THE MODERN INTERNATIONAL CONVENTIONS GOVERNING THE CARRIAGE OF GOODS BY SEA — THE LONELY EXCEPTIONS TO SHIPPING LAW'S WIDESPREAD PREFERENCE FOR ARBITRATION

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I. Introduction

Arbitration has long been a popular method of dispute resolution in maritime cases. In some contexts, such as charterparty disputes, arbitration is used almost exclusively. The nearly universal acceptance of the New York Convention,[1] which now has over 150 parties, is compelling evidence of arbitration's widespread popularity not only in shipping law but across the legal spectrum. In many countries, including the United States, judicial decisions have if anything been even more favorable to arbitration than governing statutes necessarily require. U.S. courts regularly hold that consumers and injured seamen are bound by arbitration clauses to which they "agreed" under only the most transparent of legal fictions.[2] Even in nations that are

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[1] International Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.N.S.T. 2518, 330 U.N.T.S. 38.

[2] *See*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding consumers bound by a boilerplate arbitration clause in a contract of adhesion that lower courts had found unconscionable under state contract law); *Pysarenko v. Carnival Corp.*, 135 S. Ct. 2378 (2015) (declining to review a lower-court decision that required an injured seaman who earned less than

more protective of consumers and workers, business entities are routinely bound by the arbitration clauses in their commercial contracts.

Against that background, it is perhaps surprising that the two most recent international conventions governing the carriage of goods by sea — the Hamburg Rules[3] and the Rotterdam Rules[4] — include provisions that limit the enforcement of arbitration clauses in international commercial transactions. Indeed, many believe that those provisions would make arbitration so unappealing as a practical matter that arbitration clauses are unlikely to be included in contracts of carriage subject to those provisions.

This chapter examines the arbitration provisions of those two recent conventions, explaining the theory behind their unusual approach. Although the arbitration provisions may seem illogical when considered in isolation, when examined in context they form a sensible part of a larger regime. Critics may question the policy choices that have been made in crafting those regimes, but those choices were largely driven by commercial considerations as affected stakeholders agreed on a compromise solution to a practical problem. In the end, the arbitration provisions are a sensible way to give effect to those policy choices.

$5.00 per hour to arbitrate his personal injury claim against his U.S.-based employer in Monaco, despite the fact that the seaman was then resident in the United States and neither the seaman nor the employer had any apparent connection to Monaco).

[3] United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3 [hereinafter Hamburg Rules].

[4] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Dec. 11, 2008, General Assembly Resolution 63/122, U.N. Doc. A/RES/63/122 [hereinafter Rotterdam Rules]. Minor amendments were adopted in January 2013 to correct two editorial mistakes. *See* Correction to the Original Text of the Convention, U.N. Doc. C.N.105.2013.TREATIES-XI-D-8 (Depositary Notification) (Jan. 25, 2013). Those amendments have no bearing on the issues discussed here.

II. Background

The Hamburg and Rotterdam Rules are the most recent international conventions regulating the carriage of goods by sea, but other treaties have addressed the subject for decades. The Hague Rules,[5] over 90 years ago, were the first international convention to address the carriage of goods by sea, and a 1968 protocol amended that convention to produce the Hague-Visby Rules.[6] All of those international conventions trace their lineage back to the United States' 1893 Harter Act[7] and Harter-inspired domestic legislation in other countries.[8] All of those regimes — both domestic and international — are, for the most part, "one-way mandatory," meaning that they impose rules restricting a carrier's ability to avoid or reduce certain core responsibilities but they permit the carrier to accept increased obligations. For example, all of the international conventions set a package limitation amount and require the carrier to be liable for certain categories of cargo loss or damage at least to that extent, with no possibility to reduce its liability below the package limitation but with complete freedom to set a higher limitation amount.[9]

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[5] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 155 [hereinafter Hague Rules].

[6] The Hague-Visby Rules are the Hague Rules, *supra* note 5, as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules), Feb. 23, 1968, 1412 U.N.T.S. 128 [hereinafter Visby Protocol], and also (perhaps) the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1412 U.N.T.S. 146 [hereinafter SDR Protocol].

[7] 27 Stat. 445 (1893). The Harter Act was recodified in 2006, and the current version is now found at 46 U.S.C. §§ 30701-07.

[8] *See generally*, *e.g.*, Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. MAR. L. & COM. 1, 15-17 (1991) [hereinafter *History*].

[9] Thus the Hague Rules, *supra* note 5, set the limitation amount at £100 per package, *see* art. 4(5), and invalidate any attempt to reduce that limitation amount, *see* arts. 3(8), 4(5).

The theory commonly repeated in support of an unbalanced system is that carriers have superior economic power, making true freedom of contract impossible, and legislative intervention is accordingly necessary to protect shippers who would otherwise be at the mercy of unscrupulous carriers.[10] Elsewhere I have questioned the extent to which any of the cargo liability regimes actually protect shippers from unscrupulous carriers.[11] But at the very least, imposing defined minimum obligations on the carriers that issue bills of lading effectively protects third-party purchasers who can thereby rely on the value of the bill of lading without needing to read the boilerplate provisions.[12]

Regardless of the validity of the central assumption that carriers almost inevitably have superior bargaining power, it is at least widely accepted that the carriers — in their standard-form bills of lading — draft the contractual terms under which goods subject to the international regimes are carried.[13] Moreover, in individual transactions a shipper is typically offered those terms on a take-it-or-leave-it basis, and most shippers accept the standard terms — often with little or no knowledge of the contract's boilerplate provisions.[14] Thus if the parties were to

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[10] *See*, *e.g.*, Michael F. Sturley, *The Mandatory Character of the Convention and Its Exceptions: Volume Contracts*, in LAS REGLAS DE ROTTERDAM: UNA NUEVA ERA EN EL DERECHO UNIFORME DEL TRANSPORTE – ACTAS DEL CONGRESO INTERNACIONAL [THE ROTTERDAM RULES: A NEW ERA IN UNIFORM TRANSPORT LAW – PROCEEDINGS OF THE INTERNATIONAL CONGRESS] 271, 274-276 (Rafael Illescas Ortiz & Manuel Alba Fernández eds. 2012) (describing the "freedom of contract" debate during the negotiation of the Hague Rules) [hereinafter *Mandatory Character*].

[11] *See id.* at 288-290.

[12] *See id*. at 289-290.

[13] It is important to note the distinction between shipments carried under bills of lading, which are subject to the international regimes, and charterparty shipments, which are excluded from the international regimes. *See*, *e.g.*, Hague-Visby Rules, *supra* note 6, art. 5; Hamburg Rules, *supra* note 3, art. 2(3). It is generally accepted that true freedom of contract exists in the charterparty context.

[14] It may be that shippers are largely unconcerned with the boilerplate contract terms because the consignees or the cargo insurers will suffer the consequences of any disadvantageous terms. *Cf.*

"agree" to reduce the package limitation, for example, the agreement would most likely take the form of a fine-print clause in the bill of lading drafted by the carrier (or the carrier's lawyers). The shipper would be unlikely to see the clause until after the cargo has been lost or damaged, and if it did see the clause in advance it would have no real ability in a particular transaction to negotiate the terms of the liability reduction. Similarly, if the bill of lading were to include an arbitration clause, the clause would be drafted solely by the carrier; the shipper would be unlikely to have any practical say in the matter.

The central issues with respect to arbitration under the Hamburg and Rotterdam Rules are the extent to which the contracting parties should be free to agree on — or the carrier in its standard terms should be permitted to insist on — arbitration in a specified forum as the mechanism for resolving disputes that arise under their contract, and the extent to which third parties should be bound by an agreement to arbitrate. The argument for restricting access to arbitration in this context is most commonly based on the belief that carriers would otherwise use their superior bargaining power to include arbitration clauses in contracts of carriage in order to reduce the possibility that cargo claimants will seek recovery for their losses, or at least to ensure that those recoveries will be as small as possible.

Litigation and arbitration differ in significant ways, of course, but the two methods for resolving legal disputes are closely related. In the absence of an enforceable arbitration clause, the parties will be subject to litigation. Conversely, if an arbitration clause is enforceable, the parties will lose whatever rights they might otherwise have with respect to litigation. Thus the two alternatives must be considered together. As the Supreme Court of the United States has

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Michael F. Sturley, *Carriage of Goods by Sea*, 31 J. MAR. L. & COM. 241, 245 (2000). Why consignees and cargo insurers do not protect themselves in the sales and insurance contract is a matter for speculation.

recognized, jurisdiction clauses (in the litigation context) and arbitration clauses are simply two different types of forum-selection clauses.[15] Moreover, efforts to restrict the parties' access to arbitration in the international carriage context have been inextricably linked to efforts to restrict the parties' ability to agree on a forum for litigation.

Whether a forum-selection clause specifies jurisdiction in a particular court or arbitration in a particular place, accepted legal doctrine generally declares that the choice is merely "procedural" and does not affect the substantive result in the underlying dispute.[16] In the real world, however, lawyers on both sides of the docket recognize that the choice of forum is often dispositive in a case.[17] If a cargo claim is relatively small and the claimant is denied access to a convenient forum, the dispute may well be resolved by the claimant's abandoning the claim. Even when a claim is worth pursuing, identifying the forum will often enable the parties to agree on a settlement value (which will be higher or lower depending on whether the resolution of the forum issue favored the claimant or the carrier).[18]

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[15] *Vimar Sequros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995) ("arbitration clauses are but a subset of . . . forum selection clauses in general").

[16] *See*, *e.g.*, *id*. at 534-537; *Maharani Woollen Mills Co. v. Anchor Line*, [1927] Lloyd's Rep. 169, 169 (C.A.) (Scrutton, L.J.).

[17] Any party represented by competent counsel will engage in "forum shopping" when doing so advances its interests, but cargo claimants and carriers "shop" in different ways. Claimants traditionally shop by choosing the court in which they bring a claim. Carriers traditionally shop by inserting forum-selection clauses in their bills of lading, challenging the claimant's choice of forum (for example, by asserting *forum non conveniens* or seeking an anti-suit injunction), or bringing their own preemptive suit for a declaration of non-liability. *See generally*, *e.g.*, DAVID W. ROBERTSON, STEVEN F. FRIEDELL & MICHAEL F. STURLEY, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 519-520 (3d ed. 2015).

[18] *See generally* Robert Force & Martin Davies, *Forum Selection Clauses in International Maritime Contracts*, in JURISDICTION AND FORUM SELECTION IN INTERNATIONAL MARITIME LAW: ESSAYS IN HONOR OF ROBERT FORCE 1 (Kluwer 2005).

Efforts to limit a carrier's ability to impose an unfavorable forum-selection clause date back at least to the late nineteenth century. The Harter Act in 1893 was the first legislation to regulate the carriage of goods by sea. Although arbitration was rare at the time, and forum-selection clauses were then disfavored in the United States even in the litigation context,[19] the parties' ability to agree on a forum for dispute resolution was nevertheless a controversial issue. U.S. cargo interests complained to Congress that choice-of-law and choice-of-forum clauses were included in bills of lading to require all cargo claims to be litigated in England under English law, which had the practical effect of denying any remedy for small claims.[20] Despite those complaints, Congress did not address dispute resolution in the Harter Act.

Cargo interests were more successful in other countries that passed legislation modeled on the U.S. statute. In 1904, Australia's Harter-style legislation included a specific provision that explicitly banned forum-selection clauses.[21] In 1910, the Canadian Water Carriage of Goods Act, which served as the most immediate model for the Hague Rules,[22] declared that "any stipulation or agreement purporting to oust or lessen the jurisdiction of any court having jurisdiction at the port of loading in Canada in respect of the bill of lading or document [of title],

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[19] *See*, *e.g.*, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9-10 & n.10 (1972); Note, *Validity of Contractual Stipulation Giving Exclusive Jurisdiction to the Courts of One State*, 45 YALE L.J. 1150, 1150 & n.2 (1936).

[20] *See*, *e.g.*, H.R. Rep. No. 1988, 52d Cong., 1st Sess. 2 (1892); 24 Cong. Rec. 172 (1892) (Rep. Coombs).

[21] *See* Sea-Carriage of Goods Act 1904, No. 14, § 6 (Austl.); *cf*. Carriage of Goods by Sea Act 1991, No. 160, § 11 (Austl.) (current statute restricting the enforcement of forum-selection clauses). The current Australian statute permits arbitration clauses, but only to the extent that "the arbitration must be conducted in Australia." *Id*. § 11(3).

[22] *See* Sturley, *History*, *supra* note 8, at 20.

shall be illegal, null and void, and of no effect."[23] In 1911, New Zealand amended its Harter-style legislation to follow the Australian and Canadian examples.[24] And in 1919, French Morocco's Harter-style legislation invalidated any bill of lading clause derogating from the normal rules of judicial competence.[25]

The drafters of the Hague Rules consciously omitted any regulation of dispute resolution from their work,[26] and the drafters of the Hague-Visby Rules expressly rejected even a modest attempt to regulate forum-selection clauses.[27] Cargo interests over the years argued that article 3(8) of the Hague and Hague-Visby Rules,[28] which invalidates any contractual provision that "lessen[s] [the carrier's] liability otherwise than as provided" in the convention, was sufficient to

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[23] Water Carriage of Goods Act 1910, 9-10 Edw. 7, ch. 61, § 5 (Can.); *cf*. Marine Liability Act 2001, ch. 6, § 46(1) (Can.) (current statute, modeled on the Hamburg Rules, restricting the enforcement of forum-selection clauses).

[24] *See* Shipping and Seaman Amendment Act, 1911, No. 37, § 9 (N.Z.); *cf*. Maritime Transport Act 1994, No. 104 § 210(1) (N.Z.) (current statute restricting the enforcement of forum-selection clauses). The current New Zealand statute explicitly permits arbitration clauses. *See id*. § 210(2).

[25] *See* FRANCESCO BERLINGIERI, NOTES ON THE HAGUE RULES, 1921, at 25 n.1 (summarizing Code de Commerce Maritime, art. 264 (Morocco, French Zone, Mar. 31, 1919)), *reprinted in* 2 THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE *TRAVAUX PRÉPARATOIRES* OF THE HAGUE RULES 524 (Michael F. Sturley ed. 1990) [hereinafter HAGUE RULES *TRAVAUX PRÉPARATOIRES*].

[26] Immediately prior to the diplomatic conference that adopted the Hague Rules, *supra* note 5, the Comité Maritime International (CMI) held a conference in London that finalized the draft of the Hague Rules that the diplomatic conference would consider. *See* Sturley, *History*, *supra* note 8, at 27-28. During that London conference, the CMI discussed and declined to pursue an Argentine suggestion to address jurisdiction clauses. *See* COMITÉ MARITIME INTERNATIONAL, LONDON CONFERENCE, OCTOBER 1922, at 405-407, 411 (Bulletin no. 57) (statements of James Petrie and Louis Franck), *reprinted in* 2 HAGUE RULES *TRAVAUX PRÉPARATOIRES*, *supra* note 25, at 415-417, 421.

[27] *See* COMITÉ MARITIME INTERNATIONAL, REPORT OF THE 26TH CONFERENCE 101-102 (Stockholm Conference, 1963) (rejecting the suggestion that a choice-of-forum clause should be invalid when the effect would be to exclude the application of the convention).

[28] Because neither the Visby Protocol nor the SDR Protocol, *see supra* note 6, amended article 3(8) of the Hague Rules, *supra* note 5, the article is the same in the Hague-Visby Rules.

ban forum-selection clauses. Results were mixed.[29] In *Maharani Woollen Mills Co. v. Anchor Line*,[30] Lord Justice Scrutton summarily rejected the argument that a clause requiring suit in Bombay was invalid under article 3(8). He concluded that "the liability of the carrier appears to me to remain exactly the same under the clause. The only difference is a question of procedure — where shall the law be enforced? — and I do not read any clause as to procedure as lessening liability."[31] But in *The Hollandia*,[32] the House of Lords refused to enforce a forum-selection clause when the chosen forum would have applied a different law with a lower package limitation. In the United States, the Supreme Court, reversing decades of lower-court authority to the contrary,[33] upheld an arbitration clause in the face of an article 3(8) challenge.[34] It cited *Maharani Woollen Mills* for the proposition that article 3(8) did not impose a *per se* ban on forum-selection clauses,[35] and *The Hollandia* for the proposition that the result might have been different if the cargo claimant could have demonstrated that its recovery would have been lower in the chosen forum.[36]

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[29] *See*, *e.g.*, Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729, 776-796 (1987) (discussing results in several countries) [hereinafter *International Uniform Laws*].

[30] [1927] Lloyd's Rep. 169 (C.A.).

[31] [1927] Lloyd's Rep. at 169.

[32] [1983] A.C. 565 (1982).

[33] *See*, *e.g.*, *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 1967 AMC 589 (2d Cir. 1967) (en banc); *see generally* Sturley, *International Uniform Laws*, *supra* note 29, at 777-782 (summarizing U.S. jurisprudence prior to *Sky Reefer*).

[34] *Vimar Sequros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

[35] 515 U.S. at 537.

[36] 515 U.S. at 541.

III. The Hamburg Rules

The Hamburg Rules[37] finally brought the regulation of forum-selection clauses in contracts for the carriage of goods by sea — both jurisdiction and arbitration clauses — to the international arena.[38] Article 21 of the Hamburg Rules, which addresses jurisdiction, implements a compromise between cargo and carrier interests. Cargo claimants[39] are guaranteed the right to institute judicial proceedings in any of a short list of places having a significant relationship to the transaction — the carrier's principal place of business,[40] the place where the contract was made,[41] the ports of loading or discharge,[42] or any other place specified in the contract of carriage.[43] Carriers, in turn, are protected from being sued in any other place.[44]

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[37] *Supra* note 3.

[38] Conventions governing other modes of transportation have long addressed forum-selection clauses. *See*, *e.g.*, Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air, 12 Oct. 1929, arts. 28, 32, 137 L.N.T.S. 11, 26-31; Convention on the Contract for the International Carriage of Goods by Road (CMR), 19 May 1956, art. 31, 33, 399 U.N.T.S. 189, 216, 218.

[39] The drafting history demonstrates that article 21 was intended to give cargo claimants a limited choice of forum. *See*, *e.g.*, *Responsibility of Ocean Carriers for Cargo — Bills of Lading: Report of the Secretary-General*, 1972 UNCITRAL Y.B. 263, ¶¶ 75-126 [hereinafter *Secretary-General Report*]; *see also* Joseph C. Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part I)*, 7 J. MAR. L. & COM. 69, 93-102 (1975) (discussing the drafting history of article 21). But article 21 was drafted — on the apparent assumption that cargo claimants would be the plaintiffs in judicial proceedings — to give "the plaintiff" the choice of forum. That drafting choice creates the possibility that a carrier may be able to choose the forum under the Hamburg Rules by instituting an action for a declaration of non-liability. Surprisingly, the problem was raised during the negotiation of the Hamburg Rules but was not corrected. *See id*. at 100-101.

[40] *See* Hamburg Rules, *supra* note 3, art. 21(1)(a).

[41] *See* art. 21(1)(b).

[42] *See* art. 21(1)(c).

[43] *See* art. 21(1)(d).

Article 21 most obviously protects cargo interests by guaranteeing them access to a local forum in most cases,[45] but it also protects carriers, who might otherwise be forced to litigate in a forum having no connection with the transaction simply because the cargo claimant was able to obtain jurisdiction there.[46]

Article 22 of the Hamburg Rules addresses arbitration in very similar terms. Regardless of the venue specified in the arbitration clause, a claimant may institute arbitration proceedings in any of a short list of places having a significant relationship to the transaction — the same places that were on the list in article 21 for litigation: the carrier's principal place of business,[47] the place where the contract was made,[48] the ports of loading or discharge,[49] or any other place specified in the arbitration clause.[50] In other words, if a Danish carrier issues a bill of lading with a London arbitration clause at its office in Lagos to govern a shipment from Tema to New York, the consignee would not be bound to arbitrate in London if part of the cargo were lost or

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[44] *See* art. 21(2)-(3). Under article 21(2), the cargo claimant may institute an action in a port where it arrests the carrying ship or a sister ship, but the claimant must at the carrier's request remove the action to one of the forums specified in article 21(1). Under article 21(3), no actions may be brought except in places specified in article 21(1)-(2).

[45] In the typical case, the cargo claimant is most likely to be the shipper, the consignee, or someone (such as an insurer) asserting their interests. The shipper will almost inevitably have a presence in the port of loading (at least in the port-to-port shipments that were contemplated by the Hamburg Rules, *see* art. 4(1)), and the consignee will similarly have a presence in the port of discharge. Under article 21(1)(c), the cargo claimant is guaranteed the right to institute judicial proceedings in either of those places. *See supra* note 42 and accompanying text

[46] When the Hamburg Rules do not apply, it is not uncommon to see a carrier being sued for cargo loss or damage in a place that has no connection with the shipment at issue. *See*, *e.g.*, Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. MAR. L. & COM. 553, 559 n.45 (1995) (collecting cases).

[47] *See* art. 22(3)(a)(i).

[48] *See* art. 22(3)(a)(ii).

[49] *See* art. 22(3)(a)(iii).

[50] *See* art. 22(3)(b).

damaged. The consignee would instead have the option of instituting arbitration proceedings in Denmark (the carrier's principal place of business), Nigeria (the country where the contract was made), Ghana (the country where the port of loading, Tema, is located), the United States (the country where the port of discharge, New York, is located), or London (the place specified in the arbitration clause).

The Hamburg Rules' approach to arbitration has been criticized as utterly impractical. Unlike litigation, arbitration is necessarily consensual. And consenting to arbitrate in one place, subject to well-defined procedures, is not equivalent to consenting to arbitrate in a different place, subject to very different procedures. In the hypothetical described in the last paragraph, for example, the carrier's decision to include a London arbitration clause in the bill of lading would depend on the carrier's desire for the arbitration to be conducted in London subject to all of the rules and procedures associated with London arbitration. Arbitration in Denmark, Nigeria, Ghana, or the United States would be completely different. To consider just one basic distinction, judicial review of the arbitration panel's decision would be more readily available in England than in the United States. Many countries with active ports do not even have the capacity to conduct sophisticated commercial arbitrations, but if goods are shipped to or from those ports then claimants would have the option of demanding arbitration proceedings there. Critics predicted that the likely result of article 22 would be that carriers would never include arbitration clauses in their bills of lading if the Hamburg Rules would apply to them.[51] A carrier would be unlikely to accept the risk that it would be subject to arbitration in a place that was completely different from the one it had specified in the arbitration clause.

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[51] It is unclear whether the Hamburg Rules actually had that effect, given that carriers do not generally include arbitration clauses in bills of lading regardless of the governing regime. In any event, relatively few bills of lading are subject to the Hamburg Rules.

Although arbitration clauses may be utterly impractical under the Hamburg Rules, those who drafted article 22 were not hostile to arbitration. They recognized that "few bills of lading contain arbitration clauses."[52] They were instead concerned that when article 21 regulated jurisdiction clauses, carriers might specify arbitration to avoid article 21's restrictions.[53] They accordingly regulated arbitration clauses to protect cargo interests from that potential evasion.

IV. The Rotterdam Rules

The Hamburg Rules never achieved the widespread acceptance necessary for a successful convention, and thus the U.N. Commission on International Trade Law (UNCITRAL) made the effort to negotiate a new convention — the Rotterdam Rules[54] — to supersede the Hague, Hague-Visby, and Hamburg Rules (and to resolve important issues that those earlier conventions had not addressed). Although the Hamburg Rules' provisions on jurisdiction and arbitration were the starting point for the new negotiations on the issue, the Rotterdam Rules ultimately differed in significant ways.

A. The Context of the Negotiations

When UNCITRAL discussed the jurisdiction and arbitration provisions, a number of countries expressed strong views on the proper resolution of the issue — and those strongly held views were in deep conflict. At one extreme, carrier-friendly nations and industry groups, along with nations commonly named in forum-selection clauses, opposed any reference to jurisdiction or arbitration (except, perhaps, for a provision that would enforce all forum-selection clauses).

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[52] *Secretary-General Report*, *supra* note 39, ¶ 127.

[53] *See id*.

[54] *Supra* note 4.

Not surprisingly, the United Kingdom was a prominent member of that coalition.[55] At the other extreme, nations and industry groups sympathetic to cargo interests, along with nations that already regulate jurisdiction and arbitration (either by domestic statute or as parties to the Hamburg Rules), insisted that the convention must protect a claimant's ability to recover for cargo loss or damage in a reasonable forum of its own choosing (notwithstanding a forum-selection clause). Between those extremes, several nations sought a more balanced compromise. Because the United States had forged a compromise position among its domestic interests, it was a leading advocate of the compromise approach during the UNCITRAL negotiations.[56]

The negotiation of the jurisdiction and arbitration chapters was further complicated by the European legal situation. Because the European Union regulates jurisdiction provisions among its members,[57] the European Commission — not the individual member states — has sole competence to negotiate an international convention on the subject. Some of the nations that were most active in negotiating other aspects of the Rotterdam Rules could therefore participate in the jurisdiction debate only in the internal European discussions. And the Commission, which did not even attend meetings that addressed other aspects of the convention, became a major player in negotiating the jurisdiction chapter.[58] For arbitration, on the other hand, the Commission has no legal competence and the individual member states were free to negotiate as

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[55] *See*, *e.g.*, *Comments by the United Kingdom of Great Britain and Northern Ireland Regarding Arbitration*, U.N. doc. no. A/CN.9/WG.III/WP.59 (2005) [hereinafter *British Arbitration Paper*].

[56] *See*, *e.g.*, *Proposal by the United States of America*, U.N. doc. no. A/CN.9/WG.III/WP.34 ¶¶ 30-35 (2003).

[57] EC Regulation No. 44/2001, which addressed jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, was the key instrument at the time. EU Regulation No. 1215/2012 is now in force.

[58] Because all of the strongly held views in the larger negotiation were well represented in the member states of the European Union, the Commission was forced to forge an internal compromise and thus became a leading advocate of the compromise position.

they wished.[59] That distinction also made it impossible, as a practical matter, to treat jurisdiction and arbitration as a single subject — even though the two issues are in fact so closely intertwined that it makes no sense to discuss one without the other.

UNCITRAL's response to the wildly differing views was to harmonize the law to the extent possible, but to recognize that it would be impossible to achieve any agreement on several aspects of the subject, and impossible to achieve universal agreement on any substantive aspect. UNCITRAL thus abandoned some of its more ambitious goals, and agreed to accommodate those nations that were unprepared to accept any compromise on jurisdiction or arbitration. The single most significant provision in the jurisdiction chapter is article 74, which permits each nation to decide for itself whether to be bound by that chapter.[60] Article 78 likewise permits each nation to decide whether to be bound by the arbitration rules.[61] This "opt in" solution

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[59] *See*, *e.g.*, *British Arbitration Paper*, *supra* note 55; *Proposal by the Netherlands on Arbitration*, U.N. doc. no. A/CN.9/WG.III/WP.54 (2005) [hereinafter *Dutch Arbitration Paper*].

[60] Some have criticized the opt-in solution. Critics on one side have said that enough countries wished to regulate jurisdiction and arbitration that the majority should have forced Hamburg-like provisions into the convention. No doubt there was majority support for a Hamburg-like approach. Critics on the other side, however, have said that enough countries opposed the regulation of jurisdiction and arbitration that UNCITRAL should have abandoned the subject entirely. There was, in their view, no consensus.

UNCITRAL's goal was to achieve as much uniformity as possible — both as broad an agreement as possible and as broad an acceptance of that agreement as possible. If UNCITRAL had abandoned jurisdiction and arbitration entirely, it would have achieved nothing whatsoever on the subject. Moreover, nations for which some treatment of jurisdiction and arbitration was essential might have abandoned their support of the entire convention. If UNCITRAL had tried to cram stricter regulation of jurisdiction and arbitration down unwilling throats, it would also have lost support — not only on those chapters but for the entire convention — from those nations for which any regulation of jurisdiction and arbitration would have been totally unacceptable.

[61] In theory, the two opt-in provisions are entirely independent. As a practical matter, however, it would make little sense for a nation to opt in to only one of the chapters.

proved to be the only possible compromise among three groups of nations holding three entirely different positions.

B. The Jurisdiction Chapter[62]

Turning to the substance, the Rotterdam Rules (like the Hamburg Rules) establish the general rule that a cargo claimant[63] may choose a reasonable forum in which to bring judicial proceedings against the carrier,[64] and the carrier is generally protected from suit in any other forum.[65] More specifically, the claimant may generally choose any "competent court" from a list of places with a reasonable connection to the transaction. The list differs slightly from the Hamburg Rules' list. UNCITRAL deleted the place of contracting because it "was largely irrelevant to the performance of the contract" and "could be difficult or impossible to determine" in the electronic context.[66] UNCITRAL also added the place of receipt (which could be an inland location prior to the port of loading) and the place of delivery (which could be an inland location after the port of discharge) in recognition of the Rotterdam Rules' broader coverage to accommodate multimodal transactions.[67]

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[62] For a more detailed discussion of the Rotterdam Rules' jurisdiction chapter, see MICHAEL F. STURLEY, TOMOTAKA FUJITA & GERTJAN VAN DER ZIEL, THE ROTTERDAM RULES: THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA ¶¶ 12.022 – 12.069 (2010).

[63] Article 66 protects only the cargo claimant, thus avoiding the unintended consequences of the Hamburg Rules' use of the term "plaintiff." *See supra* note 39.

[64] *See* Rotterdam Rules, *supra* note 4, art. 66. *Cf. supra* notes 39-46 and accompanying text.

[65] *See* art. 69.

[66] *Report of Working Group III (Transport Law) on the Work of Its Fourteenth Session*, ¶ 125, U.N. Doc. A/CN.9/572 (2004) [hereinafter *Fourteenth Session Report*].

[67] Because the Hamburg Rules apply only on a port-to-port basis, *see* art. 4(1), there was no need to recognize the possibility of the carrier's inland receipt or delivery of the goods. Because the Rotterdam Rules cover the entire contract of carriage, *see* arts. 1(1), 12, the places of receipt and delivery in a multimodal contract may well differ from the ports of loading and discharge.

In a significant departure from the Hamburg Rules, the drafters of the Rotterdam Rules recognized that in some situations the carrier does not have superior bargaining power and thus it would be inappropriate to restrict the carrier's freedom of contract in an effort to protect the shipper from overreaching.[68] Article 80 accordingly permits the parties to a "volume contract"[69] to negotiate substantive liability rules that are more favorable to the carrier, and article 67 similarly permits parties to agree in advance on an exclusive jurisdiction clause that will be enforced if certain conditions are satisfied.[70] The requirements of article 67 generally mirror the requirements for broader freedom of contract under the special rules for volume contracts in article 80.

As a general rule, an article 80 derogation binds only the immediate parties to the volume contract unless a third party with adequate notice of the derogation expressly consents to be bound by it.[71] Under article 67(2), however, a non-consenting third party may be bound by an exclusive jurisdiction clause if four requirements are satisfied. Those four requirements severely restrict the scope of the provision and ensure that objecting third parties will not be bound.[72]

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[68] *Cf. supra* notes 9-14 and accompanying text (describing the rationale for having a "one-way mandatory" liability regime).

[69] *See* Rotterdam Rules art. 1(2) (defining "volume contract"). For an analysis of the volume contract provisions, see Sturley, *Mandatory Character*, *supra* note 10.

[70] To a considerable degree, the conditions in article 67 mirror the conditions in article 80. It was nevertheless important to deal with them independently in article 67 so that all of the jurisdiction provisions could be self-contained in a single location. Otherwise, the "opt in" procedure of article 74 would have been unmanageable, and the logistics for the European Union and its member countries would have become unduly complicated, *cf. supra* notes 57-59 and accompanying text.

[71] Article 80(5).

[72] *See* Rotterdam Rules art. 67(2)(a)-(d).

C. The Arbitration Chapter — Principles

On its face, the arbitration chapter is very similar to the jurisdiction chapter as the central provisions of chapter 15 mirror the corresponding provisions of chapter 14.[73] Although the two chapters must be considered together to be understood, the context, theory, and purposes of the two are completely different. Jurisdiction clauses are routine in the liner trade, which is the primary focus of the Rotterdam Rules. During the negotiations, many delegations felt strongly that the convention must regulate jurisdiction to ensure that cargo claimants would have the ability to litigate their claims in a reasonable forum of their choice.[74] Arbitration clauses, in contrast, are still rare in the liner trade.[75] The industry relies on arbitration almost exclusively in non-liner trades governed by charterparties (a context in which jurisdiction clauses are seldom seen). Because commercial parties are widely believed to have more-or-less equal bargaining power in the charterparty context, meaning that genuine negotiation and agreement can occur, the risk of carrier abuse is thought to be significantly lower. Thus the drafters of the Rotterdam Rules saw little direct need to protect cargo interests from arbitration clauses in the way that article 66 protects them from jurisdiction clauses.

The principal risk in leaving arbitration totally unregulated is that industry patterns might change. When carriers in liner trades find that they can no longer use jurisdiction clauses to restrict cargo claims to a forum of their own choosing, they may be tempted to use arbitration as a device to deny cargo claimants the rights that article 66 would otherwise protect. Arbitration could become the "back door" route for carriers seeking to avoid the constraints of the chapter 14

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[73] *Compare*, *e.g.*, art. 66 *with* art. 75(2).

[74] *See*, *e.g.*, *Report of the Working Group on Transport Law on the Work of its Ninth Session*, ¶ 61, U.N. doc. no. A/CN.9/510 (2002).

[75] *Cf. supra* note 52 and accompanying text.

jurisdiction rules. Once UNCITRAL made the decision to regulate jurisdiction, therefore, regulating arbitration became necessary to block a back-door means of evading the jurisdiction rules.

In other words, the purpose of the arbitration chapter is not to regulate a virtually non-existing use or to facilitate the introduction of arbitration in a context in which it has rarely been used until now. The purpose was instead to ensure that arbitration is not used improperly.[76] The goal was accordingly to regulate arbitration as minimally as possible (and, in particular, to avoid conflicts with existing practice) while still preserving the rights of cargo claimants — to the extent that the jurisdiction chapter grants such rights — to seek recovery in a reasonable forum of their choosing.

With this understanding in mind, it follows that the arbitration chapter mirrors the jurisdiction chapter not from a desire to duplicate the results of that negotiation in a different context. Rather, the arbitration chapter mirrors the jurisdiction chapter simply to preserve the rights established in the jurisdiction chapter without going any further. If a cargo claimant has the right under article 66 in a particular situation to select the forum for litigation, chapter 15 simply ensures that an arbitration clause will not defeat that right. But if a cargo claimant does not have the right to select the forum for litigation, then there is no need to protect that claimant from arbitration in the same circumstances.[77]

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[76] *See*, *e.g.*, *Fourteenth Session Report*, *supra* note 66, ¶ 156; *Report of Working Group III (Transport Law) on the Work of Its Sixteenth Session*, ¶¶ 85, 96, U.N. Doc. A/CN.9/591 (2006) [hereinafter *Sixteenth Session Report*]; *Report of Working Group III (Transport Law) on the Work of Its Eighteenth Session*, ¶ 268, U.N. Doc. A/CN.9/616 (2006).

[77] *See*, *e.g.*, *Sixteenth Session Report*, *supra* note 76, ¶ 99.

With this understanding, it also becomes clear that the Rotterdam Rules are not hostile to arbitration. On the contrary, article 75(1) expressly authorizes arbitration.[78] To the extent that the convention restricts arbitration clauses, it treats them in essentially the same way that it treats jurisdiction clauses — and to the extent the treatment is different, arbitration clauses are treated more favorably.[79] Historically, the struggle for arbitration advocates was to eliminate the traditional animosity toward arbitration, not to make arbitration clauses enforceable when an otherwise comparable forum-selection clause would be invalid.[80] To the extent that chapter 15 of the Rotterdam Rules restricts the enforcement of arbitration clauses, it does nothing more than put them on the same footing as other forum-selection clauses.

D. The Arbitration Chapter — Specific Provisions[81]

Article 75 establishes both the general rules for arbitration and the exceptions. Article 75(1) declares the most basic principle that the parties may agree to resolve disputes under the convention by arbitration.[82] But this basic principle is explicitly qualified by the other provisions of the chapter.[83]

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[78] *See infra* note 82 and accompanying text.

[79] Arbitration clauses in charterparty bills of lading are enforceable in situations in which jurisdiction clauses would not be enforceable. *See* art. 76(1)(a); *infra* note 98 and accompanying text.

[80] *See*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (recognizing that the U.S. Federal Arbitration Act, 9 U.S.C. §§ 1–14, was enacted to "place arbitration agreements on an equal footing with other contracts").

[81] For a more detailed discussion of the Rotterdam Rules' arbitration provisions, see STURLEY, FUJITA & VAN DER ZIEL, *supra* note 62, ¶¶ 12.071 – 12.089.

[82] Some UNCITRAL delegations argued that this should be the sole arbitration provision in the convention. *See*, *e.g.*, *British Arbitration Paper*, *supra* note 55, ¶ 8.

[83] *See*, *e.g.*, art. 75(2).

The general rule regulating arbitration mirrors the general rule of the jurisdiction chapter. Just as article 66, following the example of the Hamburg Rules, gives the claimant the right to choose a reasonable forum in which to bring a cargo action against the carrier,[84] so article 75(2), again following the Hamburg Rules,[85] gives essentially the same rights to a cargo claimant in the arbitration context. The format is virtually the same. If the dispute is subject to arbitration, the claimant has the option to arbitrate either in the place designated in the agreement[86] or in any other place chosen from a list that tracks article 66(a)'s list of permissible forums.[87]

There are two substantial differences. The permissible forums for litigation are limited to "competent courts," which must be in countries that are party to the Rotterdam Rules[88] and must have jurisdiction over the listed places. Article 75(2) does not require the place of arbitration to be in a country that is a party to the convention. So long as the relevant criteria are satisfied, any location is permitted. Furthermore, article 75(2) does not require the place of arbitration to correspond to the physical place that has a connection to the transaction. It is sufficient if the place of arbitration is in the same country. Thus if Vladivostok is the port of discharge for a shipment, arbitration in Moscow or St. Petersburg would be permitted.

The general rule regulating arbitration clauses, like the general rule in the jurisdiction context, is subject to some exceptions. In carefully limited situations, with safeguards to protect both claimants' rights and long-established commercial practice, some arbitration clauses will be binding, with the result that claimants will not have the ability to choose the place of arbitration.

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[84] *See supra* notes 63-67 and accompanying text.

[85] *See* Hamburg Rules art. 22.

[86] *See* Rotterdam Rules art. 75(2)(a); *cf*. art. 66(b).

[87] *See* art. 75(2)(b); *cf*. art. 66(a).

[88] *See* arts. 66 (requiring a "competent court"), 1(30) (defining a "competent court" to include only courts in a country that is a party to the Rotterdam Rules).

They will instead be bound by the place specified in the arbitration clause. Just as jurisdiction clauses in volume contracts are enforceable in defined circumstances,[89] so "the place of arbitration in [an arbitration] agreement is binding" on the immediate parties to a volume contract if essentially the same requirements are met.[90] Because the goal of the arbitration chapter is to prevent a carrier from using arbitration as a device to avoid the compulsory jurisdiction rules,[91] there is no reason to regulate arbitration clauses in a situation in which an exclusive jurisdiction clause would be permitted.[92] And just as jurisdiction clauses in volume contracts are enforceable against third parties if four restrictive requirements have been satisfied,[93] so a third party is bound by the place of arbitration in a volume contract's arbitration clause if essentially the same four requirements have been satisfied.[94]

The arbitration chapter differs structurally from the jurisdiction chapter in one significant respect. For countries that have elected to be bound,[95] the jurisdiction chapter applies to every contract of carriage within the scope of application of the Rotterdam Rules. But the arbitration chapter leaves most of the non-liner trade unregulated. Non-liner transactions are generally outside the convention's scope of application in any event,[96] so article 76 achieves chapter 15's non-liner exclusion by addressing two specific circumstances.[97] For transactions under a

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[89] *See supra* notes 68-70 and accompanying text.

[90] *See* art. 75(3).

[91] *See supra* notes 76-77 and accompanying text.

[92] *See*, *e.g.*, *Sixteenth Session Report*, *supra* note 76, ¶ 99.

[93] *See supra* notes 71-72 and accompanying text.

[94] *See* art. 75(4).

[95] *See* art. 74; *supra* notes 60-61 and accompanying text.

[96] *See* art. 6(2).

[97] Transactions in which no charterparty (or similar contract) exists but a transport document or electronic transport record is issued, *see* article 6(2)(a)-(b), are essentially liner transactions

charterparty (or similar contract) in which a third party now has rights against the carrier under a transport document or electronic transport record (*e.g.*, a third-party holder of a charterparty bill of lading),[98] and for transactions in which the shipper and carrier voluntarily incorporate the Rotterdam Rules into their contract when the convention otherwise would not apply, arbitration that would have been subject to chapter 15 is instead left unregulated.

Because the industry has long relied on arbitration in both of those circumstances, and that reliance has not created a substantial problem in practice, UNCITRAL decided that it would be appropriate to preserve existing law in those contexts (subject to some safeguards to protect the rights of third parties). In many legal systems, the effect will be to make arbitration clauses fully enforceable, with third parties bound by the place of arbitration specified in the agreement. But this is not inevitably so. Article 76(1) simply declares that "[n]othing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in" either of those contexts. To the extent that a national legal system restricts the enforcement of an arbitration agreement against third parties, for example, the convention will leave that rule undisturbed.[99]

Permitting free use of arbitration clauses in cases of voluntary incorporation was not controversial. Few saw any reason to be concerned about leaving unregulated those transactions that in any event fell outside the Rotterdam Rules' scope of mandatory application. For charterparty bills of lading and related transactions, however, article 76(2) imposes some

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except that they fail to meet the strict definition of liner service. Because they are functionally equivalent to liner transactions, the industry has not tended to employ arbitration clauses in that context. Thus UNCITRAL saw no need to exclude them from the scope of chapter 15 even though they are technically non-liner transactions. Article 76 does not apply to them and they are fully governed by chapter 15 to the extent that it is otherwise applicable.

[98] *See* art. 6(2)(a)-(b).

[99] This reliance on otherwise applicable law essentially gives a country the ability to subject non-liner trade within the scope of the convention to the general rule of article 75(2) if it objects to article 76(1).

safeguards to ensure fairness to third parties before an arbitration clause can escape regulation under the chapter. To ensure that the third party is not unfairly surprised, and to avoid ambiguity, the relevant transport document (or electronic transport record) must clearly identify the charterparty (or similar contract) by the parties' names and the date,[100] and must specifically incorporate the clause containing the arbitration agreement.[101] Requiring the arbitration agreement to be incorporated from the charterparty (or similar contract) also ensures that third parties are simply being held to the contractual terms that were negotiated between commercial parties that generally have more-or-less equal bargaining power, and that new arbitration clauses (which were never subject to negotiation) are not being imposed on them in an effort to evade the convention's jurisdiction rules.

V. Conclusion

The jurisdiction and arbitration chapters are perhaps the most controversial aspects of the Rotterdam Rules, much as the corresponding chapters of the Hamburg Rules were particularly controversial a generation ago. But much of the opposition to the arbitration provisions is from those who reject the essential premise underlying the jurisdiction chapter — the premise that it is necessary to protect cargo interests from carriers that might otherwise impose contractual clauses to undermine the substantive provisions of the new convention. For those opponents, the new convention unnecessarily regulates carriers and interferes with the efficient operation of their businesses. Conversely, another significant segment of the opposition is concerned that the Rotterdam Rules go too far in permitting a carrier to impose a forum-selection clause in a volume contract. For those opponents, the new convention does not regulate carriers strictly

[100] Art. 76(2)(a).

[101] Art. 76(2)(b).

enough.[102] Yet others recognize the possibility that this might be an appropriate area in which to regulate a carrier's conduct, but question why commercial entities that are sophisticated enough to participate in international trade should receive better protection than consumers who accept a contract of adhesion with no understanding of its terms or poorly paid workers who are injured in the service of their ship.[103]

If one accepts the jurisdiction provisions, however, then the logic of the arbitration chapter makes perfect sense — even if this lonely exception to the general preference for arbitration in shipping law may seem very peculiar when considered out of context. The Rotterdam Rules do not resurrect the historic animosity toward arbitration, or make arbitration clauses unenforceable when an otherwise comparable forum-selection clause would be valid. To the extent that chapter 15 of the Rotterdam Rules restricts the enforcement of arbitration clauses, it simply puts them on the same footing as other forum-selection clauses.

The criticism that arbitration under the Hamburg or Rotterdam Rules would be unworkable completely misses the point. The goal of the arbitration chapter was never to facilitate arbitration in a context in which it has not traditionally been used. The goal is to ensure that the jurisdiction rules work as they were intended to, and that arbitration not be used as a method to circumvent those rules, while at the same time imposing the least regulation necessary to achieve that goal. If carriers choose never to include an arbitration clause in a contract of

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[102] This inconsistent opposition from opposing perspectives may seem ironic, but such is the nature of compromises. The jurisdiction and arbitration chapters, like the Rotterdam Rules as a whole, are based on a commercial compromise in which no party achieved all of its goals.

[103] *Cf. supra* note 2 and accompanying text. The Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2007, which regulates forum-selection clauses between European Union and a handful of other European countries, has special provisions to protect consumers (arts. 15-17) and employees (arts. 18-21). *See also* EU Regulation No. 1215/2012, arts. 17-19 (special provisions to protect consumers), 20-23 (special provisions to protect employees).

carriage under circumstances in which article 75(2) of the Rotterdam Rules would apply, as critics have predicted,[104] then the arbitration chapter will be working exactly as intended.[105] But even if a carrier attempts to use an arbitration clause in an effort to evade the jurisdiction rules, the choice of arbitration will still be respected — as will the claimant's right to select the place in which the dispute is resolved.

[104] *Cf*. *supra* note 51 and accompanying text.

[105] *See*, *e.g.*, *Report of Working Group III (Transport Law) on the Work of Its Fifteenth Session*, ¶ 271, U.N. Doc. A/CN.9/576 (2005).