMC”), London, 19 November 1976 art 4.

²⁸ Hare p. 163

Other incentives to shop for or select forum than limitation of liability are for instance that the parties may prefer to bring suit under a certain system and law. Another reason is that the particular claim might have different positions in the hierarchy of claims against the shipowner depending on the jurisdiction. Additionally a party might prefer to bring suit under a jurisdiction that applies a certain convention or the proceedings in court might differ considering costs, speed and currency. Finally some jurisdictions demand counter-security for arrest and damages if an arrest turns out to be unjustified.²⁹

2.2 How is forum shopping used?

Below follows some examples of how it is possible to act to influence the choice of forum. To control what forums will be available it is advisable to:

- Negotiate for a forum selection or arbitration clause to be included in the contract.
- Bring suit first.
- Arrest the opponent's ship when it is situated in a favourable forum to get jurisdiction there.
- Make an agreement with the opponent after damage has occurred.

If a party has already been sued and wants to decide the dispute in another forum it is possible to:

- Invoke an exclusive jurisdiction or arbitration clause. Exclusive jurisdiction clauses have a good chance of being recognised and enforced, and if the parties have agreed on arbitration and the claimant nevertheless brings suit in court the court normally dismisses the case.
- Argue that the court where the opponent has initiated proceedings doesn't have jurisdiction, for example because an international convention is applicable.
- If it is a common law court the defendant can try to obtain a stay on the ground of forum non conveniens or an anti-suit injunction (see 3.4.1 Forum non conveniens and 3.4.2 Anti-suit Injunctions).³⁰

3. Court Jurisdiction

The general rule is that the parties may decide jurisdiction unless mandatory rules limit party autonomy.³¹ In maritime relations it is common that the parties agree about how and where to solve a problem, often beforehand when they draft their commercial agreement.³² Many standard forms of bills of lading and charterparties contain clauses about choice of forum.³³

²⁹ Hare p. 164-165

³⁰ Hare p. 160

³¹ von Ziegler p. 88

³² Falkanger, Bull & Brautaset p. 36

³³ JF Wilson, *Carriage of Goods by Sea*, Pearson Education Limited, 7th edition, 2010, p. 313

If the parties haven't agreed where to bring suit beforehand they generally have the option to come to an agreement after damage occurred. If they can't agree jurisdiction is determined in accordance with the applicable national law (often based on if there is sufficient connection between the circumstances of the case and the forum where the plaintiff has initiated proceedings), unless one of the international conventions on jurisdiction is applicable to the case.³⁴

There is no convention regulating jurisdiction in international disputes that is applicable in the entire world. There are however some international conventions of great importance and within the European Union the Brussels-I convention (see 3.2 The EU and Brussels-I) is applicable.³⁵

Before any international regulation addressed jurisdiction and arbitration different nations had different ways to handle it. Some countries, like the US, didn't have any general regulation but let the decision be solved by otherwise applicable national law while others like Australia, Canada and New Zealand had national laws that restricted the applicability of choice of jurisdiction and arbitration clauses.³⁶

During the negotiations leading up to the Hague Rules jurisdiction and arbitration were deliberately not discussed since the negotiating groups reckoned that national regulation was better suited for the task because jurisdiction is relevant in more than just liability issues.³⁷ Hence under the Hague Rules, jurisdiction is not a part of harmonised international maritime law. When parties to transport contracts started to make use of the possibility to shop for/select forum it was debated whether art 3(8) of the convention could be used to prohibit them from taking such action or not. The article declares all clauses limiting the carrier's liability to a greater extent than the rules provide for to be null and void.³⁸ The key-question was if actively choosing a forum because of its advantages compared to others could be considered limitation of liability.

Despite this ambiguity, jurisdiction was still not included when the convention was amended by the Hague-Visby Rules. The situation didn't change until the Hamburg Rules were drafted and a list of forums available at the choice of the claimant was introduced to restrain carriers from abusing their market power.³⁹

According to art 21(1) the cargo claimant may bring suit in the principal place of business or habitual residence of the defendant, the state in which the contract was made if the defendant also has a place of business there, the port of loading, the port of discharge or any additional place designated for that purpose in the contract of carriage. If the ship has been arrested that state has jurisdiction but the jurisdiction can be transferred to another state if the defendant provides security.⁴⁰

³⁴ Baatz, *Maritime Law* p. 9-10

³⁵ Baatz, *Maritime Law* p. 9-10

³⁶ Sturley, Fujita & van der Ziel p. 324

³⁷ Sturley, Fujita & van der Ziel p. 325

³⁸ von Ziegler p. 89

³⁹ Sturley, Fujita & van der Ziel p. 326

⁴⁰ Tetley, *Jurisdiction Clauses and Forum Non Conveniens* p. 187-188

Since the Hamburg Rules didn't become a success the Hague-Visby Rules are still the convention that affects the market the most. The convention is however becoming obsolete (a process starting more than a decade ago) due to the containerisation of the maritime industry and the increasing focus on multimodal transports. Since the scope is limited to bills of lading it is becoming too narrow as a multimodal industry demands port-to-port or even door-to-door regulation rather than tackle-to-tackle.⁴¹ Additionally, the convention has become partly too favourable to carriers.⁴²

The newest addition to the conventions on international carriage of goods by sea is the Rotterdam Rules⁴³. In 1996, UNCITRAL⁴⁴ made a study regarding the practice in carriage of goods by sea and concluded that the contemporary regimes were unsatisfactory and didn't permit a free flow of trade. After a request from UNCITRAL, CMI⁴⁵ made a Draft Instrument that after several revisions eventually became the Rotterdam Rules.⁴⁶ After a law making process of 12 years in Working Group III of UNCITRAL the convention was signed in 2009.⁴⁷ As for today⁴⁸ the convention has 25 signatories and two states have ratified it.⁴⁹ It is therefore not in force since that would require 20 ratifying states due to art 94.

Neither jurisdiction nor arbitration was included in the draft but were added to the convention later in the process⁵⁰ since the parties couldn't agree⁵¹ and CMI reckoned it was too early to discuss the subject⁵². CMI did however assume that jurisdiction would be included in the final convention.⁵³ They were eventually regulated in chapters 14 and 15 respectively and these were two of the most problematic chapters to negotiate.⁵⁴

The Rotterdam Rules is the second international convention to address jurisdiction and arbitration⁵⁵ and it is to this day the most ambitious project in transport law, though it is rather an evolution of already existing regimes than a revolution.⁵⁶

⁴¹ A Diamond, "The Rotterdam Rules", *Lloyd's Maritime and Commercial Law Quarterly*, Volume 2009, Issue 4, 2009, pp. 445-536, p. 445

⁴² Diamond p. 446

⁴³ *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* ("The Rotterdam Rules"), Rotterdam, 23 December 2009

⁴⁴ The United Nations Commission on International Trade Law

⁴⁵ Comité Maritime International

⁴⁶ F Sparka, *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis*, Springer, 2010, p. 198

⁴⁷ JM Alcántara González, "Rotterdam Rules. Prelude or Premonition?", *Cuadernos de Derecho Transnacional*, Volume 2, Number 1, 2010, pp. 25-43, p. 26

⁴⁸ 2013-12-20

⁴⁹ http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html

⁵⁰ Sparka p. 200 & 202, W Tetley, "Reform of the Carriage of Goods – The UNCITRAL Draft and Senate COGSA '99", *Tulane Maritime Law Journal*, Volume 28, Number 1, 2003, pp. 1-44, p. 13

⁵¹ Güner-Özbek p. 268

⁵² *Report of the Working Group III's 9th Session*, UN Doc. A/CN.9/510 61 §

⁵³ MF Sturley, *Jurisdiction under the Rotterdam Rules*, Rotterdam Rules, Paper presented at the Colloquium of the Rotterdam Rules 2009, held at De Doelen on 21 September 2009, retrieved 24 October 2013, <http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Michael%20Sturley%2023%20KT29.pdf>, p. 5

⁵⁴ Sturley, Fujita & van der Ziel p. 324

⁵⁵ Alcántara González p. 40

An important change is that while the Hague-Visby Rules only are applicable to agreements under bills of lading the scope of the Rotterdam Rules extends to sea waybills and electronic documents too.⁵⁷

The convention covers international contracts of carriage where the port of loading and the port of discharge of a sea carriage are located in different states and the place of receipt, loading, delivery or discharge is situated in a contracting state, art 5. This means that it covers international maritime carriages as well as door-to-door operations with an international sea leg.⁵⁸ This is the most significant difference between the convention and its predecessors; the convention concerns not only transport by sea, but also transport on land and in the air whenever connected to a sea transport; a concept called “maritime plus”.⁵⁹ It is however not a multimodal convention, but has an extended scope of application compared to “unimodal” conventions like the Hague-Visby and Hamburg Rules. There are gaps between the unimodal regimes when applied to multimodal transport and the Rotterdam Rules try to fill them.⁶⁰

Some hoped that the convention would regulate all door-to-door transports, but that is not the case since the Working Group agreed to let more specific international conventions overrule the Rotterdam Rules. Hence the same contract of carriage might still be ruled by several different conventions if more than one mode of transport is used.⁶¹ Despite its subsidiarity it is possible that the Rotterdam Rules will conflict with other international conventions regarding transport of goods by road, rail, air and inland water like the CMR⁶² and COTIF^{63,64}.

When the matter of jurisdiction and arbitration was brought up in Working Group III it immediately became apparent that the group was divided by some extreme opinions about how to handle jurisdiction and arbitration in international regimes. One side consisted of carrier friendly groups and states that are often selected in choice of forum agreements. They demanded that there should be no provisions about neither

⁵⁶ J Rosengren, *Rotterdamreglerna – Ny konvention för sjötransportavtal*, InfoTorg Juridik, 2011, retrieved 21 October 2013,

<http://www.infotorgjuridik.se/premium/mittijuridiken/praktikerartiklar/article168657.ece>

⁵⁷ See the definition of a “contract of carriage” on the Hague-Visby Rules art 1(b) respectively the Rotterdam Rules art 1(1).

⁵⁸ M Alba Fernández, “14. Jurisdiction”, in *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, A von Ziegler, J Schelin & S Zunarelli (ed), Kluwer Law International, 2010, pp. 283-320, p. 285

⁵⁹ Rosengren

⁶⁰ N Boschiero, T Scovazzi, C Pitea & C Ragni, *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, Asser Press, 2013, p. 825-837, p. 834

⁶¹ Rosengren

⁶² *Convention on the Contract for the International Carriage of Goods by Road (“CMR”)*, Geneva, 19 May 1956

⁶³ *Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (“COTIF”)*, Bern, 9 May 1980

⁶⁴ PHF Bekker & D Ginsburg, “Rotterdam Rules and Arbitration: Questions and Warning Signs”, *Dispute Resolution Journal*, Volume 65, Issue 1, 2010, p. 68-73, p. 73

jurisdiction nor arbitration in the convention, or just one generally enforcing agreements⁶⁵ and argued that jurisdiction is a matter for national regulation.⁶⁶

The other side consisted of cargo friendly groups and states that had already chosen to regulate jurisdiction and arbitration on a national level. They demanded that the cargo interests should be protected in the same manner as under the Hamburg Rules⁶⁷ and argued that it could be useful and maybe even necessary to regulate jurisdiction and arbitration.⁶⁸

Between these two opposite points of view was a group pursuing a balanced compromise.⁶⁹ The US is one of the states that promoted a sort of middle way solution supporting no interest more than the other. In a proposal submitted to Working Group III regarding some aspects of the draft the comment on jurisdiction (above all suggesting to include a list like in the Hamburg Rules) turned out to be very close to what the final convention would look like.⁷⁰

The strong opinions forced the discussion to aim for creating a balance between the various interests stressed by the parties: protection of cargo and carrier interests, a desirable level of predictability for both parties regarding what forums might be relevant to their case, freedom of contract and party autonomy.⁷¹ Another objective was to give the claimant a choice instead of being bound by exclusive clauses.⁷²

When the matter was reviewed the majority decided that jurisdiction should be included and that it should be modelled after the Hamburg Rules art 21-22.⁷³ A minority still thought that jurisdiction and arbitration should be left completely to the states' discretion.⁷⁴

An additional complication was that the European Union has the competence to negotiate on behalf of its member states about jurisdiction but not arbitration. This meant that in the jurisdiction negotiations all EU member states had to remain passive while they could (and would) negotiate the arbitration provisions.⁷⁵

In the end of the discussions following compromise was reached to satisfy the diverse opinions and the technical problem regarding the EU: The Rotterdam Rules have provisions regulating jurisdiction and arbitration in two separate chapters, but the chapters are optional at the choice of each contracting state, art 74 and 78.⁷⁶ The

⁶⁵ Sturley, Fujita & van der Ziel p. 327-328

⁶⁶ Güner-Özbek p. 268

⁶⁷ Sturley, Fujita & van der Ziel p. 327-328

⁶⁸ 9th Session Report 61 §, Güner-Özbek p. 268

⁶⁹ Sturley, Fujita & van der Ziel p. 327-328

⁷⁰ *Report of the Working Group III's 12th Session*, UN Doc. A/CN.9/WG.III/WP.34 30-33 §§

⁷¹ Alba Fernández p. 286

⁷² Wilson p. 241

⁷³ Güner-Özbek p. 268

⁷⁴ *Report of the Working Group III's 11th Session*, UN Doc. A/CN.9/256 158 §, Güner-Özbek p. 268

⁷⁵ Sturley, Fujita & van der Ziel p. 328

⁷⁶ Sturley, Fujita & van der Ziel p. 329

chapters are voluntary since that will likely allow efficient ratification. It allows the European member states to ratify the Rotterdam Rules individually and lessens the risk of the jurisdiction chapter becoming an obstacle for an efficient ratification process since the number of states opting in doesn't affect the coming into force of the convention.⁷⁷

To opt in the states have to formally declare that they want to be bound, art 91. The declaration can be made and withdrawn at any time⁷⁸, a widely approved suggestion⁷⁹. The Working Group also discussed whether the states should have to opt in on either both or none of the chapters, but that never became reality. The idea was described as desirable but not feasible, since it would be technically impossible for the EU member states to opt in if the two chapters were linked in such a way.⁸⁰ In theory it is therefore possible for a contracting state to opt in on just one of the chapters.⁸¹

The contracting states that don't opt in will have continued freedom to decide jurisdiction and arbitration in accordance with their national law or other international conventions than the Rotterdam Rules to which they might be parties.⁸²

3.1 The Rotterdam Rules

3.1.1 Jurisdiction

The general rule

The general rule for jurisdiction is that in actions against the carrier the claimant may choose a court from a list provided by the convention as long as the court is also a competent court, art 66. The rule creates a balance between the parties since it gives cargo interests protection from carriers who are trying to limit their liability through jurisdiction clauses but it also guarantees carriers that they can't be sued in any additional jurisdictions.⁸³ That right is specifically stated in art 69. Hence the parties can't make other contractual arrangements prior to any damage occurs that will be recognised by a court.⁸⁴

A competent court is a court that is both situated in a contracting state and recognised as competent by national procedural rules, art 1(30). This is a much narrower definition than the one provided in the Hamburg Rules.⁸⁵ There was broad support for letting

⁷⁷ *Report of the Working Group III's 20th Session*, UN Doc. A/CN.9/642 202-205, 216 and 218 §§

⁷⁸ Sturley, Fujita & van der Ziel p. 329-330

⁷⁹ *Report of the Working Group III's 20th Session*, UN Doc. A/CN.9/642 204 §

⁸⁰ *Report of the Working Group III's 18th Session*, UN Doc. A/CN.9/616 278 §, *Report of the Working Group III's 20th Session*, UN Doc. A/CN.9/642 217 §

⁸¹ Sturley, Fujita & van der Ziel p. 330

⁸² Güner-Özbek p. 270

⁸³ Sturley, Fujita & van der Ziel p. 331

⁸⁴ Alba Fernández p. 303

⁸⁵ Güner-Özbek p. 272, Sturley, Fujita & van der Ziel p. 332

national law rather than international rules establish competent courts.⁸⁶ Therefore the convention doesn't dictate specific procedural rules for the question and so leaves space for variation in procedural rules in national law.⁸⁷ As an effect more than just one court in the same state might have jurisdiction and in some states the competent court will be specialized and in some general; all depending on national law.⁸⁸

All state parties to the Rotterdam Rules are considered "contracting states" regardless of if they have opted in or not. Courts in states that haven't opted in therefore have jurisdiction by virtue of the convention and are obliged to apply the substantive law of the Rotterdam Rules but not the procedural rules in chapters 14-15. Therefore in the choice between a state that has and a state that hasn't opted in, it is wiser for a claimant to bring suit in the former to make it easier to predict if the case will be accepted or not since jurisdiction then has to be decided in conformity with the convention.⁸⁹

To require the court to be situated in a contracting state makes sure that the carrier can't be sued in states that are not parties to the Rotterdam Rules, i.e. don't have to apply the substantive rules of the convention.⁹⁰ The Working Group wanted to avoid giving the claimant a mean to force the carrier into a forum that doesn't have to apply the Rotterdam Rules using the convention.⁹¹ However, this solution doesn't protect the carrier entirely from the risk of being sued in a non-contracting state. The claimant still has the option to choose a court in a non-contracting state (but without the protection of the Rotterdam Rules), which will apply its own procedural rules to establish jurisdiction. There is only an indirect protection against this situation; a judgement from a non-contracting state regarding a matter handled in the convention won't be recognised and enforced in the contracting states (see art 73 below).⁹²

The number of forums that are available to the claimant varies depending on the circumstances of each individual case. All the optional forums have a connection to the transaction and under some circumstances a connection might be missing. If for example the transaction lacks a port of loading in a contracting state the option of bringing suit in the port of loading disappears.⁹³

The forums available to the claimant are the competent courts in the listed places (a) or a competent court designated by an agreement between the shipper and the carrier (b), art 66. The latter could for example be a jurisdiction clause in a transport document and should not be confused with an exclusive choice of court agreement (see below).⁹⁴

⁸⁶ *Report of the Working Group III's 14th Session*, UN Doc. A/CN.9/572 114-115 §§

⁸⁷ Sturley, Fujita & van der Ziel p. 331

⁸⁸ Sturley p. 10

⁸⁹ Alba Fernández p. 318

⁹⁰ Sturley, Fujita & van der Ziel p. 331-332

⁹¹ Sturley p. 10

⁹² Alba Fernández p. 288

⁹³ Sturley, Fujita & van der Ziel p. 332-333

⁹⁴ Sturley, Fujita & van der Ziel p. 338-339

The places in the list have been selected to ensure that there is a minimum objective connection between the forum and the transaction.⁹⁵ The available forums are:

- (i) *The domicile of the carrier* – The carrier’s domicile is defined in art 1(29) and differs depending on if the person in question is natural or legal. The provision is formulated with the different nations’ definitions of companies’ domiciles in mind and might because of its loose wording have the effect that one legal person has more than one domicile, which gives the claimant one more option. The carrier’s domicile normally doesn’t have any connection to the transaction but was included in the list since it is reasonable to expect the carrier to defend a suit there.⁹⁶ This is an uncontroversial choice and a very common feature in international carriage conventions.⁹⁷ The definition is based on the corresponding definition in Brussels-I.⁹⁸
- (ii) *The contractual place of receipt* – Since the Rotterdam Rules cover the entire contract of carriage including multimodal transports it was deemed necessary to cover the possibility of an inland place of receipt. The article covers the contractual place of receipt, not the actual, but these will be the same most of the time since the parties normally make a new contract including the new place of receipt if something unpredicted would happen.⁹⁹ This forum was included since the place of receipt often is situated close to the claimant.¹⁰⁰
- (iii) *The contractual place of delivery* – The same remarks can be made as regarding the place of receipt.¹⁰¹
- (iv) *The port where the goods are initially loaded on to a ship or the port where the goods are finally discharged from a ship* – Loss or damage are likely to occur when the goods are handled in the ports, so it is practical to be able to bring suit there since that’s where to evidence will be located. The rule covers only where the goods are actually loaded or discharged and only the initial and final ports, which excludes ports of transshipment.¹⁰² Including the actual ports is reasonable since the parties seldom have an agreement about the ports the carriage will pass through in door-to-door international carriage. The inclusion is also motivated by the rules about joint actions (see below). The choice of only the initial and final port is to ensure some predictability to the carrier.¹⁰³

Unlike the Hamburg rules, the place of contract isn’t one of the available forums under the Rotterdam Rules. Some parties argued that the place could be useful to connect

⁹⁵ Alba Fernández p. 289

⁹⁶ Sturley, Fujita & van der Ziel p. 333-334

⁹⁷ Alba Fernández p. 289

⁹⁸ F Berlingieri, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*, UNCITRAL, Paper delivered at the General Assembly of the AMD, Marrakesh 5-6 November 2009, retrieved 24 October 2013,

http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HV_R.pdf, p. 53

⁹⁹ Sturley, Fujita & van der Ziel p. 335

¹⁰⁰ Alba Fernández p. 291

¹⁰¹ Sturley, Fujita & van der Ziel p. 337-338

¹⁰² Sturley, Fujita & van der Ziel p. 335-337

¹⁰³ Alba Fernández p. 291-292

other carriers than the contractual to the case and make it possible to bring suit against them, but the prevailing opinion was that the place of contract is too irrelevant for the performance of a contract of carriage to be included.¹⁰⁴

The option to create a jurisdiction clause made possible by art 66(b) allows the parties to add a place to the list while the indicated forum in an exclusive agreement is the only option.¹⁰⁵ Hence an “un-exclusive” jurisdiction clause can’t prevent that other courts too have jurisdiction.¹⁰⁶

There is no explicit provision addressing forum non conveniens (see 3.4.1 Forum non conveniens) in the Rotterdam Rules.¹⁰⁷ Sparka argues that the Rotterdam Rules would accept if a court denied jurisdiction due to forum non conveniens if the reason was that another competent court designated in a jurisdiction agreement is more suitable. The purpose of art 66 is after all fairness rather than legal certainty.¹⁰⁸ According to both Alba Fernández and Berlingieri however, there is no room for a competent court to dismiss a case conferred to it by chapter 14 on the ground of forum non conveniens since art 69 prevents that type of action. (I’ll get back to this discussion in 6.1 The Rotterdam Rules.)¹⁰⁹

According to González, art 66(b) makes it is possible to regulate actions against the *shipper* under the Rotterdam Rules.¹¹⁰ This seems unlikely as Alba Fernández claims that the scope of chapter 14 only covers actions against the carrier.¹¹¹ Berlingieri agrees on this point and explains that the wording of art 66 is intended as a clarification of “the plaintiff” referred to in the Hamburg Rules^{112,113} They are joined by Diamond who notes that the Rotterdam Rules don’t seem to apply to a carrier who wants to sue a shipper or consignee, only the other way around.¹¹⁴

There are two differences between the provisions in sub-paragraphs (a) and (b). First, since the list only identifies places there might be more than one court situated there and if so it is possible to bring suit in any of them. When designating a forum it is common to identify a particular court and if the parties have done that it won’t suffice to bring suit in another court on the same location as the designated. Second, a designated court doesn’t have to have any connection with the transaction. This is motivated by the

¹⁰⁴ *Report of the Working Group III’s 14th Session*, UN Doc. A/CN.9/572 125§

¹⁰⁵ Alba Fernández p. 292

¹⁰⁶ Sparka p. 201

¹⁰⁷ Diamond p. 534

¹⁰⁸ Sparka p. 201

¹⁰⁹ Alba Fernández p. 304, F Berlingieri, “An Analysis of Two Recent Commentaries of the Rotterdam Rules”, *Il Diritto Marittimo*, Volume 2012, Issue 1, 2012, retrieved 1 November 2013, <http://www.comitemaritime.org/Uploads/An%20analysis%20of%20two%20recent%20commentaries%20of%20the%20RR-F.Berlingieri.pdf>, p. 54

¹¹⁰ Alcántara González p. 40-41

¹¹¹ Alba Fernández p. 287

¹¹² Art 21(1)

¹¹³ Berlingieri, *An Analysis* p. 53

¹¹⁴ Diamond p. 534

fact that it is normally the carrier who designates the forum so it is reasonable to assume that she won't contest the choice of forum if the claimant brings suit there.¹¹⁵

Exceptions

In the American proposition the US suggested that it should be made clear that the forums are available to the claimant only and not a carrier filing for a declaration of non-liability.¹¹⁶ The final provision isn't as strict but stipulates instead that if the carrier seeks a declaration of non-liability it has to be withdrawn if the cargo claimant brings suit in another forum designated by art 66 or 68, art 71(2). If however the cargo claimant appears before the court without contesting it, proceedings may continue even if the forum is not on the list.¹¹⁷ Art 71 therefore protects the claimant "against attempted forum shopping by the defendant".¹¹⁸

A controversial side of the Rotterdam Rules is that it is possible to avoid the jurisdiction provisions through the exception for volume contracts.¹¹⁹ This is new compared to the Hamburg Rules.¹²⁰ An exclusive choice of forum clause in accordance with art 67 overrules the general rule, art 66 (initial clause). Art 66 is supposed to be understood as a general rule that prohibits exclusive choice of court agreements. Art 67 makes an exception for volume contracts.¹²¹

A choice of forum agreement is exclusive if it is contained in a volume contract and the parties have stated in the agreement that they intend it to be exclusive, art 67^{122,123} A volume contract is according to the definition in art 1(2) a contract for carriage of a specified quantity of goods in a series of shipments during an agreed period of time. If the requirements are met the parties may choose to designate all the courts in one contracting state or one or more specific courts in one contracting state, art 67 (1)(b).

Non-consenting third parties are only bound by an exclusive choice of forum clause if four additional requirements in art 67(2) are fulfilled. The requirements are too detailed to be accounted for here; it suffices to point out that they severely restrict the possibility to bind third parties in order to make sure that those who object won't be bound.¹²⁴

¹¹⁵ Sturley, Fujita & van der Ziel p. 338-339

¹¹⁶ *Report of the Working Group III's 12th Session*, UN Doc. A/CN.9/WG.III/WP.34 30 §

¹¹⁷ Wilson p. 242

¹¹⁸ TJ Schoenbaum, "An Evaluation of the Rotterdam Rules from the US", *The Journal of International Maritime Law*, Volume 17, Issue 4, 2011, pp. 274-290, p. 289

¹¹⁹ Rosengren

¹²⁰ Berlingieri, *A Comparative Analysis* p. 46

¹²¹ The CMI Working Group on the Rotterdam Rules, *Questions and Answers on The Rotterdam Rules*, 2012, retrieved 5 November 2013,

http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/RotterdamRules_QA_10102012.pdf, p. 21

¹²² The article provides some additional requirements, but they are so detailed that there is no use to give an account of them within the limits of this thesis.

¹²³ Sturley, Fujita & van der Ziel p. 341

¹²⁴ Sturley, Fujita & van der Ziel p. 344

Another exception is that the parties have the right to agree on a court after the damage occurred, art 72. The provision aims at increasing flexibility of choice of court agreements in that situation.¹²⁵ The parties may choose any court as long as it is competent. If the defendant doesn't contest the choice this is also deemed as an agreement; implicit but nevertheless valid, art 72(2).¹²⁶ The second paragraph is applicable independently of who initiates proceedings. The first paragraph is only applicable after damage occurred but before actions are initiated while the second operates after suit has been brought.¹²⁷ Both paragraphs are dependent on the fact that damage has already occurred.¹²⁸

Baatz argues that it isn't apparent if an agreement according to art 72(1) must be exclusive or not and that the relation to art 66 in general isn't clear. Does an agreement after damage occurred deprive the claimant the possibility to choose a forum from the list in art 66?¹²⁹ Berlingieri responds that the purpose of art 72 is to show that art 67 and 68 aren't applicable any longer after a dispute has arisen and I therefore conclude that the answer to question two at least is yes.¹³⁰

Yet another exception is arrest, art 70. If there is another international convention on the subject of arrest applicable in the state where a ship is arrested¹³¹ that convention will be recognised by the Rotterdam Rules. If there isn't, the forum has only jurisdiction if it fulfils the requirements otherwise stated in chapter 14.¹³² Two international conventions that are relevant in these situations are the 1952 Arrest Convention¹³³ and 1999 Arrest Convention^{134, 135}. The objective of art 70 is to "*preserve the solutions based on the Arrest Conventions by indirectly adopting them*"¹³⁶ and to enable states that are parties to both an arrest convention and the Rotterdam Rules to comply with both. In practice the article has the effect of prolonging the list of forums available to the claimant.¹³⁷

The performing party

It is common that the contractual carrier subcontracts parts of her obligations to another carrier rather than performing the entire voyage herself and therefore not only

¹²⁵ Alba Fernández p. 313

¹²⁶ Sturley, Fujita & van der Ziel p. 347-348

¹²⁷ Alba Fernández p. 314-315

¹²⁸ Berlingieri, *A Comparative Analysis* p. 55

¹²⁹ Y Baatz, "Chapter 16. Jurisdiction and Arbitration", in DR Thomas (ed), *The Carriage of Goods by Sea under the Rotterdam Rules*, Lloyd's List, 2010, pp. 319-342, p. 329

¹³⁰ Berlingieri, *An Analysis* p. 118

¹³¹ Alcántara González p. 41

¹³² Sturley, Fujita & van der Ziel p. 352

¹³³ *The International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships of 1952* ("The 1952 Arrest Convention"), Brussels, 10 May 1952

¹³⁴ *The International Convention on the Arrest of Ships 1999* ("The 1999 Arrest Convention"), Geneva, 12 March 1999

¹³⁵ Alba Fernández p. 306

¹³⁶ Alba Fernández p. 307

¹³⁷ Alba Fernández p. 307

the carrier but also marine performing parties are liable under the Rotterdam Rules, art 19.¹³⁸ The convention regulates however only the liabilities of the carriers performing parts of the marine carriage.¹³⁹

The convention extends the period of liability compared to its predecessors¹⁴⁰ with the intention to demand the liability the performing carriers ought to assume in respect of their services without putting the burden for the entire enterprise on them.¹⁴¹ It was inspired by the Guadalajara Convention¹⁴² ¹⁴³ and there are similar provisions in the Hamburg Rules¹⁴⁴, the Montreal Convention¹⁴⁵ and CIM¹⁴⁶.¹⁴⁷

The performing party is defined as a person who performs any of the carrier's obligations under a contract of carriage and a marine performing party is a person that meets those requirements and undertakes any of the obligations during the time between the arrival of the goods at the port of loading and their departure from the port of discharge, art 1(6)-(7).

Like in the case with the contractual carrier the convention supplies the plaintiff with a list of forums for proceedings against marine performing parties that are available if the courts are competent, art 68. The plaintiff may bring suit either in the domicile of the performing party (a) or where the party performs (b); that is the port where the goods are received, delivered or where the party performs its activities in respect of the goods.

The places have been chosen because they have at least a minimum link to the transaction and they mirror the two types of maritime performing parties that operate these missions. First there are the parties operating stationary in one port like warehousing companies, terminal operators, stevedores etc. Second there are the moving parties, i.e. sea carriers.¹⁴⁸

If the plaintiff wants to bring suit against both the contractual carrier and the maritime performing party this has to be done in a forum identified in both art 66 and 68 according to art 71. This provision motivates why the initial port of loading and final port of discharge were kept as places for claims against the carrier in art 66 since it makes it more probable that a place should be in both lists. If no port can be found in

¹³⁸ Sturley, Fujita & van der Ziel p. 348

¹³⁹ Alba Fernández p. 301

¹⁴⁰ Rosengren

¹⁴¹ Alba Fernández p. 301

¹⁴² *Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier* ("The Guadalajara Convention"), Guadalajara, 18 September 1961

¹⁴³ von Ziegler p. 111

¹⁴⁴ Art 10

¹⁴⁵ *Convention for the Unification of Certain Rules for International Carriage by Air* ("The Montreal Convention"), Montreal, 28 May 1999 Art 39

¹⁴⁶ *Uniform Rules Concerning the Contract for International Carriage of Goods by Rail* ("CIM") Appendix B to the Convention Concerning International Carriage by Rail (COTIF) of 9 May 1980 as per Protocol 1999, Vilnius, 3 June 1999 Art 3(b)

¹⁴⁷ Alba Fernández p. 301 footnote 53

¹⁴⁸ Alba Fernández p. 301

both lists the plaintiff may bring suit in a port where the marine performing party does business in accordance with 68(b), which will likely be a port of transshipment. Despite this prolongation of the list there are still situations when there will be no possibility for joint actions. If for example there isn't any court appearing in both art 66 and 68 and the port described in 68(b) is in a non-contracting state the claimant can't bring suit against the carriers in the same action due to lack of a competent court. Additionally, exclusive choice of court agreements might also prevent joint actions.¹⁴⁹ Even single actions might be impossible under some circumstances. Due to the formulation of the rules there won't be any competent court available to a claimant who wants to bring suit against a maritime performing party that is domiciled in a non-contracting state and performs its activities there.¹⁵⁰ However, nothing prevents the plaintiff from trying to bring suit in a non-contracting state. It is just not possible to obtain the protection from the Rotterdam Rules in doing so.

Recognition and enforcement

If a court has jurisdiction in accordance with chapter 14 its rulings shall be recognised and enforced in all other contracting states that have opted in, art 73. If recognition and enforcement would be incompatible with national law, art 73(2) gives the states the opportunity to refuse.¹⁵¹ Hence the convention doesn't require more than national law does.¹⁵²

Paragraph (3) is specifically formulated to handle the EU matter. The European Union hasn't ratified the convention yet so the paragraph will only be applicable if it does and opts in. The provision will then work as a "disconnection clause" in relation with EU law by giving priority to EU regulations regarding jurisdiction in a way that mirrors how national law is treated in the above paragraphs.¹⁵³ Therefore Brussels-I would prevail over the Rotterdam Rules if the EU opted in.¹⁵⁴

3.1.2 Arbitration

Just like concerning jurisdiction there were two strong and opposing opinions about whether or not to include arbitration in the convention.¹⁵⁵ Many states didn't want the use of any clauses to be restricted.¹⁵⁶

¹⁴⁹ Alba Fernández p. 309

¹⁵⁰ *Report of the Working Group III's 16th Session*, UN Doc. A/CN.9/591 43§, Sturley, Fujita & van der Ziel p. 350

¹⁵¹ *Report of the Working Group III's 16th Session*, UN Doc. A/CN.9/591 71 §, *Report of the Working Group III's 20th Session*, UN Doc. A/CN.9/642 199 §, Schelin et al (Alba Fernández) p. 316

¹⁵² Sturley, Fujita & van der Ziel p. 353

¹⁵³ Alba Fernández p. 317

¹⁵⁴ Sparka p. 202

¹⁵⁵ *Report of the Working Group III's 16th Session*, UN Doc. A/CN.9/591 85 §

¹⁵⁶ CD Hooper, in A von Ziegler, J Schelin & S Zunarelli (ed), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, Kluwer Law International, 2010, pp. 321-330, p. 323

The UK was, as a state often chosen as seat for arbitration, very engaged in the discussion regarding arbitration.¹⁵⁷ Before reviewing the draft the United Kingdom and Northern Ireland submitted a comment regarding arbitration to Working Group III. They argued first that there was no need to regulate arbitration clauses and second that if the opponents insisted on regulation it should only be in the shape of a provision generally upholding arbitration clauses.¹⁵⁸

Their main argument was that the current practice of the industry has been developed through trial and error during a long period of time and that there would be no reason to change the patterns of the industry.¹⁵⁹ Arbitration is the preferred way to settle disputes throughout the maritime industry¹⁶⁰ and arbitration clauses are widely used and understood by the concerned parties¹⁶¹. Additionally, regulating arbitration would follow in the footsteps of the Hamburg Rules and that convention hasn't been a success. Instead one should look to the Hague and Hague-Visby Rules, which don't regulate arbitration.¹⁶² Finally they feared that the new convention might conflict with the New York Convention¹⁶³ if arbitration clauses were regulated.¹⁶⁴

The current practice is dominated by choice of court agreements providing for arbitration as the mean of solving disputes. Working Group III did not try to change that, but limited the possibilities to contractually choose a forum.¹⁶⁵ Most states don't regulate the possibility to choose the place of arbitration in national law. This has given carriers the possibility to use arbitration clauses to reduce their liability by designating courts of arbitration that are inconvenient to their opponents in the contracts of carriage.¹⁶⁶ This is why arbitration is regulated in the Rotterdam Rules.

Despite the carrier friendly states' objections arbitration was included in chapter 15 of the Rotterdam Rules with the Hamburg Rules as a model.¹⁶⁷ The chapter is very similar to chapter 14, but the reasoning behind the chapters is very different. Choice of jurisdiction clauses are very common in the liner trade¹⁶⁸ while arbitration clauses are common in non-liner trade¹⁶⁹ governed by charterparties. Normally charterparties are used by commercial parties that are more or less equal in bargaining power, hence there is no reason to restrict the use of arbitration agreements to protect the weaker party from carrier abuse since there is no weaker party to protect. Instead an arbitration

¹⁵⁷ It couldn't take part in the jurisdiction negotiations due to its membership in the EU.

¹⁵⁸ *Report of the Working Group III's 16th Session*, UN Doc. A/CN.9/WG.III/WP.59 4§

¹⁵⁹ *Report of the Working Group III's 16th Session*, UN Doc. A/CN.9/WG.III/WP.59 8§

¹⁶⁰ *Report of the Working Group III's 16th Session*, UN Doc. A/CN.9/WG.III/WP.59 2§

¹⁶¹ *Report of the Working Group III's 16th Session*, UN Doc. A/CN.9/WG.III/WP.59 3§

¹⁶² *Report of the Working Group III's 16th Session*, UN Doc. A/CN.9/WG.III/WP.59 4§

¹⁶³ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("The New York Convention"), 10 June 1958, New York

¹⁶⁴ *Report of the Working Group III's 16th Session*, UN Doc. A/CN.9/WG.III/WP.59 1§

¹⁶⁵ Bekker & Ginsburg p. 70

¹⁶⁶ Hooper p. 322

¹⁶⁷ Berlingieri, *A Comparative Analysis* p. 49

¹⁶⁸ Art 1(3) – "*Liner transportation' means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.*"

¹⁶⁹ Art 1(4) – "*Non-liner transportation' means any transportation that is not liner transportation.*"

chapter was needed because otherwise arbitration would've continued to offer the carriers a way to circumvent the provisions about jurisdiction.¹⁷⁰ The reason for regulating arbitration is to protect the claimant's ability to choose jurisdiction under art 66. Chapter 15 is designed to protect the claimant's freedom of choice only as long as she would've been able to choose jurisdiction under the same circumstances.¹⁷¹ The Working Group had to create a balance between on one hand protecting cargo claimants and on the other regulating arbitration as little as possible to not interfere with existing practise.¹⁷² As I see it both chapters are mainly a discussion about how to manage rules that protect weak parties at the same time as it gives equal parties freedom of contract. This was done by enabling limited freedom of arbitration in the liner industry and broad freedom of arbitration in the non-liner industry, where arbitration is the standard method to solve disputes and also where there is little risk of abuse.¹⁷³

Also, the legal background was different compared to jurisdiction since there was already a successful international convention regulating arbitration: the New York Convention¹⁷⁴, which requires all contracting states to recognize agreements between the parties to resolve disputes in arbitration, art 2(1).

The general rule

First of all the convention explicitly recognises the parties' freedom to choose arbitration as the mean for solving their disputes, art 75(1). An arbitration agreement makes art 66 inapplicable and thus eliminates the claimant's right to bring suit in court.¹⁷⁵ The agreed place of arbitration is on the other hand not the only option for a claimant who has agreed to arbitration¹⁷⁶, since some additional tribunals get available as soon as the two parties agree to arbitration.¹⁷⁷

A claimant wishing to arbitrate has essentially the same options as a plaintiff wishing to bring suit, art 75(2). If the parties have designated a place for the purpose in their agreement, that place is one of the claimant's options (a).¹⁷⁸ The parties may only designate one forum in the agreement.¹⁷⁹ Moreover, the claimant can choose from an identical list of places as in chapter 14, but the convention doesn't require arbitration to take place in a contracting state.

The reason for not making the list more extensive is that the Working Group agreed that it isn't desirable giving the claimant a too wide range of arbitration options, since

¹⁷⁰ Sturley, Fujita & van der Ziel p. 354-355

¹⁷¹ Güner-Özbek p. 284

¹⁷² Sturley, Fujita & van der Ziel p. 355

¹⁷³ *Report of the Working Group III's 16th Session*, UN Doc. A/CN.9/591 96 §, *Report of the Working Group III's 14th Session*, UN Doc. A/CN.9/572 156 §, *Report of the Working Group III's 18th Session*, UN Doc. A/CN.9/616 268 §

¹⁷⁴ Sturley, Fujita & van der Ziel p. 355

¹⁷⁵ Güner-Özbek p. 271

¹⁷⁶ Wilson p. 242

¹⁷⁷ Bekker & Ginsburg p. 71

¹⁷⁸ Sturley, Fujita & van der Ziel p. 356

¹⁷⁹ Güner-Özbek p. 285

agreeing to arbitrate in one forum doesn't equal agreeing to arbitrate anywhere.¹⁸⁰ If an arbitration agreement designates a court the carrier automatically has to be prepared to defend the case in the agreed place as well as the places added by the list depending on which forum the claimant chooses. The list should be concise to give the carrier the possibility to foresee where to expect to be sued.

The word "place" in art 75 isn't defined in the convention and so if it comes into force it will probably be up to national law to decide that. It could refer to a nation, a territory within a nation, a port or a city etc. Hooper remarks that if it is given the meaning "*any place within the same state*" there might be some inconvenience since inland courts might lack maritime expertise.¹⁸¹ In response Berlingieri suggests that the word "place" should be interpreted in the same way in all art 75(2) sub-paragraphs and that it should be a city since the place of receipt and delivery must be cities. Additionally the parties almost always designate a city in their arbitration agreement.¹⁸² Sturley on the other hand, seems to assume that place means that it is sufficient to start proceedings in the state where for example the carrier's domicile is situated.¹⁸³

An effect of the formulation of art 75(2) is that if a claimant would choose to initiate proceedings in a contracting state that hasn't opted in that state might reject the case in favour of the designated place if that is required by its national law. Therefore, to make sure not to get dismissed it is essential to designate a court of arbitration in a state bound by chapter 15.¹⁸⁴

It wouldn't be farfetched to imagine a situation where the two parties to a dispute are from states that haven't opted in on chapter 15 while some of the available tribunals are situated in states bound by the chapter. How the question of jurisdiction would be dealt with in that situation is completely dependent on the tribunal chosen by the claimant and we won't know the answer to that question until it has been tried in court.¹⁸⁵

Exceptions

Arbitration clauses can be binding in situations similar to when a jurisdiction clause is exclusive, art 75(3). There is no need for the cargo interest protection under chapter 15 to be wider than under chapter 14, so arbitration clauses are allowed if an exclusive jurisdiction clause should've been permitted under the same circumstances.¹⁸⁶ A difference is as mentioned above that the parties don't have to designate a place of arbitration in a contracting state because that is more consistent with the rest of the arbitration rules.¹⁸⁷

¹⁸⁰ Güner-Özbek p. 285

¹⁸¹ Hooper p. 325

¹⁸² Berlingieri, *A Comparative Analysis* p. 59

¹⁸³ Sturley, Fujita & van der Ziel p. 356

¹⁸⁴ Hooper p. 325

¹⁸⁵ Bekker & Ginsburg p. 72

¹⁸⁶ *Report of the Working Group III's 16th Session*, UN Doc. A/CN.9/591 99 §

¹⁸⁷ Sturley, Fujita & van der Ziel p. 358

A significant difference between chapters 14 and 15 is that the latter makes an exception for non-liner transportation, art 76. Non-liner transportation is already outside of the scope of the convention to a great extent (see art 6(2)). Nevertheless there are still two situations where non-liner transportation is within the scope of the Rotterdam Rules and they need therefore to be excluded from the scope of chapter 15 specifically. The first situation is when the shipper and carrier voluntarily have chosen to incorporate the rules of the convention into the contract of carriage and the convention wouldn't have been applicable if they hadn't, art 76(1)(b). The second is when a third party can assume the rights of the shipper under a charterparty or similar contract, art 76(1)(a).¹⁸⁸ In other words: what art 76(1)(a) does is to “...grant an exemption to negotiable transport documents in the non-liner trades once they are negotiated to a party which is not the charterer.”¹⁸⁹

The reason for permitting free use of arbitration agreements in these cases is that that's how the industry has been operating for a long time and it has worked well so the Working Group saw no reason to change practice. It is however important to note that the convention only takes a step back in favour of national law in these situations and doesn't interfere neither if national law prohibits nor enforces arbitration clauses.¹⁹⁰

It wasn't a controversial choice to allow arbitration clauses when the parties voluntarily has incorporated the convention in the contract, but in the case of third parties there are some additional requirements to fulfil in order to avoid unfair surprises for the third parties, art 76(2). Generally these safeguards require that the charterparty is clearly identified in the transport document and that the arbitration clause is specifically incorporated into the transport document.¹⁹¹ Hence an arbitration clause that falls within the scope of the Rotterdam Rules may also be subject to chapter 15 if the requirements aren't met.¹⁹² There is a similar provision in the Hamburg Rules art 22(2) and in American law¹⁹³ where the way of incorporating a charterparty is a commonly litigated matter and so it makes sense to explain how to incorporate it properly in the convention¹⁹⁴.

Finally, like jurisdiction, the parties may agree to settle the dispute by arbitration in any place after a dispute has arisen, art 77.

3.1.3 Critique against the Rotterdam Rules

All changes in transport law get strong opponents and the Rotterdam Rules are not an exception.¹⁹⁵ Below follows a summary of the critique the convention has received regarding chapters 14 and 15. I have divided the subject under headlines to make it

¹⁸⁸ Sturley, Fujita & van der Ziel p. 359

¹⁸⁹ Diamond p. 535

¹⁹⁰ Sturley, Fujita & van der Ziel p. 359

¹⁹¹ Sturley, Fujita & van der Ziel p. 360

¹⁹² Y Baatz, “Chapter 15. Arbitration”, in Y Baatz, C Debattista, F Lorenzon, A Serdy, H Staniland & M Tsimplis (ed), *The Rotterdam Rules: A Practical Annotation*, Informa, 2009, pp. 235-242, p. 241

¹⁹³ Hooper p. 329

¹⁹⁴ Hooper p. 330

¹⁹⁵ Rosengren

easier to get an overview. Inevitably some remarks overlap, but I think that this is the clearest way to present it.

Balancing the interests

One of the aims of the convention was to create a balance between the carrier and the shipper. As we have seen above it has been commonly accepted for a long time that the carrier has the stronger negotiation position, but developments in the maritime industry constantly shifts the positions of carriers and shippers. Therefore an important task for the drafters was to find a way to recreate the balance between the parties.

Schoenbaum doesn't think that the Rotterdam Rules alter the balance between carrier and shipper interests at all.¹⁹⁶ According to Baatz on the other hand, the Rotterdam Rules are very controversial and not at all successful in striking a balance between the carrier and cargo interests.¹⁹⁷ She claims that it is too much in favour of the shipper and third parties and criticises that it forms a sort of consumer protection in commercial contracts.¹⁹⁸ Hooper as well as Bekker and Ginsburg are of more or less the same opinion and use the general arbitration rule to motivate it. Compared to in the situation when there is an arbitration agreement with one designated court, the convention puts the carrier in a rather unpredictable position. If a carrier agrees to resolve future disputes in arbitration, it equals agreeing to solve them in the forum chosen by the claimant from a list of places under the Rotterdam Rules. There is nothing that prevents the claimant from deliberately picking a forum that is inconvenient for the carrier or puts her in a disadvantageous position. Furthermore, the claimant could even use this advantage to force a settlement.¹⁹⁹ The carrier can protect herself from some abuse by negotiating an agreement designating a particular tribunal and terms saying that the claimant undertakes to pay for any costs the carrier assumes to get to the tribunal if the claimant chooses another tribunal. Nevertheless, this would mean a cargo friendly shift in the balance. The question is if it is too favourable or not.²⁰⁰

Surprisingly, the cargo interests are not content with the protection they get under the convention either and fear that the carriers will take advantage of the volume contract exception to avoid liability.²⁰¹ Diamond even claims that the system favours the carrier to such an extent that the convention fails to offer a fair system to divide the risks between the parties.²⁰² Hooper argues against that and suggests that, unlike the broad perception that the parties to a volume contract are equal, the shipper (who is often a large sophisticated cargo interest) has in fact slightly larger bargaining power than the carrier.²⁰³ Another argument in favour of supporting the carrier interest that was used

¹⁹⁶ Schoenbaum p. 290

¹⁹⁷ Baatz, *Jurisdiction and Arbitration* p. 320

¹⁹⁸ Y Baatz, "Forum Selection in Contracts for the Carriage of Goods by Sea: The European Dimension", *Lloyd's Maritime and Commercial Law Quarterly*, Volume 2011, Issue 2, 2011, pp. 208-226, p. 222

¹⁹⁹ Hooper p. 326, Bekker & Ginsburg p. 71

²⁰⁰ Bekker & Ginsburg p. 71

²⁰¹ Rosengren

²⁰² Diamond p. 536

²⁰³ Hooper p. 326

already during the negotiations was that the threat of carriers circumventing chapter 14 wouldn't become reality since liner trade doesn't use arbitration.²⁰⁴

Disregarding the question about who might be stronger, Baatz accuses the Rotterdam Rules of being incompatible with the principle of party autonomy recognised by both the European member states and English law.²⁰⁵ This is a serious accusation bearing in mind that two of the interests that the drafters were trying to protect were freedom of contract and party autonomy.

Making chapters 14 and 15 optional

One of the goals of the Working Group was to harmonise maritime law and agree on a compromise to make the convention as broadly acceptable as possible²⁰⁶ and thus create legal certainty and efficiency²⁰⁷. In the light of this the opt-in solution has been criticised from the beginning.²⁰⁸

Schoenbaum claims that the opt in solution causes two new groups of states, hence the very convention works against uniformity.²⁰⁹ Tarman too thinks that the solution hinders harmonisation, but underlines that the aim of establishing consensus for carriage of goods by sea nevertheless is fulfilled. Moreover, he believes that the compromise regarding chapters 14 and 15 is what made it possible and that the Rotterdam Rules would never have been completed without it. Berlingieri doesn't go as far, but thinks that the opt in solution made it possible to adopt chapters 14-15.²¹⁰

Some critics hold that during the drafting sessions there were enough parties in favour of including jurisdiction and arbitration to motivate forcing the chapters without any individual option. Others hold that there were enough parties *against* jurisdiction and arbitration provisions to motivate not including them at all. Sturley, who was involved in the drafting of the convention to a great extent²¹¹, has explained that satisfying these opposing opinions at the same time as achieving broad uniformity would have been an impossible task. Had they excluded jurisdiction and arbitration they would have lost support for the entire convention from a large group and had they included it they would have lost support for the entire convention from another large group.²¹² Hence compromise created greater consensus and therefore more harmonisation since the convention wouldn't have been accepted at all without.

²⁰⁴ *Report of the Working Group III's 16th Session*, UN Doc. A/CN.9/WG.III/WP.59 6§

²⁰⁵ Baatz, *Jurisdiction and Arbitration* p. 319-320

²⁰⁶ Sturley p. 35

²⁰⁷ Alcántara González p. 26

²⁰⁸ Sturley p. 7 footnote 29

²⁰⁹ Schoenbaum p. 289

²¹⁰ F Berlingieri, "Revisiting the Rotterdam Rules", *Lloyd's Maritime and Commercial Law Quarterly*, Volume 2010, Issue 4, 2010, pp. 583-639, p. 639

²¹¹ Sturley p. 35

²¹² Sturley p. 7 footnote 29

Predictions about the future of the convention

Rosengren believes that the prospects of the coming into force of the Rotterdam Rules are quite good.²¹³ González predicts that there are countries that won't worry about the possible conflicts with other transport conventions that are likely to ratify the Rotterdam Rules, which together with the US will be enough for it to enter into force.²¹⁴

The objective of the convention was to offer a solution to the already existing multiple regimes of liability in carriage of goods by sea. In this aspect similar conventions in other fields of transport have been more successful, like the Montreal Convention regarding carriage by air.²¹⁵ Alcántara González doubts that the Rotterdam Rules will succeed in this aspect. He believes that the states not already committed to either convention will choose the Hague-Visby Rules instead and that those already bound by them won't change.²¹⁶ Schoenbaum is more optimistic and thinks that the Rotterdam Rules can provide such a solution. He thinks that the convention should be adopted, but underlines that this isn't enough for a successful application; we also have to prevent it from becoming a fourth regime. If the Rotterdam Rules don't get globally accepted they risk becoming just another alternative among conventions and the goal to create uniformity will not be reached this time either.²¹⁷

The Rotterdam Rules contain detailed yet optional provisions about jurisdiction and arbitration but since Brussels-I is applicable to those situations within the European Union it is not likely that the EU member states will opt in according to Rosengren.²¹⁸ Schoenbaum is sure the EU member states won't opt in and observes that this will weaken the goal of global uniformity.²¹⁹

3.2 The EU and Brussels-I

When deciding jurisdiction within Europe it is important to consider whether Brussels-I²²⁰ is applicable or not as it covers all EU member states since 2007.²²¹

The objective of Brussels-I is to make it possible for the claimant to find out which jurisdiction is applicable to her actual case and to give the defendant a chance to predict in which jurisdiction she risks being sued.²²² Another important objective is the free

²¹³ Rosengren

²¹⁴ I would however like to add that González published the article in 2010 and also predicted that the Rotterdam Rules would be in force by late 2011...

²¹⁵ von Ziegler p. 86-88

²¹⁶ Alcántara González p. 42

²¹⁷ Schoenbaum p. 290

²¹⁸ Rosengren

²¹⁹ Schoenbaum p. 289

²²⁰ *Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters* ("Brussels-I", also called "The Jurisdiction Regulation"), 22 December 2000

²²¹ Wilson p. 320

²²² Baatz, *Maritime Law* p. 11

movement of judgements and a rapid and simple recognition and enforcement of judgements in the member states, recital 2 and 6.

The material scope of Brussels-I is civil and commercial matters with exception for arbitration, art 1.²²³ The regulation generally requires the defendant to be domiciled in an EU member state for the rules to apply, art 2. If not, national law determines jurisdiction, art 4. Even though most rules of the regulation only apply to defendants domiciled in EU member states, the scope isn't limited to those states as there are provisions relating to non-member states like art 23.²²⁴

The main rule is that the state where the defendant is domiciled has jurisdiction, art 2. The defendant's nationality and the claimant's domicile don't matter at all. Hence if a Japanese claimant wants to bring suit against a Belgian defendant domiciled in France the proceedings should take place in France.²²⁵ Hence art 2 provides an offer to member states only giving them the certainty that they will just have to defend a case where they're domiciled.

If the defendant is sued in wrong jurisdiction she can get a stay of the proceedings there. This is possible even if the only other court involved is situated in a non-member state according to ECJ's²²⁶ case law.²²⁷ The ECJ has taken the stand that predictability for EU member states is more important than the fact that another court might actually be more suitable.²²⁸ This approach is very different from the tradition of *forum non conveniens* in common law.

The regulation tries to avoid multiple proceedings since it is not desirable to risk getting incompatible judgements from different courts on the same matter.²²⁹ If more than one proceeding is initiated regarding the same cause of action between the same parties all courts but the one first seized must stay their proceedings until the first has decided if it has jurisdiction or not, art 27.²³⁰ This rule applies even if there is a jurisdiction clause identifying another court than the one seized. The seized court should recognise the clause and reject the claim, but as judging the validity of a jurisdiction clause can take years it is advisable for a party who wants to bring suit using a jurisdiction agreement to make sure to be the first to start proceedings.²³¹ In *Erich Gasser GmbH v MISAT SRL*²³² the ECJ ruled that art 27 is applicable even if the second party to file for proceedings is suggesting a court with exclusive jurisdiction. Since the judgement the European Commission has proposed a change to the convention saying that where there is an

²²³ Baatz, *Maritime Law* p. 11

²²⁴ Wilson p. 321

²²⁵ Baatz, *Maritime Law* p. 11

²²⁶ The European Court of Justice

²²⁷ See European Court of Justice's ruling in *Owusu v. Jackson* C-281/02 (2005)

²²⁸ Baatz, *Maritime Law* p. 11

²²⁹ Baatz, *Maritime Law* p. 16

²³⁰ Baatz, *Maritime Law* p. 16

²³¹ Baatz, *Maritime Law* p. 19

²³² *Erich Gasser GmbH v MISAT SRL* (C-116/02) [2003] E.C.R. I-14693; [2005] Q.B. 1

exclusive jurisdiction clause no other member states shall have jurisdiction until the forum designated in the agreement declines jurisdiction.²³³

If proceedings are started in different member states about *related* actions the later courts can decide whether or not they want to stay proceedings until the court first seized has decided, art 28. Hence if two cases concern the same action the later courts must stay proceedings, while they can choose if the cases are “only” related.²³⁴

The claimant is given some additional possibilities to bring suit but they should be interpreted restrictively and from a European rather than national point of view to ensure a uniform application. The ones relevant for the purpose of this thesis are: in matters relating to a contract the defendant can be sued in the courts of the place of performance, art 5(1). In matters relating to tort, delict or quasi-delict the defendant can be sued where the harmful event occurred, art 5(3). If the dispute regards the activities of a branch or agency it can be sued where it is situated, art 5(5). If the dispute regards payment of remuneration in respect of salvage of a cargo or freight the defendant can be sued in the court under the authority of which the cargo or freight has or could have been arrested, art 5(7).²³⁵

More importantly there are three major exceptions to the main rule: First, the parties are free to negotiate an agreement to choose jurisdiction in another EU member state as long as it meets the formal requirements in art 23. This is one of the most significant exceptions from the main rule and party autonomy is protected as a principle in the convention, recital 14.²³⁶ This exception will be elaborated more carefully in Chapter 4.

Second, if the defendant submits to another jurisdiction without contesting it Brussels-I won't prevent continued proceedings there, art 24.

Third, if the situation is covered by another international jurisdiction convention to which the state became a party before Brussels-I came into force it overrules Brussels-I, art 71.²³⁷ Brussels-I and the convention should be read together as far as possible, but where there is a conflict the other regime prevails. Such conventions might be: the 1952 and 1999 Arrest Conventions, the Collision Convention, the Hamburg Rules and (if they come into force) the Rotterdam Rules. According to the Collision Convention suit can be brought in the forums listed in the convention, which includes the court where a ship has been arrested.²³⁸ The Hamburg Rules fall within the exception, but most of the member states of the European Union haven't ratified them. Instead they have incorporated the jurisdiction provisions into national law. This situation doesn't fall within the exception; hence these national rules don't override Brussels-I.²³⁹ The Rotterdam Rules are not yet in force, but should they become that and if the EU opts in

²³³ Baatz, *Maritime Law* p. 18-19

²³⁴ Baatz, *Maritime Law* p. 16-17

²³⁵ Baatz, *Maritime Law* p. 22-23

²³⁶ Baatz, *Maritime Law* p. 12

²³⁷ Baatz, *Forum Selection in Contracts* p. 209-210

²³⁸ Baatz, *Maritime Law* p. 32-33

²³⁹ See 3. Court Jurisdiction for a short presentation of how jurisdiction is treated under the Hamburg Rules.

on the jurisdiction chapter, Brussels-I would have to be amended or replaced by another convention.²⁴⁰

Brussels-I doesn't make any exception for public policy or mandatory rules when a court has to determine jurisdiction. Recognition on the other hand may be denied on the basis of national public policy if they are manifestly contrary to it. The ECJ has however interpreted this rule very strictly to be consistent with the aim of free movement and rapid enforcement of judgements.²⁴¹

3.3 The Lugano Convention

The Lugano Convention²⁴² was completed in 1988 and renegotiated in 2007²⁴³.²⁴⁴ The amended version binds all EU member states, Norway, Switzerland and Iceland.²⁴⁵ The purpose of the convention is to enable the same freedom of movement of judgements between the contracting states within Europe as within the European Union.²⁴⁶ The Lugano Convention follows the provisions in Brussels-I²⁴⁷ and I therefore refer to the above text for information about the content.

3.4 English law²⁴⁸

As mentioned above, the courts establish jurisdiction in accordance with national law if no international convention is applicable. Since England is a usual choice in arbitration agreements in transport related disputes this chapter will present some central jurisdictional matters that the parties to an international dispute might approach if they have to succumb to English law. I have especially tried to point out things that are unfamiliar to people only used to civil law, like myself.

English courts and courts of arbitration have and have always had a good reputation and the judgements are said to be quick and fair, hence England is a common choice for plaintiffs selecting or shopping for forum. In *The Atlantic Star*²⁴⁹ Lord Denning described

²⁴⁰ Baatz, *Forum Selection in Contracts* p. 220-222. See 3.1.1 Jurisdiction regarding how jurisdiction is decided under the Rotterdam Rules.

²⁴¹ Baatz, *Forum Selection in Contracts* p. 224

²⁴² *The EFTA Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters*, Lugano, 16 September 1988

²⁴³ *Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* ("The Lugano Convention"), Lugano, 30 October 2007

²⁴⁴ Falkanger, Bull & Brautaset p. 35

²⁴⁵ Wilson p. 320,

http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l16029_en.htm

²⁴⁶

http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l16029_en.htm

²⁴⁷ Wilson p. 323

²⁴⁸ I'll make no distinction between jurisdiction and arbitration clauses in this chapter, as they generally are treated in the same way.

²⁴⁹ *The Atlantic Star* [1974] AC 436, 453, [1973] 2 Lloyd's Rep 197, 200, [1973] 2 All ER 175, 181 (HL)

forum shopping in England as open to all, but since then choosing an English court has become slightly more complicated than just showing up.²⁵⁰ Very simplified a party needs permission from the court to bring a suit to England using a jurisdiction clause and that will only be given if the claimant can convince the court that an English or Welsh court is best suited to solve the dispute.²⁵¹

Forum non conveniens and anti-suit injunctions are well established principles in common law that affect the outcome when the court decides jurisdiction, yet they are completely absent in civil law. The principles are therefore worth a short presentation in this paper.

3.4.1 Forum non conveniens

If a party to a foreign arbitration agreement²⁵² breaks it by bringing suit in an English court, the court is obliged to stay the proceedings on the ground of forum non conveniens if the defendant applies for it and provided that the court finds the foreign arbitration clause to be valid.²⁵³ To be granted a stay the defendant must convince the court first that England is not the appropriate forum for the claim and that there is another forum better suited for the task and second that choosing the other forum doesn't deprave the plaintiff of any judicial advantage available in the English court.²⁵⁴ Even if the foreign arbitration clause is valid an English court doesn't have to but it can and should grant a stay unless there are strong reasons not to.²⁵⁵ The court has to consider the circumstances of each individual case. If there is an arbitration agreement this clearly affects the outcome but other factors like where the proof and witnesses are, applicable law, convenience and expense of the parties, connections to the case and juridical advantages and disadvantages also matters.²⁵⁶ So does where the place of tort is and existing proceedings elsewhere.²⁵⁷

A complication with forum non conveniens is that it is not a global concept. As noted above civil law countries don't have the concept at all and even among common law countries there is no guarantee that two states will apply the same principles. Further, the effect of the principle is limited since it has no impact on foreign courts.²⁵⁸

²⁵⁰ Tetley, *Jurisdiction Clauses and Forum Non Conveniens* p. 223

²⁵¹ Baatz, *Maritime Law* p. 34-35

²⁵² Any case that doesn't have a connection to England can be stayed on the ground of forum non conveniens. Hence the principle is relevant in court as well as in courts of arbitration and in any area of law. I have however chosen to present forum non conveniens from a maritime trade point of view only.

²⁵³ Baatz, *Maritime Law* p. 5-6

²⁵⁴ Tetley, *Jurisdiction Clauses and Forum Non Conveniens* p. 224 See also *MacShannon v Rockware Glass Ltd* [1978] AC 795, 812, [1978] 1 All ER 625, 630 (HL)

²⁵⁵ Tetley, *Jurisdiction Clauses and Forum Non Conveniens* p. 226 See also *The Eleftheria* [1969] 1 Lloyd's Rep 237, 242, *The El Amria* [1981] 2 Lloyd's Rep 119, 123-124 (CA) and *Donohue v ArmCo* [2002] 1 Lloyd's Rep 425, 432-433

²⁵⁶ Tetley, *Jurisdiction Clauses and Forum Non Conveniens* p. 200-201

²⁵⁷ Baatz, *Maritime Law* p. 35-36

²⁵⁸ 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*, Kluwer Law International, 2005, pp. 59-84, p. 60

3.4.2 Anti-suit injunctions

Anti-suit injunction is a mean for parties who seek to affect the choice of forum that aims at making sure that proceedings are only brought where the person seeking it chooses or desires.²⁵⁹ If a common law party to a London arbitration agreement intends to bring suit, or has already initiated proceedings elsewhere, breaking the arbitration clause the defendant can apply to the English court for an anti-suit injunction to prevent the opponent from doing so. A granted anti-suit injunction is towards the party who wishes to start proceedings elsewhere and not the other forum. Hence if the foreign court accepts jurisdiction an anti-suit injunction won't stop it.²⁶⁰ This is a problem also in litigations between common law countries because such things as anti-anti-suit injunctions may appear. This motivates why jurisdiction needs to be regulated on an international level.²⁶¹

If the court is asked to enforce a jurisdiction agreement through an anti-suit injunction it will be granted if the party proposing the foreign jurisdiction fails to convince the court that it shouldn't, *Donohue v Armco*²⁶². Hence the burden of proof lies on the party breaking the arbitration agreement. When there is no exclusive jurisdiction agreement to enforce the court will grant the injunction if England is the natural forum and if the conduct of the defendant is serious enough.²⁶³

The ECJ's ruling in *Turner v Grovit*²⁶⁴ and *The Front Comor*²⁶⁵ prohibits the use of anti-suit injunctions towards other EU member states or contracting states to the Lugano Convention. Additionally, if the English court is the second to be seized, not only is it prevented from granting an anti-suit injunction it is also required to stay proceedings if the first forum is a member state, Erich Gasser and Brussels-I art 27 (see 3.2 The EU and Brussels-I).²⁶⁶

In *The Front Comor* Brussels-I was questioned as an obstacle for anti-suit injunctions upholding an arbitration clause. The defendant claimed that since arbitration is excluded from the scope of the regulation²⁶⁷ another member state's decision about the validity of an arbitration clause falls outside the scope too and therefore Brussels-I can't preclude an anti-suit injunction. Despite this objection the ECJ ruled that the decision was indeed within the scope. The defendant had hit the Italian claimant's jetty in Syracuse, hence Italy had jurisdiction over the substantive claim unless there was a valid arbitration agreement according art 5(3). Therefore the court argued that the decision about the agreement's validity was also within the scope of the regulation.²⁶⁸

²⁵⁹ Meeson p. 59

²⁶⁰ Baatz, *Maritime Law* p. 42-43

²⁶¹ Meeson p. 59-60

²⁶² *Donohue v Armco* [2001] UKHL 64; [2002] 1 Lloyd's Rep. 425

²⁶³ Baatz, *Maritime Law* p. 42-43

²⁶⁴ *Turner v Grovit* (C-159/02) [2004] E.C.R. I-3565; [2005] 1 A.C. 101

²⁶⁵ *Alliantz SpA (formerly Riumione Adriatiche di Sicurta SpA) v West Tankers Inc (The Front Comor)* C-185/07 (2009)

²⁶⁶ Baatz, *Maritime Law* p. 6-9 and 42-43, Meeson p. 60

²⁶⁷ See art 2(d)

²⁶⁸ Baatz, *Maritime Law* p. 6-9

Anti-suit injunctions are sometimes described as the reverse of forum non conveniens, but that isn't entirely correct. A difference between the two remedies is that forum non conveniens is dependent on that an alternative jurisdiction exists, while an anti-suit injunction isn't, since it might just as well operate as a way to stop proceedings in *any* jurisdiction.²⁶⁹

4. Forum Selection Clauses

After the preceding presentation of the frame that the parties have to act within when selecting forum the following text examines how forum selection clauses in particular are treated by the different regimes. To include a jurisdiction or arbitration clause in the contract is one of the most common strategies used to select forum. Clauses can be invalid either because of provisions in national legislation or because restricting international conventions override otherwise permissive national law.²⁷⁰ In this chapter I will comment the different regimes' stands on the validity, recognition and enforcement of forum selection clauses.

4.1 The treatment of forum clauses in international conventions

Neither the Hague nor the Hague-Visby Rules have any provisions regulating how forum selection clauses should be treated since they are based on the apprehension that jurisdiction is a matter for national law.²⁷¹ Normally the courts answering to any of these rules hold such clauses valid and third parties are bound if they can be presumed to be aware of the conditions.²⁷²

The Hamburg and the Rotterdam Rules regulate clauses and in a similar way.²⁷³ Would the Rotterdam Rules come into force, all choice of forum clauses would be held valid and binding as long as they designate a court in a contracting state.²⁷⁴ If the clause isn't exclusive the claimant would have a list of additional courts at her disposal too, art 66(b), 67 and 75.²⁷⁵

4.2 Forum selection clauses in the EU

²⁶⁹ Meeson p. 59

²⁷⁰ Tetley, *Jurisdiction Clauses and Forum Non Conveniens* p. 188

²⁷¹ M Davies, "Forum Selection, Choice of Law and Mandatory Rules", *Lloyd's Maritime and Commercial Law Quarterly*, Volume 2011, Issue 2, 2011, pp. 237-248, p. 240

²⁷² Tetley, *Jurisdiction Clauses and Forum Non Conveniens* p. 186-187

²⁷³ Davies, *Forum Selection* p. 240

²⁷⁴ See 3.1 The Rotterdam Rules for more details

²⁷⁵ Alba Fernández p. 289

One of the parties is domiciled in a EU member state and they have chosen a member state in their jurisdiction agreement

The chosen state has exclusive jurisdiction as long as the agreement fulfils the formalities requested in Brussels-I art 23(1). The national law of the chosen forum doesn't affect the jurisdiction and since there is no exception for mandatory rules or public policy in Brussels-I the clause can't be deemed void because of that.²⁷⁶

According to the ECJ's case law these rules apply to the parties of the contract, i.e. the shipper and carrier, as well as third party holders of the bill of lading if they have succeeded to the shipper's rights and obligations. Who is a lawful holder of a bill of lading is a question for national regulation to decide, so the bound parties might differ depending on where you are.²⁷⁷

If another court than the one agreed upon in the contract is seized before the contractual court the latter must stay the proceedings until the first seized has established jurisdiction. If the contractual court is first seized, it must accept jurisdiction if the formalities are met. Hence if an English court is first seized and the situation is ruled by Brussels-I it *cannot* stay proceedings on the base of forum non conveniens, which would be the case under common law.²⁷⁸

None of the parties is domiciled in a EU member state but they have chosen a member state in their jurisdiction agreement

Whether the chosen forum has jurisdiction or not is in this case a decision for its national law and unless it declines none but the chosen state has jurisdiction, art 23(3).²⁷⁹

The European Commission has proposed that art 23(3) should be deleted and 23(1) changed so that it doesn't matter where the parties are domiciled. This would mean that all jurisdiction clauses picking an EU forum would be dealt with in the same way.²⁸⁰

The defendant is domiciled in a EU member state but the parties have chosen a non-member state in their jurisdiction agreement

Brussels-I is applicable in this situation but there is no provision handling it. The European Commission has proposed that the courts should stay proceedings if the foreign court is first seized. This would however not work in favour for jurisdiction clauses for non-member states if the EU forum would be first seized.²⁸¹

²⁷⁶ Baatz, *Forum Selection in Contracts* p. 210

²⁷⁷ Baatz, *Forum Selection in Contracts* p. 210-211

²⁷⁸ Baatz, *Forum Selection in Contracts* p. 211

²⁷⁹ Baatz, *Forum Selection in Contracts* p. 213

²⁸⁰ Baatz, *Forum Selection in Contracts* p. 214

²⁸¹ Baatz, *Forum Selection in Contracts* p. 215-216

The defendant is not domiciled in the EU and they have chosen a non-member state in their jurisdiction agreement

According to art 4 national rules apply to this situation. Hence if the parties have agreed to bring suit in for example the US (a non-member state) but proceedings are commenced in an English court (a member state) and the defendant isn't domiciled in the EU, the English court will have to apply national law to decide if it has jurisdiction or not.²⁸²

4.3 National mandatory rules in the protection of state jurisdiction: Australia and the US

Forum selection clauses are common in contracts for carriage of goods by sea throughout the world, but they are not necessarily good for third parties like cargo owners or insurers as the carrier can use the clauses to limit her liability for the goods. A way for states to protect third parties is to create national mandatory rules that limit carrier liability and overrule contract clauses selecting a foreign forum.²⁸³

Many states have chosen to formulate national regulation so that it overrules foreign forum clauses to strengthen domestic law regulating contracts for carriage of goods by sea. When creating the Sea-Carriage of Goods Act²⁸⁴ in 1904 Australia became the first common law country to use this strategy to protect cargo owners. The aim was to find a way to stop shipowners from avoiding liability for their own negligence through contracting out.²⁸⁵ The system is vulnerable and can for example be avoided by an English choice of law clause in the bill of lading since an English court won't care if an Australian court finds that clause void and might even grant an anti-suit injunction to stop proceedings in Australia.²⁸⁶

The US is far more liberal than Australia, but it hasn't always been like that. Under the Harter Act of 1893 there was no provision regulating jurisdiction clauses since they were considered contrary to public law and therefore void.²⁸⁷ The matter was still not up for regulation when the US adopted the Hague Rules and created the COGSA²⁸⁸ in 1936 because there was such a robust doctrine supporting that the foreign choice of law clauses weren't valid. After that there has been a slow change in case law towards accepting choice of forum clauses. A common objection against that is that jurisdiction clauses might "force" settlements. If an American court (the plaintiff/cargo owner's state of residence) dismisses a case there is a large risk that the plaintiff won't bring suit in the assigned foreign court but would rather try to reach a settlement.²⁸⁹

²⁸² Baatz, *Forum Selection in Contracts* p. 216

²⁸³ Davies, *Forum Selection* p. 240

²⁸⁴ *The Sea-Carriage of Goods Act 1904 (Cth)*

²⁸⁵ Davies, *Forum Selection* p. 237-238

²⁸⁶ Davies, *Forum Selection* p. 240-241

²⁸⁷ Davies, *Forum Selection* p. 242

²⁸⁸ *The US Carriage of Goods by Sea Act 1936 ("COGSA")*

²⁸⁹ Davies, *Forum Selection* p. 243-244

Australia isn't the only protectionist country; New Zealand, South Africa and Canada have similar regulations and yet others like Argentina, Belgium, Chile, China, Denmark, Finland, Greece, Japan, Liberia, Morocco, Norway, Peru, Sweden and Venezuela have some kind of "actions against foreign forum selection clauses".²⁹⁰

4.4 The treatment of forum clauses in England

As we have seen above common law courts may dismiss or stay proceedings brought to them even if they have jurisdiction if they deem another jurisdiction to be more convenient (*forum non conveniens*). This can be done both on the initiative of the court and on request by one of the parties. In civil law states the courts don't have this possibility, hence if they have jurisdiction they must decide.²⁹¹

If the parties have negotiated an English jurisdiction clause the English courts try to uphold it and will only declare it to be invalid if it is motivated by strong reasons. The courts will even try to uphold the clause if proceedings have been started somewhere else as well. A valid reason to stay proceedings would be if there were multiple parties to the case that haven't agreed on English jurisdiction in the foreign court. The rules are the same regarding London arbitration clauses.²⁹²

A plausible reason to keep a case even though there is a foreign jurisdiction clause would be if the clause had the effect of limiting the carrier's liability since such clauses are void according to the Hague-Visby Rules (which is the convention England succumbs to).²⁹³ On the other hand, despite not being a protectionist state, English courts can dismiss (and have dismissed) cases because of an exclusive foreign jurisdiction clause even when the ship has been arrested in English territorial waters and the country therefore has jurisdiction according to the 1952 Arrest convention art 7.²⁹⁴

4.5 General Rules on the Validity of Clauses

The rules are not harmonised but nevertheless most courts (regardless of their nationality) consider the same circumstances when judging the validity of a jurisdiction clause. The clause itself has to be clear and precise so that there can be no doubt for the parties where they can bring suit. For the same reason the reference has to be detailed if the clause can be found in another contract. Further only parties to the contract and third persons that are aware of its content or have consented are bound by the clause. The party wishing to rely on the clause has to prove that the opponent was or should have been aware of the clause. Finally the clause mustn't be fundamentally unfair or against strong public policy.²⁹⁵

²⁹⁰ Davies, *Forum Selection* p. 248

²⁹¹ Tetley, *Jurisdiction Clauses and Forum Non Conveniens* p. 198-199

²⁹² Baatz, *Maritime Law* p. 39-40

²⁹³ Baatz, *Maritime Law* p. 39-40

²⁹⁴ Tetley, *Jurisdiction Clauses and Forum Non Conveniens* p. 197-198

²⁹⁵ Tetley, *Jurisdiction Clauses and Forum Non Conveniens* p. 249-252

5. Forum shopping

During my research I started to realise that a lot of the debate around forum shopping and jurisdiction in maritime law revolve around one or more of following questions:

1. Should jurisdiction be regulated on an international level at all?
2. Which forums would be permissible in such a list?
3. Should forum clauses be allowed?
4. Should rules about jurisdiction be mandatory?

These questions overlap to some extent, but generally I think that they can be separated.

5.1 Should jurisdiction be regulated on an international level at all?

As I see it there are two ways of restricting forum shopping. Either you can harmonise national substantial law to minimise the parties' incentives to seek other forums (like under the Hague Rules) or you can regulate jurisdiction on an international level (like under the Rotterdam Rules) to allow differences in national law at the same time as stopping forum shoppers.

Right now there is no efficient global jurisdiction convention despite two major attempts. The first didn't get any substantial power while it remains to be seen what will happen to the second. There seems to be a large group believing that regulation is needed to prevent forum shopping, but for some reason the conventions don't get immediate success. Therefore the first question must be if jurisdiction should be regulated at all on an international level.

A very common remark against regulation is that what restricting forum shopping essentially does is to protect companies. This is questionable since companies are in all other aspects of their commercial activity expected to be able to calculate the risks they are taking (and if needed get insurance).²⁹⁶ Having said that I will however disregard that objection from now on, since this isn't a paper about whether forum shopping is good or bad. My starting point is that there is such a thing as forum shopping and that it needs to be restricted in some way but not prohibited in its entirety.

It is a fact that today liability provisions vary from jurisdiction to jurisdiction, which means that based on what the world looks like today jurisdiction needs to be decided in the same way everywhere in order to prevent abuse (if my assumption that there are only two ways to restrict forum shopping is correct). If all nations applied the same rules of liability there'd be no need to regulate jurisdiction since all cases would be treated the same no matter where the dispute was resolved. That is not the case today and therefore we need global rules preventing a party from intentionally providing for a jurisdiction to avoid responsibility.²⁹⁷ Tetley believes that it is important that choice of forum rules are the same throughout the world and regrets that that is not the case today.²⁹⁸

²⁹⁶ von Ziegler p. 93

²⁹⁷ Baatz, *Jurisdiction and Arbitration* p. 319-320

²⁹⁸ Tetley, *Jurisdiction Clauses and Forum Non Conveniens* p. 184

A reason to regulate would be to protect third parties. It is commonly accepted that the freedom of contract regarding carriage of goods by sea (in transport documents, not charterparties) needs to be restricted to protect third parties so that they can expect at least minimum obligations from the carrier. Some go even further and claim that the shippers need protection too, despite being an original party to the contract. In that case the balance between the carrier and the cargo interests needs to be repaired because as it is now the carrier has a negotiation advantage as she commonly drafts the contract of carriage and therefore can choose jurisdiction.²⁹⁹

Von Ziegler suggests that if the nations' views of the situation vary too much jurisdiction better not be regulated on an international level, because then the rules wouldn't become commonly accepted. If it should be regulated he suggests that the aim should be not to give either party a weapon against the other.³⁰⁰

5.2 Which forums would be permissible in such a list?

If jurisdiction was to be regulated through an international convention the way to do it, based on the most common suggestions, seems to be through providing the claimant with a list of permissible forums.

A very uncontroversial suggestion is to include the carrier's place of business. In litigations in general both parties benefit from settling in the jurisdiction of their principal place of business. Regardless of if you are the claimant or the defendant that jurisdiction is convenient and provides foreseeability, since you probably are familiar with the law of the country where your principal places of business is situated. The problem is that in international litigation the parties' principal place of businesses lies in different jurisdictions, so the party who manages to bring the case to her jurisdiction will inevitably have an advantage. Nevertheless it is rational to choose to include the carrier's place of business in a jurisdiction convention, since there are often several cargo interests but only one carrier.³⁰¹

Before the Rotterdam Rules were finished von Ziegler suggested that jurisdiction should be limited to following certain places:

- The place of residence of the defendant
- The principal place of business of the defendant
- Where a branch or agency which the contract of carriage was made is situated. The model for this rule is the Warsaw Convention³⁰².
- The place of delivery
- The place of shipment/receipt

He also argued that the performing carrier's residence and principal place of business should be included like in the Guadalajara Convention, but slightly surprisingly he opposed including the place of arrest for the reason that it could easily interfere with

²⁹⁹ Baatz, Jurisdiction and Arbitration p. 319

³⁰⁰ von Ziegler p. 107-108

³⁰¹ Baatz, Jurisdiction and Arbitration p. 319-320

³⁰² *Convention for the Unification of Certain Rules Relating to International Carriage by Air* ("The Warsaw Convention"), Warsaw, 12 October 1929

other international conventions. As in the final version of the Rotterdam Rules von Ziegler suggested that the jurisdiction should be restricted to contracting states.³⁰³

5.3 Should forum clauses be allowed?

Von Ziegler is very sceptical to prohibiting forum clauses since it would form some kind of consumer protection but the “consumers” in this case are companies. He also points out that if the carrier chooses a reasonable jurisdiction in a bill of lading, there is no reason why such a clause should not be valid.³⁰⁴ Force and Davies too presuppose that business people are sophisticated parties, but point out that this is not a necessity. They do however admit that business people are normally viewed as sophisticated in the sense that they have the knowledge needed (or the assets to pay experts) to go on with their whereabouts without any need for protection. Therefore it is only logical to let them take responsibility for both the profits and the mistakes they make. The discussion can be summarised as a question of freedom of contract contra public policy.³⁰⁵ In a later article Davies argues that it is sensible to offer some kind of protection in order not to allow the carrier to completely avoid liability.³⁰⁶ According to a survey from 2004 the American concern that foreign jurisdiction clauses might have the effect of forcing settlements has become reality and according to Davies this proves that forum selection clauses lessen the carrier’s liability and he believes that a global convention like the Rotterdam Rules would be a solution to the problem.³⁰⁷

Another related argument in favour of restricting forum clauses is that third parties need protection. Third parties are bound by the forum selection clauses negotiated by the contracting parties since they have to sue under the bill of lading attached to it and that makes them vulnerable. Force and Davies admit that a sophisticated business person ought to know that there will most likely be a forum selection clause in the contract of carriage, but there is no way for her to know what it says.³⁰⁸ Von Ziegler argues that a buyer that agrees to let the seller arrange the shipment can prevent being taken by surprise or risking to litigate in an inconvenient forum by either arranging the shipment herself or instructing the seller about her preferences as part of the sales contract negotiations. If she doesn’t think that it would be worth paying a higher price to dictate the contract, it is reasonable that she’d have to take the consequences of the decision. Additionally, if the shipper (one of the original parties) chooses to transfer her rights to a consignee (a third party), why should the consignee get better protection than the shipper would have had? Or rather: why should the carrier’s responsibility be higher if the shipper transfers her rights compared to the terms negotiated by the shipper and which (obviously) were satisfactory to her? Therefore von Ziegler argues

³⁰³ von Ziegler p. 108-111

³⁰⁴ von Ziegler p. 112-113

³⁰⁵ R Force & 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*, Kluwer Law International, 2005, pp. 1-58, p. 1-2

³⁰⁶ Davies, *Forum Selection* p. 248

³⁰⁷ Davies, *Forum Selection* p. 247-248

³⁰⁸ Force & Davies p. 3-4

that it should not be up to transport law to give a consignee notice of any jurisdiction clauses; it should be the shipper. Hence third party protection is unnecessary.³⁰⁹

On the other hand von Ziegler argues that in general it isn't ideal to let national law decide the validity of forum clauses. Since most states today are bound by either the Hague or the Hague-Visby Rules that is the case now and it should be avoided.³¹⁰ But in his opinion there is no need to prohibit jurisdiction clauses.³¹¹ It is worth noticing that equivalent regulations of other modes of transport do exactly that and they have been broadly accepted and works well! Additionally, as we have seen above, the Hamburg Rules offer a middle way between complete freedom of contract and prohibition of forum clauses through including rules on jurisdiction but with the possibility for the parties to decide through a jurisdiction agreement.³¹²

Tetley too is of the opinion that forum clauses should be permitted, but that complete freedom of contract is not desirable. The world needs jurisdiction and arbitration clauses, but they also need to be fair.³¹³ Force and Davies don't write explicitly how they would like the clauses to be handled, but they believe that forum selection clauses should affirm the right to redress, not take away rights that would otherwise belong to any of the parties.³¹⁴

5.4 Should rules about jurisdiction be mandatory?

In his article von Ziegler has an interesting discussion about whether jurisdiction provisions should be made mandatory or not. It is noteworthy especially with the opt-in solution of the Rotterdam Rules in mind, so bellow follows an account of the main arguments in the discussion.

First of all, if jurisdiction provisions are not mandatory they will easily be overruled by choice of forum clauses in contracts of carriage. Hence if the rules should offer any substantial protection they would have to be mandatory. Considering to what extent that would limit the freedom of contract it would have to be supported by strong reasons. There are mandatory rules in the Hague Rules and the Hamburg Rules, but they only regulate carrier liability and affect just one of the parties. The Rotterdam Rules have a wider scope, which affects if the rules should be made mandatory or not.³¹⁵

One of the most common arguments in favour of mandatory provisions is public policy. The Hague Rules³¹⁶ protect the shipper but the reason for it is that it was based on the Harter Act, which was designed to protect (American) shippers against powerful (English) carriers. Today the balance has shifted and there is no longer a weaker party

³⁰⁹ von Ziegler p. 115-116

³¹⁰ von Ziegler p. 107

³¹¹ von Ziegler p. 100-101

³¹² von Ziegler p. 101-105

³¹³ Tetley, *Reform of the Carriage of Goods* p. 6

³¹⁴ Force & Davies p. 3

³¹⁵ von Ziegler p. 93-94

³¹⁶ Art 3(8)

to protect. The protection provided by the Hague Rules can be compared to consumer protection, which is what motivates most mandatory rules outside maritime law. Such a perspective often indicates the consumer's state of residence to have jurisdiction, but applied in the field of maritime law that would translate to the shipper's state of residence and that would be inconsistent with already existing rules.³¹⁷

Another reason to make the rules mandatory could be that the bill of lading is issued when the contract of carriage is completed and the goods are loaded on board. This puts the shipper in a weak position to affect the content of the contract dictated by the carrier. But why should only jurisdiction out of all clauses in the bill of lading be protected? Another solution than creating mandatory rules about what may and may not be included could be that the party issuing the terms of the bill of lading (normally the carrier) should get the burden of proof to show that the opponent agreed to the terms.³¹⁸ This should be kept apart from the intention to protect third parties i.e. parties that don't negotiate the contract of carriage which could however motivate making mandatory rules.³¹⁹

An objection against mandatory rules is that in the past practice has remained important in maritime law and that has proven to be successful. Hence one shouldn't be too eager to change the ways of the parties. Gaining uniformity is not in itself a sufficient reason to make all laws mandatory in an area like maritime law where freedom of contract should be the main principle.³²⁰ For example the interfaces among the various contracts in transport law too need some kind of predictability, so the parties to a contract of carriage can't be free to alter the connected contracts as they wish. Traditionally these rules have been left to national law which in the end has let the principle of freedom of contract decide and that has worked well.³²¹

Based on the above mentioned observations the conclusion has to be that there is no need to make all of the rules mandatory according to von Ziegler.³²²

6. Final Remarks and Conclusion

This thesis' concluding chapter offers me an opportunity to comment my findings. I have chosen to divide the chapter to one part about the Rotterdam Rules and one about forum shopping in general.

6.1 The Rotterdam Rules

³¹⁷ von Ziegler p. 95-96

³¹⁸ von Ziegler p. 96

³¹⁹ von Ziegler p. 98-99

³²⁰ von Ziegler p. 96-97

³²¹ von Ziegler p. 99-100

³²² von Ziegler p. 100-101

Regarding the complexity of the Rotterdam Rules my concern is that if the states can't overlook the convention and its effects reasonably easy it is unlikely that they will trust and ratify it. Additionally, if it is unclear the risk is greater that practitioners in the industry of carriage of goods by sea will try to find ways to circumvent it instead of using it. The industry doesn't only need broad ratification, a broad application too is essential and I think that the success of the convention is dependent on that.

I don't have enough experience in how the industry works so I don't feel comfortable trying to judge who is the stronger party and how the balance between the interests changes under different regimes. I do however agree with Hooper, Bekker and Ginsburg about the general arbitration rule under the Rotterdam Rules (see p. 3.1.3 Critique against the Rotterdam Rules). It has a rather unconventional effect since agreeing to arbitrate equals agreeing to solve the dispute in any of the forums in the list and not (as it normally would be) just the contractual forum. The safeguard suggested by Bekker and Ginsburg only protects against extra costs, not a disadvantageous forum. The list is the same as regarding jurisdiction and I don't have any objections against the places included in it. Rather I'm not content with the very idea to be bound to defend a case in places outside of the arbitration agreement. Arbitration doesn't fill the same function as bringing suit as it has an extra dimension of party autonomy, which to some extent lessens with this solution.

Further, I have got mixed feelings about the opt-in solution. From my point of view it is not ideal if the objective is to restrict forum shopping since it doesn't provide harmonised rules between the states, but it is a clever compromise to get acceptance for the rest of the convention. On the other hand, after reading von Ziegler's analysis I wouldn't prefer a convention with only mandatory rules either. The arguments in favour of making the provisions mandatory don't convince me and I'm under the impression that the shipping industry has for a long time been governed by tradition to a great extent and making mandatory rules would in my view inevitably have to change a practice that has been shaped for many years. Yet, if the rules aren't mandatory they are easily overruled with an un-harmonised system as the result, but this time due to the persons that obey under the rules rather than lack of ratification.

Additionally I'm critical to the choice not to link chapters 14 and 15 in the process of declaring compliance to them. In case a state only ratifies the jurisdiction chapter all the work creating chapter 15 to stop carriers from circumventing chapter 14 using arbitration is in vain. Naturally all contracting states will be aware of this, but it is still up to them to decide. Could this mean even less harmonisation? Carrier friendly states might, based on the apprehension that chapter 15 is only needed in theory, only opt in on chapter 14.³²³ On the other hand, they might very well be right.

There are some doubts as to the Rotterdam Rules' relation to forum non conveniens and some critics suggest that it is incompatible with the convention since art 69 excludes all additional jurisdictions, but I disagree. I think that the designated jurisdiction isn't technically an additional jurisdiction since it is in the list the claimant can choose from. (You could maybe say that it is additional insofar that the claimant has chosen another

³²³ The UK is as mentioned above, one of the states that during the drafting of the Rotterdam Rules most eagerly upheld the argument that chapter 15 is only needed in theory. The UK will however not be able to decide whether or not to opt in on the jurisdiction chapter, as they are part of the EU.

jurisdiction, but I don't find that view satisfactory.) However, the claimant has freedom of choice between the options in the list and if a court could have an opinion about the decision the freedom of choice is undoubtedly limited. If the court would stay proceedings because the defendant has applied for a stay based on forum non conveniens this would constitute a strategy for the defendant/carrier to affect the claimant's choice and I doubt that this was the drafters' intention. The defendant could try to switch to the forum designated in the arbitration agreement, which might be the result of the carrier abusing her market power. Therefore I see little point in allowing the practice of forum non conveniens under the convention, but it should be motivated by the principles protected by the convention rather than art 69.

Like Tetley I find it strange that the drafters chose to model chapters 14 and 15 so closely after the Hamburg Rules, since they weren't a success. Maybe that indicates that a more different set of rules was needed? On the other hand it is hard to imagine something completely new and to use the Hague-Visby Rules as a base would give little guidance concerning jurisdiction apart from the obvious: to not regulate it at all. The problem when it comes to chapter 14 and 15 of the Rotterdam Rules is that there is nothing to compare it with. We lack experience of using such a convention. It would have been interesting to compare it to a similar convention in another mode of transport like the Montreal Convention (especially since it has proved to be such a success). Unfortunately that was impossible to conduct within the limits of this thesis since the subject would be large enough for a thesis of its own.

My conclusion is that the rules need to be tried in practice and that it is impossible to predict if the complexity is an obstacle or not. My view is that the chapters aren't perfect but if Berlingieri is right when he suggests that we can choose between keeping an obsolete regime or trying a convention that isn't perfect but attempts to make a change, I'd risk the second.³²⁴

6.2 Forum shopping in general

A general conclusion that I have drawn is that forum shopping as a phenomenon isn't questioned any longer. Instead the discussion revolves around to what extent it should be prevented, but not whether it should be completely prohibited or not. The discussion seems to be about distinguishing between shopping and selection so to say.

I see two reasons as to why there is no global definition of forum shopping. First, I haven't found any convention explicitly prohibiting or restricting it. The lawmaker seems to prefer to hinder forum shopping using laws that have the *effect* of limiting the available forums. Since provisions directly addressing forum shopping are rare, forum shopping hasn't been delineated in law. Second, forum shopping is difficult to define because you can accomplish it in various ways. Therefore you can't define it by describing how to act to achieve it and as a result the definition has to be vague. The vague definition has in my view both advantages and disadvantages. The advantage is that many situations can be covered, which suits such a divided area as maritime law well. The disadvantage is of course unpredictability and lack of legal security. I'm not

³²⁴ Berlingieri, *Revisiting the Rotterdam Rules* p. 639

going to try to define what constitutes an “unfair” advantage, but I would like to point out that since the parties are both companies I think that one could allow slightly more “unfairness” than if the parties had been a company and a consumer. As pointed out before, companies don’t need consumer protection and should be responsible for both the profits and mistakes they make.

I think that it would be desirable to regulate jurisdiction on an international level, not least to protect third parties from forum shoppers. I do however wonder if it is possible at all to make a concrete list of forums that covers every situation that might occur without making it too complex to apply in an efficient manner. As pointed out regarding the Rotterdam Rules, a convention needs to both give the impression of being a trustworthy and efficient instrument and actually live up to the image.

I also think that forum clauses should be allowed, but with restrictions. Honest parties who aren’t trying to exploit their freedom of contract in an abusive way should not be prevented from using forum clauses. Additionally, selecting forum is not just a matter of advantages. It is a fact that some forums are more effective than others; hence forum selection is also a contractual mean to avoid the legal insecurity of endless processes. Yet, despite the benefits of forum selection, I think that part of the parties’ freedom of contract should be restricted in favour of preventing actual abuse.

I’d like to conclude with some of Hare’s remarks about forum shopping: Forum shopping isn’t treated as seriously as before. From being called undesirable and improper it has slowly transformed into an essential tool for maritime lawyers who are now expected to have the knowledge to advise their clients where to bring suit and what the advantages and disadvantages of that forum might be.³²⁵ Forum shopping will exist as long as the regimes are different and it doesn’t seem likely that there will ever be one global convention. There are both good and bad sides to forum shopping but all forum selection is permissive as long as it is not abusive.³²⁶

³²⁵ Hare p. 166

³²⁶ Hare p. 173-174

Sources

Books

Baatz, Y, *Maritime Law*, Sweet & Maxwell, 2nd edition, 2011

Baatz, Y, Debattista, C, Lorenzon, F, Serdy, A, Staniland, H & Tsimplis, M, *The Rotterdam Rules: A Practical Annotation*, Informa, 2009

Boschiero, N, Scovazzi, T, Pitea, C & Ragni, C, *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, Asser Press, 2013, p. 825-837

Davies, M, *Jurisdiction and Forum Selection in International Maritime Law – Essays in Honor of Robert Force*, Kluwer Law International, 2005

Dixon, M, *Textbook on International Law*, Oxford University Press, 6th edition, 2007

Falkanger, T, Bull, HJ & Brautaset, L, *Scandinavian Maritime Law: The Norwegian Perspective*, Universitetsforlaget, 3rd edition, 2011

Güner-Özbek, MD, *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the “Rotterdam Rules”*, Springer, 2011

Sparka, F, *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis*, Springer, 2010

Sturley, MF, Fujita, T & van der Ziel, G, *The Rotterdam Rules*, Sweet & Maxwell (Registered trademark of Thomson Reuters (Legal) Limited), 2010

Thomas, DR, *The Carriage of Goods by Sea under the Rotterdam Rules*, Lloyd’s List, 2010

Williams, R, *Gard Guidance on Maritime Claims and Insurance*, Gard AS, 2013

Wilson, JF, *Carriage of Goods by Sea*, Pearson Educated Limited, 7th edition, 2010

von Ziegler, A, Schelin, J & Zunarelli, S, *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, Kluwer Law International, 2010

Articles

Alcántara González, JM, “Rotterdam Rules. Prelude or Premonition?”, *Cuadernos de Derecho Transnacional*, Volume 2, Number 1, 2010, pp. 25-43

Baatz, Y, “Forum Selection in Contracts for the Carriage of Goods by Sea: The European Dimension”, *Lloyd’s Maritime and Commercial Law Quarterly*, Volume 2011, Issue 2, 2011, pp. 208-226

Bekker, PHF & Ginsburg, D, "Rotterdam Rules and Arbitration: Questions and Warning Signs", *Dispute Resolution Journal*, Volume 65, Issue 1, 2010, p. 68-73

Berlingieri, F, *A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*, UNCITRAL, Paper delivered at the General Assembly of the AMD, Marrakesh 5-6 November 2009, retrieved 24 October 2013, http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf

Berlingieri, F, "An Analysis of Two Recent Commentaries of the Rotterdam Rules", *Il Diritto Marittimo*, Volume 2012, Issue 1, 2012, retrieved 1 November 2013, <http://www.comitemaritime.org/Uploads/An%20analysis%20of%20two%20recent%20commentaries%20of%20the%20RR-F.Berlingieri.pdf>

Berlingieri, F, "Revisiting the Rotterdam Rules", *Lloyd's Maritime and Commercial Law Quarterly*, Volume 2010, Issue 4, 2010, pp. 583-639

Clarke, J, "Maritime Law Sources", *Legal Information Management*, Volume 8, Issue 3, 2008, pp. 166 - 171

The CMI Working Group on the Rotterdam Rules, *Questions and Answers on The Rotterdam Rules*, 2012, retrieved 5 November 2013, http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/RotterdamRules_QA_10102012.pdf

Davies, M, "Forum Selection, Choice of Law and Mandatory Rules", *Lloyd's Maritime and Commercial Law Quarterly*, Volume 2011, Issue 2, 2011, pp. 237-248

Diamond, A, "The Rotterdam Rules", *Lloyd's Maritime and Commercial Law Quarterly*, Volume 2009, Issue 4, 2009, pp. 445-536

Maloy, R, "Forum Shopping? What is Wrong With That?", *Quinnipiac Law Review*, Volume 24, Issue 1, 2005, pp. 25-62

Rosengren, J, *Rotterdamreglerna – Ny konvention för sjötransportavtal*, InfoTorg Juridik, 2011, retrieved 21 October 2013, <http://www.infotorgjuridik.se/premium/mittijuridiken/praktikerartiklar/article168657.ece>

Schelin, J, *Rotterdamreglerna och multimodala transporter*, Sjörettsbiblioteket, 2012, retrieved 24 October 2013, <http://www.sjorettsbiblioteket.se/multimodala-transporter/rotterdamreglerna-och-multimodala-transporter/>

Schoenbaum, TJ, "An Evaluation of the Rotterdam Rules from the US", *The Journal of International Maritime Law*, Volume 17, Issue 4, 2011, pp. 274-290

Sturley, MF., *Jurisdiction under the Rotterdam Rules*, Rotterdam Rules, Paper presented at the Colloquium of the Rotterdam Rules 2009, held at De Doelen on 21 September

2009, retrieved 24 October 2013,

<http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Michael%20Stu rley%2023%20OKT29.pdf>

Tetley, W, "Reform of the Carriage of Goods – The UNCITRAL Draft and Senate COGSA '99", *Tulane Maritime Law Journal*, Volume 28, Number 1, 2003, pp. 1-44

Conventions

International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("The Hague Rules"), Brussels, 25 August 1924

Convention for the Unification of Certain Rules Relating to International Carriage by Air ("The Warsaw Convention"), Warsaw, 12 October 1929

The International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships of 1952 ("The 1952 Arrest Convention"), Brussels, 10 May 1952

The International Convention for the Unification of Certain Concerning Civil Jurisdiction in Matters of Collision ("The Collision Convention"), Brussels, 10 May 1952

Convention on the Contract for the International Carriage of Goods by Road ("CMR"), Geneva, 19 May 1956

Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The New York Convention"), 10 June 1958, New York

Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier ("The Guadalajara Convention"), Guadalajara, 18 September 1961

The 1969 Vienna Convention on the Law of Treaties ("The Vienna Convention"), Vienna, 23 May 1969

The Convention on Limitation of Liability for Maritime Claims ("LLMC"), London, 19 November 1976

United Nations Convention on the Carriage of Goods by Sea ("The Hamburg Rules"), Hamburg, 31 March 1978

The Hague Rules 1924 as Amended by the Brussels Protocol 1968 ("The Hague-Visby Rules"), Brussels, 21 December 1979

Uniform Rules Concerning the Contract for International Carriage of Goods by Rail ("COTIF"), Bern, 9 May 1980

United Nations Convention on International Multimodal Transport of Goods ("The Multimodal Convention"), Geneva, May 24 1980

The EFTA Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, Lugano, 16 September 1988

The International Convention on the Arrest of Ships 1999 (“The 1999 Arrest Convention”), Geneva, 12 March 1999

Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (“CIM”) Appendix B to the Convention Concerning International Carriage by Rail (COTIF) of 9 May 1980 as per Protocol 1999, Vilnius, 3 June 1999

Convention for the Unification of Certain Rules for International Carriage by Air (“The Montreal Convention”), Montreal, 28 May 1999

Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (“Brussels-I”, also called “The Jurisdiction Regulation”), 22 December 2000

Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“The Lugano Convention”), Lugano, 30 October 2007

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (“The Rotterdam Rules”), Rotterdam, 23 December 2009

National Law

Australia:

The Sea-Carriage of Goods Act 1904 (Cth)

United States of America:

The US Carriage of Goods by Sea Act 1936 (“COGSA”)

Preparatory Work to the Rotterdam Rules

Report of Working Group III, 9th Session (15-26 April 2002, New York)
UN Doc. A/CN.9/510 – Report of the Working Group on Transport Law on the work of its ninth session

Report of Working Group III, 11th Session (24 March-4 April 2003, New York)
UN Doc. A/CN.9/526 – Report of the Working Group III (Transport Law) on the work of its eleventh session

Report of Working Group III, 12th Session (6-17 October 2003, Vienna)
UN Doc. A/CN.9/WG.III/WP.34 – Transport Law: Preparation of a draft instrument on the carriage of goods [by sea] – Proposal by the United States of America

Report of Working Group III, 14th Session (29 November-10 December 2004, Vienna)
UN Doc. A/CN.9/572 – Report of the Working Group III (Transport Law) on the work of its fourteenth session

Report of Working Group III, 16th Session (28 November-9 December 2005, Vienna)
UN Doc. A/CN.9/591 – Report of the Working Group III (Transport Law) on the work of its sixteenth session
UN Doc. A/CN.9/WG.III/WP.59 – Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea] - Comments by the United Kingdom of Great Britain and Northern Ireland regarding arbitration

Report of Working Group III, 18th Session (6-7 November 2006, Vienna)
UN Doc. A/CN.9/616 – Report of the Working Group III (Transport Law) on the work of its eighteenth session

Report of Working Group III, 20th Session (15-25 October 2007, Vienna)
UN Doc. A/CN.9/642 - Report of the Working Group III (Transport Law) on the work of its twentieth session

Gabriella Svensson

Första kursregistrering: Höstterminen 2013

Omregistrering: -

Examinationstillfälle: Januari 2014