

# Jurisdiction Under the Rotterdam Rules<sup>†</sup>

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## I. Introduction

It is a genuine pleasure for me to be here for the signing of the Rotterdam Rules and for all of the events in conjunction with the signing ceremony. I extend both my congratulations and thanks to Jan de Vos and his team for organizing such a successful program.

Personally, I have been working on this project — in various forms and in various forums — for seventeen and a half years. I know that my time pales in comparison to Francesco Berlingieri’s commitment to this enterprise, but it is still nearly a third of my life (and over 60% of my professional career). I can fairly say that we have been a long time getting here. Despite the long time *en route*, our work is by no means finished. Much still remains to be done to ensure the success of the Rotterdam Rules, starting with ratifications.<sup>1</sup> But this week is an important milestone along the way, and it is very good to be here.

It is particularly good to be *here*, in Rotterdam, for this milestone. Being here, we recognize the important role that Rotterdam plays in maritime (or “maritime-plus”) commerce. That

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<sup>†</sup> The analytical portions of this paper are based to a considerable extent on a chapter in a forthcoming treatise: 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* (London: Sweet & Maxwell 2010).

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<sup>1</sup> The convention enters into force approximately one year after the twentieth ratification. *See* Rotterdam Rules art. 94(1). For the convention to be successful, however, it will need more than that. It will need to be widely accepted throughout the maritime and commercial world.

commerce is not only the subject of this new convention but also the beneficiary of the legal regime that it creates. In addition, we recognize and pay tribute to the central role that one of Rotterdam's citizens played in the development and drafting of what we now know as the Rotterdam Rules. I refer, of course, to Gertjan van der Ziel. His public role throughout the CMI and UNCITRAL process is well known, from civil-law draftsman for the CMI to the head of the influential Dutch delegation at Working Group III. His role behind the scenes was even greater and more influential. The Rotterdam Rules were undoubtedly a team effort, and it was a very large team that produced them. With all due respect to many others on that team, including many who are with us in Rotterdam this week, we can still recognize that no other individual has played a greater role than Prof. van der Ziel in making the Rotterdam Rules what they are today. It is a pleasure to pay tribute to him in his home city.

Although chapter 14 — the jurisdiction chapter — is an “optional”<sup>2</sup> aspect of the convention (and we already know that about half of the countries signing this week are unlikely to “opt in” to the chapter), it is nevertheless an important issue to discuss here. In addition to its inherent importance, many of the larger themes of the chapter are representative of the convention as a whole. For example, this topic provides an excellent illustration of some of the approaches taken in the negotiation of the Rotterdam Rules.

Before we can consider either the larger themes or the detailed operation of the chapter, however, it will be helpful to look at the historical background to this subject and to examine the context in which the UNCITRAL debate occurred.

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<sup>2</sup> See *infra* notes 28-33 and accompanying text.

## II. From Hague and Visby to Hamburg

Although the Hague Rules did not explicitly address the jurisdiction issue, a few national courts construed article 3(8), which prohibits carriers from contractually lessening their liability,<sup>3</sup> to govern choice-of-court clauses. Some courts read this provision to ban all choice-of-court clauses on the ground that they effectively lessen a carrier's liability by imposing practical barriers to a claimant's recovery.<sup>4</sup> Others took a more moderate approach, holding that choice-of-court clauses are generally permissible under article 3(8), but that a particular clause would be invalid when its practical effect would be to subject a claimant to a legal system that would limit the carrier's liability to a lower amount than the claimant could recover in its chosen forum.<sup>5</sup>

During the negotiations that produced the Visby Protocol, jurisdiction was on the agenda with two limited but competing proposals. One suggestion, which would have essentially adopted the relatively moderate interpretation of article 3(8),<sup>6</sup> proposed

a rule . . . by which the court of a Contracting State could exercise jurisdiction notwithstanding the fact that the [bill of lading] might contain a jurisdiction clause which, if allowed to stand, would bring the action outside the scope of the Convention or before some Court where the Convention would not be respected.<sup>7</sup>

The other suggestion, which would have effectively overruled the more robust interpretation of article 3(8) that some national courts had adopted,<sup>8</sup> called for

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<sup>3</sup> The Visby Protocol did not change article 3(8) of the Hague Rules, and thus article 3(8) of the Hague-Visby Rules is identical.

<sup>4</sup> The Belgian courts appear to have adopted this robust interpretation of article 3(8), as did the lower courts in the United States for many years.

<sup>5</sup> The British House of Lords and the U.S. Supreme Court both appear to have taken this position. *See The Hollandia*, [1983] A.C. 565, 574-575 (1982); *Vimar Sequros y Reasegueros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-541 (1995).

<sup>6</sup> *See supra* note 5 and accompanying text.

<sup>7</sup> CMI Stockholm Conference Report 1963, at 101 (report of the Sub-Committee on Bills of Lading).

<sup>8</sup> *See supra* note 4 and accompanying text.

a rule by which the Contracting States would be obliged to accept as binding jurisdiction clauses in [bills of lading] which “seem to be reasonable,” especially if by such clauses jurisdiction would be given to a court in a Contracting State.<sup>9</sup>

In the end, neither proposal made it out of the sub-committee, which concluded that the liability regime should instead focus on the substantive rules governing the liability of the parties. The delegates felt that a liability regime was “hardly the ideal vehicle for a special provision about conflicts of law laying down what jurisdiction is acceptable.”<sup>10</sup> Thus the Hague-Visby Rules continued to leave jurisdiction and arbitration to national law.

The Hamburg Rules became the first international regime to regulate jurisdiction in this context. To guard against the risk that carriers would abuse their market power to force cargo claimants to pursue their claims in inhospitable forums (or to abandon their claims entirely), a new provision guaranteed the “plaintiff” the right to bring proceedings in a reasonable forum. More specifically, plaintiffs and claimants were permitted to choose from a list of forums that had a significant connection with the transaction or the carrier, including the carrier’s principal place of business, the ports of loading and discharge, and any forum specified in the contract of carriage.<sup>11</sup>

### **III. The Context of the Jurisdiction Debate**

The CMI did not include provisions on jurisdiction in its Draft Instrument,<sup>12</sup> primarily because another CMI International Sub-Committee had recently discussed the issue and concluded “that uniform rules should contain a provision on jurisdiction along the lines of article 21

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<sup>9</sup> CMI Stockholm Conference Report 1963, at 102 (report of the Sub-Committee on Bills of Lading).

<sup>10</sup> CMI Stockholm Conference Report 1963, at 102 (report of the Sub-Committee on Bills of Lading).

<sup>11</sup> Hamburg Rules arts. 21(1).

<sup>12</sup> CMI Draft Instrument on Transport Law, 2001 CMI YEARBOOK 532.

of the Hamburg Rules, but not including the provisions of article 21 which were in conflict with article 7(1) of the 1952 Arrest Convention.”<sup>13</sup> Thus the CMI assumed that jurisdiction provisions would be included in the final convention and that article 21 of the Hamburg Rules would furnish the basis for further discussion.

When UNCITRAL first mentioned the subject, “it was widely considered that [a provision on jurisdiction] would be useful and even, in the view of some, indispensable,”<sup>14</sup> but some also argued that the Convention should not address the subject at all.<sup>15</sup> A year later, when UNCITRAL first focused on the subject, a majority again appeared to agree that the Convention should address the issue and that further discussions should proceed based on the model of the Hamburg Rules.<sup>16</sup> The Secretariat was requested to include Hamburg-based provisions (and possible alternatives) to address jurisdiction in the next draft of the proposed instrument.<sup>17</sup>

In the debates that followed, it quickly became clear that a number of countries held very strong views on the proper resolution of the issue, and that these strongly held views were in deep conflict. At one extreme, nations and industry groups sympathetic to carrier interests, along with nations commonly selected in choice-of-court agreements, argued that the Convention should include no provision on jurisdiction (except, perhaps, one that routinely enforced choice-

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<sup>13</sup> 2001 CMI YEARBOOK 535; *see also* 1999 CMI YEARBOOK 113. CMI and UNCITRAL also felt that it would have been premature to draft jurisdiction provisions before any substantive provisions had been agreed. *See* 2001 CMI YEARBOOK 535; Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea, U.N. doc. no. A/CN.9/WG.III/WP.21, ¶ 24 (2002).

<sup>14</sup> 9th Session Report ¶ 61 (Spring 2002).

<sup>15</sup> 9th Session Report ¶ 61 (Spring 2002).

<sup>16</sup> 11th Session Report ¶ 158 (Spring 2003).

<sup>17</sup> 11th Session Report ¶ 159 (Spring 2003). These new provisions were ultimately before the Working Group at its 14th session (Fall 2004) as chapters 15 and 16 of Transport Law: Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea], U.N. doc. no. A/CN.9/WG.III/WP.32 (2003).

of-court agreements).<sup>18</sup> Not surprisingly, the United Kingdom was a prominent member of this coalition. At the other extreme, nations and industry groups sympathetic to cargo interests, along with nations that regulate jurisdiction domestically or as parties to the Hamburg Rules,<sup>19</sup> insisted that the Convention should follow the example of the Hamburg Rules to protect a cargo claimant's ability to seek recovery in a reasonable forum of its choice (notwithstanding a choice-of-court agreement).<sup>20</sup> Between these two extremes, a number of nations sought a more balanced compromise between cargo and carrier interests.<sup>21</sup> Because the United States had been forced to forge a compromise position among its domestic interests, it was a leading advocate of the compromise approach during the UNCITRAL negotiations.<sup>22</sup>

The negotiation of the jurisdiction chapter was further complicated by the legal situation in Europe. Because the European Union regulates jurisdiction provisions among its members,<sup>23</sup> the individual member states lack competence to negotiate an international convention on the subject. The European Commission has sole competence in the field. Thus some of the nations that were most active in negotiating other aspects of the Convention could participate in the jurisdiction debate only within the internal European Union discussions. And the European

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<sup>18</sup> Some of the discussion in favor of greater freedom of contract in the jurisdiction context is reported at 9th Session Report ¶ 61 (Spring 2002); 14th Session Report ¶¶ 111, 130 (Fall 2004); 15th Session Report ¶ 159 (Spring 2005); 16th Session Report ¶¶ 23-24, 81 (Fall 2005).

<sup>19</sup> See Hamburg Rules arts. 21-22; *supra* note 11 and accompanying text.

<sup>20</sup> Some of the discussion in favor of a Hamburg-style approach in the jurisdiction context is reported at 9th Session Report ¶ 61 (Spring 2002); 14th Session Report ¶ 132 (Fall 2004); 15th Session Report ¶ 158 (Spring 2005); 18th Session Report ¶ 254 (Fall 2006).

<sup>21</sup> Some of the discussion in favor of a compromise approach in the jurisdiction context is reported at 14th Session Report ¶ 135 (Fall 2004); 15th Session Report ¶ 157 (Spring 2005); 16th Session Report ¶ 21 (Fall 2005).

<sup>22</sup> See, e.g., Proposal by the United States of America, U.N. doc. no. A/CN.9/WG.III/WP.34 ¶¶ 30-35 (2003); *cf. infra* note 24.

<sup>23</sup> See, e.g., Council Regulation (EC) No. 44/2001 (Dec. 22, 2000) (addressing jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

Commission, which did not even attend the meetings that addressed other aspects of the Convention, became one of the major players in negotiating the jurisdiction chapter.<sup>24</sup>

The solution in the end 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 that it would be impossible to achieve universal agreement on any aspect worth discussing. Thus UNCITRAL abandoned some of its more ambitious goals for the chapter, making the decision not to pursue uniform rules on such topics as *concursum*<sup>25</sup> and *lis pendens*,<sup>26</sup> for example. Even more significantly, UNCITRAL decided to accommodate those nations that were not prepared to accept any compromise on jurisdiction.<sup>27</sup>

#### **IV. The Principal Jurisdiction Compromise: An Optional Chapter**

The single most significant provision in chapter 14 — the Rotterdam Rules’ treatment of jurisdiction — is article 74, which permits each nation ratifying (or otherwise<sup>28</sup> becoming a party to) the Convention to decide for itself whether it will be bound by that chapter.<sup>29</sup> This “opt in”

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<sup>24</sup> 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. *Cf. supra* notes 21-22 and accompanying text.

<sup>25</sup> *See* 15th Session Report ¶¶ 143-146 (Spring 2005).

<sup>26</sup> *See* 15th Session Report ¶¶ 153-155 (Spring 2005).

<sup>27</sup> *See infra* notes 28-33 and accompanying text.

<sup>28</sup> A nation will typically become a party to an international convention by formally signing and then ratifying it or by acceding to it. Once a nation has become a party to the Convention, the process by which it became a party will be irrelevant. Thus I will not generally focus on the distinction between ratification and other methods of becoming a party to the Convention.

<sup>29</sup> Some have criticized this opt-in solution. Critics on one side have said that enough countries wished to regulate jurisdiction that we 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 that we should have abandoned the subject entirely. There was, in their view, no consensus.

These criticisms, I might note, have come largely from those who were not involved in the project or who became involved only at the eleventh hour. It is always easy to review someone else’s work, especially when compromises are involved, and explain how you could have done a better job (if only you had participated in the effort). Indeed,

solution proved to be the only possible compromise among the three groups of nations holding three entirely different positions.<sup>30</sup>

A nation choosing to be bound must make a formal declaration to that effect under article 91.<sup>31</sup> A nation that simply ratifies the Convention without taking any further action, therefore, will not be bound by the chapter. A court in that nation will instead address these issues under the law that it would otherwise apply, which might be its own national law, the proper law of the contract, another international instrument, or even some combination of those sources.

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academic commentators in particular have every incentive to explain others' mistakes. No one has made an academic reputation for praising what a contemporary has already done!

For those of us who were involved in the project, our goal was to achieve as much uniformity as possible. This means both as broad an agreement as possible and as broad an acceptance of that agreement as possible. If we had abandoned jurisdiction entirely, we would have achieved nothing whatsoever on the subject. Moreover, we would have lost support — not only on the jurisdiction chapter but also on the entire convention — from those nations for which some treatment of jurisdiction was essential. If we had tried to cram stricter regulation of jurisdiction down unwilling throats, we would have lost support — not only on the jurisdiction chapter but also on the entire convention — from those nations for which any regulation of jurisdiction would have been totally unacceptable.

<sup>30</sup> See *supra* notes 18-22 and accompanying text.

<sup>31</sup> As an alternative to the “opt in” procedure that was actually adopted in articles 74 and 78, UNCITRAL considered an “opt out” procedure under which a nation that did *not* wish to be bound by either chapter would have made a formal declaration to that effect. See, e.g., Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea], U.N. doc. no. A/CN.9/WG.III/WP.81, arts. 77, 81 (2007). For the arbitration chapter, it would have made little difference whether the default rule was coverage or non-coverage; nations preferring the opposite result would simply file the required declaration. With respect to the jurisdiction chapter, however, the “opt out” procedure would have complicated matters for the member countries of the European Union because the European Commission has exclusive competence in the jurisdiction field. See, e.g., 20th Session Report ¶ 203 (Fall 2007); see also *supra* notes 23-24 and accompanying text.

The Commission representatives argued that a member country would need the Commission's permission to ratify the Convention if the jurisdiction chapter were part of the default rule — even if the country planned to opt out of that chapter — because the country would be ratifying a convention that addressed jurisdiction issues. (Of course, the member country would also need the Commission's permission to opt out of the jurisdiction chapter because that declaration would address jurisdiction issues.) But the Commission representatives explained that a member country would *not* need the Commission's permission to ratify the Convention if ratification did not involve the jurisdiction chapter. A member country would need the Commission's permission only if it wished to “opt in” to the jurisdiction chapter.

In order to enable member countries of the European Union to ratify the Convention as simply as possible, UNCITRAL decided to adopt the “opt in” procedure embodied in articles 74 and 78. See 20th Session Report ¶¶ 202-205, 216-218 (Fall 2007).



Most nations making declarations under article 74 will presumably do so at the time they ratify the Convention, but article 91(1) permits the declaration to be made “at any time”<sup>32</sup> and article 91(5) similarly permits a nation to withdraw its declaration “at any time.”<sup>33</sup> Thus a nation could ratify the Convention immediately while postponing its decision on the jurisdiction chapter. Moreover, it may revisit its decision at any time, either accepting rules that it had previously rejected or withdrawing from the coverage that it had previously elected.

## V. The General Rule: The Claimant’s Choice Among Reasonable Forums

Article 66 establishes the general rule that a claimant has the right to choose a reasonable forum in which to bring a cargo action against the carrier, an approach very similar to that taken in the Hamburg Rules.<sup>34</sup> More specifically, the claimant may generally choose any “competent court” from a list of courts with a reasonable connection to the transaction.<sup>35</sup> The carrier, in turn, is generally protected from suit in any other forum,<sup>36</sup> thus providing a balance between the

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<sup>32</sup> The flexibility to make a declaration “at any time” applies only to declarations with respect to the jurisdiction and arbitration chapters. Other declarations permitted by the Convention must “be made at the time of signature, ratification, acceptance, approval or accession.” Rotterdam Rules art. 91(1).

<sup>33</sup> If a nation makes its declaration before the Convention enters into force with respect to that nation, then the jurisdiction or arbitration rules enter into force with the rest of the Convention for that nation. If the declaration comes after the Convention has entered into force with respect to that nation, then there is at least a six-month wait before the jurisdiction or arbitration rules enter into force for that nation. Similarly, if a nation withdraws its declaration the jurisdiction rules remain in force for approximately six months. The effective date for declarations or withdrawals after the Convention has entered into force is “the first day of the month following the expiration of six months after the date” that “the depositary” receives the declaration or the notice of withdrawal. Rotterdam Rules art. 91(4), (5). The “depositary” is the Secretary-General of the United Nations. *Id.* art. 87. Thus if the Secretary-General receives a declaration or withdrawal on February 14, the effective date will be September 1 of the same year — six and a half months later.

<sup>34</sup> *See generally* Hamburg Rules art. 21. Article 66 nevertheless differs from article 21 of the Hamburg Rules in some respects. Perhaps the most significant is article 66’s limitation of the party protected to the cargo claimant. *See infra* notes 83-84 and accompanying text. Article 21(1)(b) of the Hamburg Rules also includes “the place where the contract was made” on the list of permissible forums. UNCITRAL decided to drop this place from the article 66 list because it “was largely irrelevant to the performance of the contract” and “could be difficult or impossible to determine” in the electronic context. 14th Session Report ¶ 125 (Fall 2004).

<sup>35</sup> *See infra* notes 42-50 and accompanying text.

<sup>36</sup> *See, e.g., infra* notes 156-158 and accompanying text.

claimant's and the carrier's interests. Exceptions exist to both of these general rules,<sup>37</sup> but the analysis must at least begin with the default rules.

### A. Competent Court

A “competent court” is defined as “a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.”<sup>38</sup> Depending on national law, more than one court may have jurisdiction over a particular dispute in a particular place. In a federal system, for example, national law may grant jurisdiction over a dispute both to the national courts and to the local state or provincial courts. Similarly, the national rules may give plaintiffs the choice of proceeding in either a specialized court or a court of general jurisdiction. The Convention leaves these issues to be resolved entirely by national law.

The most significant implication of the “competent court” definition is that article 66 protects the claimant's right to choose a court only in a country that is a party to the Rotterdam Rules.<sup>39</sup> The goal is to ensure that a claimant cannot use a provision of the Convention (article 66) to force a carrier into a forum that would not apply the Convention.<sup>40</sup> A court in a non-party country would not be “competent” under the terms of the definition. This narrower definition of “competent court” represents one of the more significant differences between the Rotterdam Rules' treatment of jurisdiction and the corresponding provisions of the Hamburg Rules.<sup>41</sup>

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<sup>37</sup> See *infra* notes 89-135 and accompanying text; *infra* notes 158-165 and accompanying text.

<sup>38</sup> Rotterdam Rules art. 1(30).

<sup>39</sup> See, e.g., 14th Session Report ¶¶ 114-115 (Fall 2004).

<sup>40</sup> Similarly, to the extent that other provisions in chapter 14 protect a carrier's choice of forum, they protect only the choice of a court in a country that is a party to the Rotterdam Rules. See, e.g., *infra* text at note 113.

<sup>41</sup> Cf. Hamburg Rules art. 21(1).

## B. The List of Permissible Forums

The list of permissible forums for a particular dispute depends on the facts of the transaction. In some cases, it will be a very short list.<sup>42</sup> In others, it will be much longer.<sup>43</sup> With one exception,<sup>44</sup> each court on the list must have jurisdiction over a place with some significant connection to the transaction. Thus it is helpful to begin with a list of the relevant places:

- (1) the carrier's "domicile,"<sup>45</sup>
- (2) the place (as agreed in the contract of carriage) at which the carrier (or its agent) receives the goods for carriage,<sup>46</sup>
- (3) the "port where the goods are initially loaded on a ship,"<sup>47</sup>
- (4) the "port where the goods are finally discharged from a ship,"<sup>48</sup>
- (5) the place (as agreed in the contract of carriage) at which the carrier (or its agent) delivers the goods,<sup>49</sup> and

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<sup>42</sup> If a transaction has only one connecting factor with a country that is a party to the Convention, there may be only one "competent court" on the list. Although unlikely, it is even possible that no competent court will qualify. In theory, the only connecting factor to trigger the application of the Convention under article 5(1) could be a contractual port. *See* Rotterdam Rules art. 5(1)(b), (d). If the relevant *actual* port (which is the connecting factor under article 66, *see infra* text at notes 68-71) differs from the contractual port, and the actual port is in a country that is not a party to the Convention, then there would be a sufficient connection to invoke the Convention but no forum under article 66.

<sup>43</sup> Although it would be very unusual, the list could include courts in more than eight countries if receipt, loading, discharge, and delivery (*see infra* notes 56-76 and accompanying text) each took place in a different country; the carrier had three domiciles (*see infra* notes 52-54 and accompanying text) in three different countries; and the contract of carriage designated competent courts in more than one country (*see infra* note 80 and accompanying text). The list could more easily include a larger number of courts if multiple courts have jurisdiction over a transaction in a particular place. *See supra* text at note 38.

<sup>44</sup> *See infra* text at note 78.

<sup>45</sup> Rotterdam Rules art. 66(a)(i). *See infra* notes 51-55 and accompanying text.

<sup>46</sup> Rotterdam Rules art. 66(a)(ii). *See infra* notes 56-60 and accompanying text.

<sup>47</sup> Rotterdam Rules art. 66(a)(iv). *See infra* notes 61-72 and accompanying text.

<sup>48</sup> Rotterdam Rules art. 66(a)(iv). *See infra* notes 61-72 and accompanying text.

<sup>49</sup> Rotterdam Rules art. 66(a)(iii). *See infra* notes 73-76 and accompanying text.

(6) any competent court designated in an agreement between the shipper and the carrier.<sup>50</sup>

### C. The Carrier's "Domicile"

Article 66(a)(i) generally protects the claimant's ability to bring an action against the carrier in a competent court with jurisdiction over the carrier's "domicile." Article 1(29) defines "domicile" in different ways depending on the circumstances. For a natural person, the "domicile" is the person's "habitual residence"<sup>51</sup> (without regard to nationality or citizenship). Thus a Greek citizen habitually resident in London is domiciled in London. For "a company or other legal person or association of natural or legal persons," the "domicile" is any of three places: (1) the place of its "statutory seat or place of incorporation or central registered office, whichever is applicable,"<sup>52</sup> (2) the place where it has its "central administration,"<sup>53</sup> and (3) the place where it has its "principal place of business."<sup>54</sup>

As very few commercial ships have individual owners today, the more relevant aspect of the definition identifies the domicile (or domiciles) of corporate owners. The "statutory seat," "place of incorporation," and "central registered office" were generally expected to be alternatives. As the phrase "whichever is applicable" signals, different legal systems define corporate citizenship in different ways. Some countries will use the "statutory seat" to define a company's legal home, others will use the "place of incorporation" for the same purpose, and yet others will recognize the "central registered office." To the extent that a particular jurisdiction were to

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<sup>50</sup> Rotterdam Rules art. 66(b). *See infra* notes 77-82 and accompanying text.

<sup>51</sup> Rotterdam Rules art. 1(29)(b).

<sup>52</sup> Rotterdam Rules art. 1(29)(a)(i).

<sup>53</sup> Rotterdam Rules art. 1(29)(a)(ii).

<sup>54</sup> Rotterdam Rules art. 1(29)(a)(iii).

recognize more than one of these concepts, however, that would not be a problem. A carrier can (and very often will) have more than one “domicile” under article 1(29). It is very common for a company’s legal home (for example, its “place of incorporation”) to differ from its corporate headquarters or its principal place of business. Indeed, more than one place may qualify under a single category if a company were to have more than one “statutory seat” or more than one “place of incorporation.” If a carrier has multiple domiciles, the claimant will simply have a wider range of permissible forums from which to choose.

In a typical case, the carrier’s domicile may seem to have no real connection with the transaction.<sup>55</sup> For example, when considering a shipment from Australia to South America a carrier’s European domicile seems largely coincidental. It is nevertheless appropriate to include the carrier’s domicile on the list. The goal is to ensure that cargo interests can resolve their claims in a forum of their choice in which it would be reasonable to expect the carrier to defend the suit. For places having a close connection with the transaction, it is reasonable to expect the carrier to defend a suit where it conducts business. It is at least as reasonable to expect a carrier to defend a suit in its home base, regardless of whether the particular transaction at issue has a connection to the home base. Indeed, in many cases a carrier’s domicile will be the only place in which a claimant could obtain an enforceable judgment.

#### **D. The Place of Receipt**

Article 66(a)(ii) generally protects the claimant’s ability to bring an action against the carrier in a competent court with jurisdiction over the contractual place of receipt. The Hamburg

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<sup>55</sup> *Cf. infra* text at note 81.

Rules do not include the place of receipt on the list of permissible forums.<sup>56</sup> The explanation for the difference lies in the Rotterdam Rules' broader coverage to accommodate multimodal transactions. Because the Hamburg Rules apply only on a port-to-port basis,<sup>57</sup> there was no need to recognize the possibility of the carrier's inland receipt of the goods. The port of loading (which is included on the Hamburg list<sup>58</sup>) and the place of receipt were treated as the same place. Because the Rotterdam Rules cover the entire contract of carriage, however, the place of receipt in a multimodal contract may well differ from the port of loading. It is therefore included separately in article 66.

It is worth stressing that the relevant place of receipt is that "agreed in the contract of carriage,"<sup>59</sup> not the actual place of receipt. This is one of several examples of the Convention's focus on the contract itself rather than the performance of the contract. As a practical matter, the actual and contractual places of receipt will almost inevitably be the same. If the shipper needs to have the carrier receive the goods in a different place than originally agreed in the contract, it will almost inevitably need to work out a new agreement with the carrier. Thus the contract will be modified, and the actual place of receipt will be the contractual place of receipt under the modified contract.<sup>60</sup>

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<sup>56</sup> Cf. Hamburg Rules art. 21(1)(a)-(d).

<sup>57</sup> See Hamburg Rules art. 4(1).

<sup>58</sup> Hamburg Rules art. 21(1)(c).

<sup>59</sup> Rotterdam Rules art. 66(a)(ii).

<sup>60</sup> A similar focus on the contract with regard to the place of delivery will be more significant. See *infra* text at notes 75-76.

**E. The Initial Port of Loading and the Final Port of Discharge**

Article 66(a)(iv) generally protects the claimant's ability to bring an action against the carrier in a competent court with jurisdiction over the initial port of loading or the final port of discharge. Although the Hamburg Rules include the ports of loading and discharge on the list of permissible forums,<sup>61</sup> UNCITRAL seriously considered omitting ports from the article 66 list.<sup>62</sup> This was thought to be consistent with the Convention's heavy emphasis on the contract of carriage.<sup>63</sup> Some delegates thought that when a door-to-door contract was at issue, which may identify only the places of receipt and delivery, it would be inappropriate to look behind the contract to identify potential forums on the basis of the actual performance.<sup>64</sup> In their view, ports were relevant only in a port-to-port contract (when the ports would also be the places of receipt and delivery).

After extensive discussion,<sup>65</sup> however, UNCITRAL decided that the practical benefits of including the ports of loading and discharge on the list of permissible forums overcame any theoretical objection. Loss or damage is more likely to occur when the goods are being handled in a port. Thus a port will very often be a more convenient forum because all of the relevant parties, witnesses, and other evidence will be available there. Often a port will be the only forum in which a cargo claimant can bring an action against both the carrier and the responsible

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<sup>61</sup> Hamburg Rules art. 21(1)(c).

<sup>62</sup> See, e.g., Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea], U.N. doc. no. A/CN.9/WG.III/WP.56, art. 75(c) (2005) (including "ports" only in brackets); Draft Instrument WP.32, *supra* note 17, art. 72 (omitting "ports").

<sup>63</sup> See, e.g., *supra* notes 59-60 and accompanying text; *infra* text at notes 75-76.

<sup>64</sup> See, e.g., 15th Session Report ¶ 121 (Spring 2005).

<sup>65</sup> See, e.g., 14th Session Report ¶¶ 120, 128 (Fall 2004); 15th Session Report ¶ 121 (Spring 2005); 16th Session Report ¶¶ 10-13, 17 (Fall 2005).

maritime performing party.<sup>66</sup> Moreover, preserving the jurisdiction of courts in the ports will often facilitate the ability of courts to manage their own dockets.<sup>67</sup>

Unlike the places of receipt and delivery listed in article 66(a)(ii)-(iii), which are the *contractual* places of receipt and delivery,<sup>68</sup> and unlike the ports mentioned in article 5(1)(b) and (d),<sup>69</sup> which are the *contractual* ports, article 66(a)(iv) specifies the ports at which the goods were *actually* loaded or discharged. Although the actual and contractual ports will often be the same, when there is a difference the actual port will almost always be the more appropriate forum.<sup>70</sup> Ports are included on the list primarily because a port will often be the most convenient forum.<sup>71</sup> That convenience is based on the events that actually happened there, not the identification of the port in the contract.

In the scope-of-application context of article 5, it is essential to be able to identify the ports in advance, at the time the contract is concluded, so that the parties will know in advance whether the Convention governs their conduct. Otherwise they will not know the substantive rules that regulate their performance until it is too late to alter their actions. It is less important to identify the potential forums in advance with the same degree of certainty. So long as the parties know that the Convention applies (or at least that by its own terms it applies), they will know

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<sup>66</sup> Cf. *infra* notes 150-160 and accompanying text.

<sup>67</sup> The United States submitted a paper explaining in greater detail how both cargo and carrier interests benefited from including “ports” on the article 66 list. See Proposal by the United States of America regarding the inclusion of “ports” in draft article 75, U.N. doc. no. A/CN.9/WG.III/WP.58 (2005). UNCITRAL accepted these arguments. See 16th Session Report ¶¶ 10-12, 17 (Fall 2005).

<sup>68</sup> See Rotterdam Rules art. 66(a)(ii)-(iii). See also *supra* notes 59-60 and accompanying text.

<sup>69</sup> Article 5(1)(b) and (d) is relevant in determining the Convention’s scope of application.

<sup>70</sup> See 16th Session Report ¶¶ 14, 17 (Fall 2005). Of course, there are exceptions. If the cargo was discharged and delivered at an alternate port because the voyage was frustrated, for example, the contractual port could well be a more appropriate forum than the actual port.

<sup>71</sup> See *supra* notes 65-67 and accompanying text.



that they must conform to its standards. In any event, because article 66 generally gives the claimant a choice among different forums, it will usually be impossible to know the actual forum in advance. The claimant's choice will depend on the circumstances of the transaction as they appear after the loss or damage.

Finally, it is important to note that article 66(a)(iv) refers only to the *initial* port of loading and the *final* port of discharge. If the ocean voyage includes a transshipment, the port of transshipment does not qualify under article 66(a)(iv).<sup>72</sup>

#### **F. The Place of Delivery**

Article 66(a)(iii) generally protects the claimant's ability to bring an action against the carrier in a competent court with jurisdiction over the contractual place of delivery. The Hamburg Rules do not include the place of delivery in its list of permissible forums.<sup>73</sup> As with the place of receipt,<sup>74</sup> the explanation for the difference lies in the Rotterdam Rules' broader coverage to accommodate multimodal transactions. With the Rotterdam Rules' coverage of the entire contract of carriage, the place of delivery in a multimodal contract may well differ from the port of discharge. It is therefore included separately in article 66.

As with the place of receipt,<sup>75</sup> the relevant place of delivery is that "agreed in the contract of carriage," not the actual place of delivery. This is yet another example of the Convention's focus on the contract itself rather than the performance of the contract. This is also a distinction

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<sup>72</sup> See, e.g., 16th Session Report ¶ 15 (Fall 2005). The port of transshipment may qualify as a permitted forum, even for an action against the carrier, under article 71(1). This provision applies if the cargo claimant seeks to recover from both the carrier and a maritime performing party in one proceeding. See *infra* notes 150-155 and accompanying text.

<sup>73</sup> Cf. Hamburg Rules art. 21(1)(a)-(d).

<sup>74</sup> See *supra* note 56 and accompanying text.

<sup>75</sup> Cf. *supra* text at note 59.

that could make a practical difference because a carrier might need to deliver the goods at a different place than agreed in the contract. If that happens, a dispute seems more than usually likely, and article 66(a)(iii) will still protect the claimant's access to a competent court with jurisdiction over the original contractual place of delivery (assuming that the parties did not modify the contract to reflect the new delivery plans).<sup>76</sup>

### **G. The Designated Forum**

Article 66(b) generally protects the claimant's ability to bring an action against the carrier in a competent court "designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention."<sup>77</sup> As a practical matter, this means that a choice-of-court clause in a transport document that does not qualify under chapter 14 as "exclusive," even if it purports to be exclusive, simply gives the claimant another option where to file suit.

The designated forum is treated somewhat differently than the forums listed in article 66(a).<sup>78</sup> For the article 66(a) forums, the connecting factors are physical places and the relevant courts are those with jurisdiction over the places. In many cases, more than one court will have jurisdiction over a particular place.<sup>79</sup> The forum designated in article 66(b), on the other hand, is the court itself. The party drafting the contract will commonly identify the precise court that is expected to hear a case, and will not be satisfied identifying just the place in which the court sits.

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<sup>76</sup> Cf. *supra* text at note 60.

<sup>77</sup> Rotterdam Rules art. 66(b). In practice, carriers have commonly included choice-of-court clauses in bills of lading that they have drafted. Article 66(b) recognizes *any* agreement between the shipper and the carrier. For example, they may agree in a volume contract (cf. *infra* notes 91-129 and accompanying text) to resolve claims in a designated forum.

<sup>78</sup> Cf. *supra* text at note 44.

<sup>79</sup> See *supra* text at note 38.

But of course the parties are the masters of their contract, and nothing prohibits a choice-of-court clause from listing all the courts that sit in a particular place. Indeed, article 66(b) expressly contemplates the possibility that more than one competent court will be named in an agreement.<sup>80</sup>

As with the carrier's domicile,<sup>81</sup> the forum designated by a choice-of-court clause may have no real connection with the transaction. For example, when considering a shipment from Australia to South America a designated forum in Europe seems largely coincidental. It is nevertheless appropriate to include the designated forum on the list. As a practical matter, it is typically the carrier that designates a forum in a transport document, and thus it is reasonable to expect the carrier to defend a suit in the forum that it selected for itself. At the very least, the carrier will have consented to the designated forum when it entered into the contract,<sup>82</sup> and thus it is reasonable to expect a carrier to defend a suit there.

## H. Removal

Although the intention of article 21 of the Hamburg Rules was to protect only the cargo claimant's choice of forum, the provision was drafted to protect any "plaintiff" that brings "judicial proceedings relating to the carriage of goods under [the Hamburg Rules]."<sup>83</sup> This language is so broad that it also protects a carrier seeking a declaration of non-liability, which has the perverse effect of depriving the cargo claimant of its choice of forum. Article 66 corrects

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<sup>80</sup> Article 66(b) refers to "a competent court or courts," thus leaving open the possibility that the agreement may designate multiple courts, even courts in different countries. Under article 67(1)(b), the chosen courts cannot have exclusive jurisdiction unless they are all in the same country. *See infra* note 114 and accompanying text. But that does not prevent the parties from listing courts in different countries in a non-exclusive choice-of-court clause under article 66(b).

<sup>81</sup> *Cf. supra* text at note 55.

<sup>82</sup> *Cf. supra* note 77.

<sup>83</sup> Hamburg Rules art. 21(1).

that error, limiting its coverage to “the plaintiff [that] institute[s] judicial proceedings under this Convention against the carrier.”<sup>84</sup>

The Rotterdam Rules take this protection a step further and make explicit provision for the situation in which a carrier or a maritime performing party<sup>85</sup> seeks a declaration of non-liability or institutes “any other action that would deprive [the cargo claimant] of its right to select the forum.”<sup>86</sup> At the request of the defendant in this collateral action (who will be the cargo claimant), the carrier or maritime performing party that instituted the collateral action must withdraw it when the cargo claimant has chosen a forum under article 66 (for actions against the carrier) or article 68<sup>87</sup> (for actions against the maritime performing party).<sup>88</sup> The carrier or maritime performing party, if it wishes, may recommence its action in the forum chosen by the cargo claimant, but presumably there would be little point in doing so once the forum-shopping advantage is lost.

## **VI. Situations in Which Exclusive Choice-of-Court Agreements Are Enforced**

Although article 66 establishes the general rule for jurisdiction, it does not apply if the contract of carriage contains a choice-of-court agreement that is “exclusive” under the terms of

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<sup>84</sup> Rotterdam Rules art. 66 (chapeau). *See generally, e.g.*, 14th Session Report ¶¶ 118-119 (Fall 2004); 15th Session Report ¶¶ 113-114 (Spring 2005).

<sup>85</sup> *Cf. infra* notes 136-154 and accompanying text.

<sup>86</sup> Rotterdam Rules art. 71(2). This provision is plainly intended to govern not only actions seeking a declaration of non-liability but also other actions that similarly deprive the cargo claimant of its right to select the forum. Thus article 71(2) prohibits an attempt to obtain an anti-suit injunction, for example. But it does not prevent the carrier from choosing the forum and bringing genuine independent actions, such as an action for a breach of a shipper’s obligation under chapter 7 of the Convention or an action to recover freight. *See generally, e.g.*, 15th Session Report ¶ 150 (Spring 2005); 16th Session Report ¶ 57 (Fall 2005).

<sup>87</sup> *See infra* notes 139-147 and accompanying text.

<sup>88</sup> An exception to the rule applies when an exclusive choice-of-court agreement is binding on the cargo claimant. Rotterdam Rules art. 71(2) (initial clause). *See infra* notes 89-135 and accompanying text.

chapter 14.<sup>89</sup> It is therefore necessary to examine the situations in which a choice-of-court agreement is exclusive. The Hamburg Rules already enforced an exclusive choice-of-court agreement that had been concluded after the dispute arose.<sup>90</sup> The Rotterdam Rules, in a significant development, go beyond that narrow situation to enforce some additional choice-of-court agreements in specifically defined circumstances.

#### **A. Exclusive Choice-of-Court Clauses for the Immediate Parties to a Volume Contract**

Just as article 80 as a general matter permits greater freedom of contract in the context of volume contracts, so article 67 permits the parties to a volume contract to agree in advance on an exclusive choice-of-court agreement that will be enforced if certain conditions are satisfied.<sup>91</sup> The most basic requirement is self-evident: the parties must “agree” that the designated court is to have exclusive jurisdiction.<sup>92</sup> Thus a clause that simply confers jurisdiction on a court, without specifying that the jurisdiction is exclusive, does not qualify.

Once a choice-of-court agreement by its terms purports to be exclusive, four additional requirements must still be satisfied before it will be enforced to preempt the claimant’s choice of forum under article 66: (1) The choice-of-court agreement must be “contained in a volume contract.”<sup>93</sup> (2) The volume contract must “clearly state[] the names and addresses of the

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<sup>89</sup> See Rotterdam Rules art. 66 (initial clause).

<sup>90</sup> Hamburg Rules art. 21(5). See also *infra* notes 130-135 and accompanying text.

<sup>91</sup> 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, see *supra* notes 28-33 and accompanying text, would have been unmanageable, and the logistics for the European Union and its member countries would have become unduly complicated, cf. *supra* notes 23-24 and accompanying text.

<sup>92</sup> Rotterdam Rules art. 67(1).

<sup>93</sup> Rotterdam Rules art. 67(1)(a). See *infra* notes 99-100 and accompanying text.

parties.”<sup>94</sup> (3) The volume contract must either (i) be “individually negotiated”<sup>95</sup> or (ii) both “contain[] a prominent statement that there is an exclusive choice of court agreement”<sup>96</sup> and also “specif[y] the sections of the volume contract containing that agreement.”<sup>97</sup> (4) The choice-of-court agreement must “[c]learly designate[] the courts” — “or one or more specific courts” — of a nation that is a party to the Convention.<sup>98</sup>

The first and third of these additional requirements mirror the requirements for broader freedom of contract under the special rules for volume contracts in article 80. Just as a general derogation is enforceable only when it is part of a volume contract,<sup>99</sup> so an exclusive choice-of-court agreement must be “contained in a volume contract”<sup>100</sup> before it will be enforced. And just as article 80 imposes a requirement that can be satisfied either by proof of individual negotiation or by the inclusion of a prominent specification in the volume contract,<sup>101</sup> so article 67 enforces an exclusive choice-of-court agreement only when it satisfies a requirement-in-the-alternative<sup>102</sup> that is very similar.<sup>103</sup>

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<sup>94</sup> Rotterdam Rules art. 67(1)(a). *See infra* notes 105-108 and accompanying text.

<sup>95</sup> Rotterdam Rules art. 67(1)(a)(i). *See infra* notes 101-103 and accompanying text.

<sup>96</sup> Rotterdam Rules art. 67(1)(a)(ii). *See infra* notes 101-103 and accompanying text.

<sup>97</sup> Rotterdam Rules art. 67(1)(a)(ii). *See infra* notes 101-103 and accompanying text.

<sup>98</sup> Rotterdam Rules art. 67(1)(b). *See infra* notes 109-114 and accompanying text.

<sup>99</sup> Rotterdam Rules art. 80(2).

<sup>100</sup> Rotterdam Rules art. 67(1)(a).

<sup>101</sup> Rotterdam Rules art. 80(2)(a)-(b).

<sup>102</sup> Rotterdam Rules art. 67(1)(a)(i)-(ii).

<sup>103</sup> The alternatives line up slightly differently in the two different contexts. Article 80(2)(a) imposes a prominent statement requirement that is essentially the same as article 67(1)(a)(ii)’s, but article 80(2)(a) requires that prominent statement in any event. The alternative requirement is in article 80(2)(b), and it can be satisfied either by proof of individual negotiation (under article 80(2)(b)(i), which is identical to article 67(1)(a)(i)) or by the inclusion of a prominent specification (under article 80(2)(b)(ii), which corresponds to the specification requirement in article 67(1)(a)(ii)). As a practical matter, carriers are more likely to rely on the second alternative in either context, simply because it is easier to prove a prominent statement than individual negotiation.

The second and fourth of these additional requirements are unique to the jurisdiction and arbitration<sup>104</sup> chapters, having no counterpart in article 80's special rules for volume contracts. Although the requirement that the volume contract "clearly state[] the names and addresses of the parties"<sup>105</sup> might also have been sensible in the broader derogation context, UNCITRAL thought that the requirement was essential only for jurisdiction and arbitration. If a claimant needs to commence proceedings in a particular court under a time-for-suit provision that is typically less generous than the general statute of limitations, the claimant must be certain of the carrier's identity and where the carrier may be found. Article 36(2)(b) already requires the carrier to include its name and address in the contract particulars, but as a practical matter this requirement can be difficult to enforce.<sup>106</sup> One impact of article 67(1)(a) is to make an otherwise exclusive choice-of-court agreement unenforceable when the carrier fails to provide the information that should in any event be included in the contract particulars.<sup>107</sup> Because exclusive jurisdiction and arbitration clauses will often be enforceable only for the immediate parties to the volume contract,<sup>108</sup> it is also important to ensure that the shipper's identity is clearly established in the volume contract.

The requirement that the court(s) be "[c]learly designate[d]"<sup>109</sup> is tailored to the jurisdiction context, but it is nevertheless analogous to provisions in article 80 designed to ensure that

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<sup>104</sup> Cf. Rotterdam Rules art. 75(3).

<sup>105</sup> Rotterdam Rules art. 67(1)(a).

<sup>106</sup> Article 37 helps to protect the claimant in some contexts. In addition, article 65 extends the time for suit in some circumstances when the carrier has not been identified in the contract particulars.

<sup>107</sup> See also, e.g., 15th Session Report ¶ 163 (Spring 2005).

<sup>108</sup> Cf. *infra* notes 115-129 and accompanying text.

<sup>109</sup> Rotterdam Rules art. 67(1)(b).

any derogations will be readily apparent.<sup>110</sup> The necessity of a clear designation is self-evident, but three other aspects of the requirement are noteworthy: (1) Only a court in a country that is a party to the Convention can be “exclusive” under article 67. This limitation is already implicit in article 67, because the article applies only to courts “chosen in accordance with”<sup>111</sup> article 66(b), which is limited to “competent” courts. By definition, a “competent” court must be “in a Contracting State.”<sup>112</sup> But article 67(1)(b) is also explicitly limited to the courts of a Contracting State. Just as a claimant cannot use article 66 to force a carrier into a forum that would not apply the Convention,<sup>113</sup> so a carrier cannot use article 67 to force a claimant into a forum that would not apply the Convention. (2) The choice-of-court agreement can identify a specific court, list two or more specific courts, or generally select the courts of a specific country. (3) Despite the flexibility to designate more than one court, all of the courts must be in a single country for the clause to be exclusive.<sup>114</sup> If all of these requirements are satisfied, the exclusive choice-of-court agreement can be enforced in an action between the parties to the volume contract, thus preempting the cargo claimant’s right to choose the forum under article 66.

## **B. Enforcement of Exclusive Choice-of-Court Clauses Against Third Parties**

As a general rule, a derogation permitted under article 80 binds only the immediate parties to the volume contract unless a third party with adequate notice of the derogation ex-

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<sup>110</sup> See, e.g., Rotterdam Rules art. 80(2)(d)(i).

<sup>111</sup> Rotterdam Rules art. 67(1).

<sup>112</sup> Rotterdam Rules art. 1(30). See *supra* notes 38-41 and accompanying text.

<sup>113</sup> See *supra* text at note 40.

<sup>114</sup> Article 66(b) permits a choice-of-court agreement to list any number of competent courts from any number of different countries. Cf. *supra* note 80 and accompanying text. But article 67(1)(b) requires an exclusive choice-of-court agreement to “designate[] the courts of *one* Contracting State or one or more specific courts of *one* Contracting State” (emphasis added).



pressly consents to be bound by it.<sup>115</sup> Under article 67(2), however, a non-consenting third party may be bound by an exclusive choice-of-court agreement if four requirements are satisfied. These four requirements severely restrict the scope of the provision and ensure that objecting third parties will not be bound.

First, the choice-of-court agreement must designate one of the courts on the article 66(a) list of permissible forums.<sup>116</sup> (To avoid being meaningless, the requirement carefully excludes article 66(b)'s option of the “designated forum.”<sup>117</sup>) As a practical matter, the most likely forum to satisfy this requirement will be in the carrier's domicile.<sup>118</sup> By their nature, volume contracts generally cover shipments on a variety of related but nevertheless different routes, meaning that different shipments under a single volume contract will have different places of receipt, different ports of loading, different ports of discharge, and different places of delivery. It would thus be impossible in most volume contracts to identify a single specific court (other than a court with jurisdiction over the carrier's domicile) that would satisfy the first requirement for every shipment.<sup>119</sup> Only the carrier's domicile would be the same in each transaction.

Second, the choice-of-court agreement, which is already contained in the volume contract, must be repeated — not simply incorporated by reference — in each transport document or

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<sup>115</sup> Rotterdam Rules art. 80(5).

<sup>116</sup> Rotterdam Rules art. 67(2)(a).

<sup>117</sup> If article 66(b)'s designated forum satisfied the requirement of article 67(2)(a), every choice-of-court agreement would automatically satisfy the requirement. A clause must qualify under article 66(b) before article 67 even applies.

<sup>118</sup> See Rotterdam Rules art. 66(a)(i). See generally *supra* notes 51-55 and accompanying text.

<sup>119</sup> Even if a descriptive term, such as “the courts with jurisdiction over the port in which each shipment is unloaded,” would satisfy the clear designation requirement of article 67(1)(b), it seems unlikely that either party would see much benefit in such a clause. It would not consolidate all of the claims under the contract in a single forum. It might even be unenforceable in some of the chosen jurisdictions.

electronic transport record.<sup>120</sup> This requirement can easily be satisfied if the original shipper and carrier seriously wish to bind third parties.

Third, the non-party to the volume contract that is to be bound by the exclusive choice-of-court agreement must be “given timely and adequate notice” of two things: (1) the court in which the action must be brought and (2) the fact “that the jurisdiction of [the designated] court is exclusive.”<sup>121</sup> It is significant that the requirement is limited to “notice,” and does not require “consent,” as does article 80(5) before a derogation in a volume contract can bind a third party. UNCITRAL concluded that a higher standard of protection was required in the context of article 80, which dealt with substantive derogations. The choice of forum, while significant, was nevertheless a procedural matter for which a notice requirement would be sufficient.<sup>122</sup>

The substance of the notice should not cause problems. The volume contract must already “[c]learly designate[]” the court<sup>123</sup> and will generally<sup>124</sup> contain “a prominent statement that there is an exclusive choice of court agreement.”<sup>125</sup> The same information should simply be included in the notice to the third party.

The more problematic issue will be deciding whether a notice is “timely and adequate.” To some extent, the answer to this question must depend on the circumstances of each case. At a minimum, for a third-party purchaser of goods to be bound by an exclusive choice-of-court agreement, the notice must give the purchaser an opportunity to object to the agreement before it

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<sup>120</sup> Rotterdam Rules art. 67(2)(b).

<sup>121</sup> Rotterdam Rules art. 67(2)(c).

<sup>122</sup> See 16th Session Report ¶ 32 (Fall 2005).

<sup>123</sup> Rotterdam Rules art. 67(1)(b). See *supra* notes 109-114 and accompanying text.

<sup>124</sup> See *supra* note 103.

<sup>125</sup> Rotterdam Rules art. 67(1)(a)(ii). See *supra* text at note 96.

is irrevocably committed to the transaction. If a third-party purchaser first receives notice in a transport document after its bank has paid for the goods under an irrevocable letter of credit, for example, the purchaser is not bound by the choice-of-court agreement because the notice was not “timely and adequate.” But if the third-party purchaser instead receives notice when it is negotiating the sales contract with its seller (the shipper) and thus still has the opportunity to negotiate a different contract, then the notice would be “timely and adequate.”

Fourth, “[t]he law of the court seized” must recognize that the third party “may be bound” by the exclusive choice-of-court agreement.<sup>126</sup> In the final analysis, therefore, the enforceability of an exclusive choice-of-court agreement against a non-consenting third party is left to national law. The issue will typically arise in the context of a third-party purchaser seeking to recover from a carrier and thus bringing suit in the forum that it has selected under article 66. When the defendant carrier challenges that court’s jurisdiction, arguing that the exclusive choice-of-court agreement binds the third-party purchaser under article 67(2), the court chosen by the plaintiff must determine its own jurisdiction. Under article 67(2)(d), that court must apply its own law (including any applicable choice-of-law rules) to decide as a general matter whether an exclusive choice-of-court agreement can bind a non-consenting third party.<sup>127</sup> In countries that generally permit choice-of-court agreements to bind third parties, the ultimate answer will turn on the other requirements of article 67. But in legal systems that prohibit

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<sup>126</sup> Rotterdam Rules art. 67(2)(d).

<sup>127</sup> *See generally, e.g.*, 16th Session Report ¶ 30 (Fall 2005). UNCITRAL rejected a proposal to have this issue determined under “the law of the court named in the volume contract,” 21st Session Report ¶ 216 (Jan. 2008), which would presumably have improved the probability that the choice-of-court agreement would be found effective.

enforcement against a non-consenting third party,<sup>128</sup> the rest of article 67's requirements will be irrelevant.<sup>129</sup>

### C. Post-Dispute Agreements and Waiver

Perhaps the least controversial provision in the entire chapter is article 72, which recognizes two additional situations in which exclusive choice-of-court agreements are enforced. Article 72(1) allows the parties to a dispute to agree after the dispute has arisen to resolve it in “any competent court.”<sup>130</sup> Substantially the same provision appears in the Hamburg Rules.<sup>131</sup> Although the effect is the enforcement of an exclusive choice-of-court agreement, that result is entirely consistent with the general rule of the chapter.<sup>132</sup> Article 66 preserves the claimant's ability to select a reasonable forum in which to resolve a cargo dispute until the claimant can make an informed choice based on the circumstances of the loss, damage, or delay. Once the dispute arises, the claimant must make a choice. Usually the claimant chooses the forum by filing suit in a particular court. Article 72(1) simply permits the claimant to choose by concluding a post-dispute agreement with the carrier.<sup>133</sup>

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<sup>128</sup> As a practical matter, article 67(2)(d) essentially gives a country the ability to opt out of article 67(2). A nation whose national law does not allow a third party to be bound by an exclusive choice-of-court agreement — or a nation that amends its national law so as not to allow a third party to be bound by an exclusive choice-of-court agreement in this situation — can choose to be bound by the rest of the jurisdiction chapter and limit article 67 to its effect on the immediate parties to a volume contract.

<sup>129</sup> Some legal systems will avoid the two extremes in favor of a middle position in which an exclusive choice-of-court agreement is binding on a third party only in some circumstances. For those systems, the impact of article 67(2)(d) will be to impose a cumulative set of requirements. The agreement will bind the third party only if the requirements of both article 67(2) and national law are satisfied. *See generally, e.g.*, 16th Session Report ¶ 31 (Fall 2005).

<sup>130</sup> *See supra* notes 38-41 and accompanying text (discussing the meaning of “competent court”).

<sup>131</sup> *See* Hamburg Rules art. 21(5).

<sup>132</sup> *See supra* notes 34-88 and accompanying text.

<sup>133</sup> Given that the claimant could settle the case entirely at that point, which waives the right to any further proceedings in any forum, it should not be surprising that the claimant is permitted to waive the right to further proceedings in any forum other than the one on which the parties agreed.

Article 72(1) at first blush may seem superfluous. If the claimant wants the case to be resolved in a particular forum, why not simply file suit there? Many explanations are possible. Most obviously, the parties may want to resolve the case in a forum that would not otherwise be open to the claimant. Or the claimant may obtain some benefit from the carrier in return for agreeing to a compromise forum. Or the claimant may obtain some benefit from committing to a particular forum before it is prepared to file the suit. Or it may well be some combination of independent explanations. Whatever the explanation, a post-dispute agreement is enforceable.

Article 72(1) recognizes explicit post-dispute agreements,<sup>134</sup> but sometimes the parties informally or implicitly agree to resolve a dispute in a particular forum. Although no written evidence of the agreement exists, the defendant's failure to contest jurisdiction in accordance with the local procedural rules is nevertheless strong evidence that the defendant was in fact part of the agreement. Article 72(2) was added to recognize these informal or implicit post-dispute agreements.<sup>135</sup>

## **VII. Actions Against Maritime Performing Parties**

Until now, the focus here has been on actions against the “carrier,” meaning the party that contracts with the shipper.<sup>136</sup> In many transactions, however, the carrier itself performs none of the carriage but instead subcontracts with “performing parties”<sup>137</sup> to do the actual work. In virtually every transaction, the carrier will subcontract at least a portion of the performance.

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<sup>134</sup> See *supra* notes 130-133 and accompanying text.

<sup>135</sup> See 16th Session Report ¶¶ 62, 65-69 (Fall 2005).

<sup>136</sup> Rotterdam Rules art. 1(5).

<sup>137</sup> Article 1(6) defines “performing party.”

Article 19 creates a direct cause of action against responsible maritime performing parties<sup>138</sup> to permit a cargo claimant to recover directly from the person that actually damages the goods. As a result, chapter 14 must address the jurisdictional issues that arise in these actions.

#### **A. The List of Permissible Forums**

A forum that has a significant connection to the transaction as a whole may have no connection whatsoever with a performing party's portion of the transaction. On a multimodal shipment from Berlin to Chicago, for example, the place of receipt (Berlin) has nothing to do with the stevedore's performance at the port of unloading. Thus it would be inappropriate to use the list of permissible forums that was created for an action against the carrier to define the permissible forums for an action in this very different context. Article 68 therefore creates an analogous list of permissible forums expressly for actions against a maritime performing party.<sup>139</sup>

The list of permissible forums for maritime performing parties has only two categories:

- (1) Just as a carrier can reasonably be expected to defend an action in its domicile,<sup>140</sup> so a maritime performing party can reasonably be expected to defend an action in its domicile.<sup>141</sup>
- (2) Just as a carrier can reasonably be expected to defend an action in the places in which it performs (or agrees to perform) the contract of carriage (the place of receipt, the ports of loading and discharge, and the place of delivery),<sup>142</sup> so a maritime performing party can reasonably be

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<sup>138</sup> Article 1(7) defines "maritime performing party."

<sup>139</sup> Article 68 can be limited to the context of maritime performing parties because the Convention does not provide for an action against other performing parties (such as inland carriers).

<sup>140</sup> See *supra* notes 51-55 and accompanying text.

<sup>141</sup> Rotterdam Rules art. 68(a).

<sup>142</sup> See *supra* notes 56-76 and accompanying text.

expected to defend an action in the places in which it performs the contract of carriage. For a land-based maritime performing party (such as a stevedore or a terminal operator), that place will be the port<sup>143</sup> in which it conducts business — “the port in which the maritime performing party performs its activities with respect to the goods.”<sup>144</sup> For an ocean-focused maritime performing party (such as an ocean carrier), the relevant places will be the port in which it receives the goods and the port in which it delivers them.<sup>145</sup>

The list of permissible forums for actions against a maritime performing party is shorter than the corresponding list for actions against a carrier because some of the forums on the carrier’s list are unnecessary for maritime performing parties. The place of receipt and the port of loading can be combined because a maritime performing party, by definition, will receive the goods in the port of loading.<sup>146</sup> Similarly, the place of delivery and the port of discharge can be combined. Finally, the forum designated in the contract for the resolution of disputes<sup>147</sup> can be omitted entirely. Because maritime performing parties are the carrier’s subcontractors, they have no direct contractual relationship with the shipper and thus no opportunity to conclude a choice-of-court agreement.

If a maritime performing party is domiciled and operates in a nation that is not a party to the Rotterdam Rules, no court will qualify for the list of permissible forums because no “competent”<sup>148</sup> court will satisfy the criteria.<sup>149</sup> In that case, article 68 does not guarantee the cargo

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<sup>143</sup> By definition, a maritime performing party operates either within a port area or on the ocean between ports. *See* Rotterdam Rules art. 1(7). Thus the list of permissible forums can focus on the ports.

<sup>144</sup> Rotterdam Rules art. 68(b).

<sup>145</sup> Rotterdam Rules art. 68(b).

<sup>146</sup> *See supra* notes 143-145 and accompanying text.

<sup>147</sup> *See supra* notes 77-82 and accompanying text.

<sup>148</sup> *See supra* notes 38-41 and accompanying text.

claimant a choice of forum in an action against the maritime performing party (or in a joint action against the carrier and a maritime performing party). As a practical matter, the cargo claimant must seek any recovery from the maritime performing party in a nation that is not bound to apply the Rotterdam Rules (or at least that is not bound to apply the jurisdiction chapter). Moreover, the action itself would be unlikely to be decided under the Convention. Under the circumstances, however, that result would probably be appropriate because the maritime performing party (and its performance) had no connection with the Convention.

## **B. Consolidation**

Although articles 66 and 68 provide distinct lists of permissible forums for actions against carriers and maritime performing parties, a claimant will often wish to sue both potential defendants in a single action. To do so, the claimant must bring its action in a forum that is included on both of the lists, if there is such a common forum.<sup>150</sup> As long as the maritime performing party operates in either the port of loading or the port of discharge,<sup>151</sup> that port will be on both lists if it is in a country that is a party to the Rotterdam Rules.<sup>152</sup> But this will not always be the case. If no forum is on both lists, the claimant must bring its action against both defendants in a forum that is on the list for maritime performing parties in the second category,<sup>153</sup> meaning a port in which the maritime performing party does business.<sup>154</sup> As a practical

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<sup>149</sup> See generally, e.g., 16th Session Report ¶ 43 (Fall 2005); cf. *supra* note 42 (noting the unusual situation in which no court may qualify as a permissible forum under article 66).

<sup>150</sup> Rotterdam Rules art. 71(1).

<sup>151</sup> See *supra* notes 61-72 and accompanying text.

<sup>152</sup> Cf. *supra* note 42.

<sup>153</sup> The first category covers places that qualify as the maritime performing party's "domicile." See Rotterdam Rules art. 68(a); see also *supra* text at notes 140-141.

<sup>154</sup> Rotterdam Rules art. 71(1).



matter, this will be a port other than the ports of loading and discharge (which would be on the list for carriers), and thus it is likely to be a port of transshipment.<sup>155</sup>

### VIII. Additional Bases of Jurisdiction

In return for the claimant's right (as a general rule) to choose a reasonable forum in which to bring a cargo action against the carrier<sup>156</sup> or a maritime performing party,<sup>157</sup> article 69 generally protects the carrier and maritime performing parties from judicial proceedings in any other forum. The general rule, in short, is that there are no additional bases of jurisdiction.

The general rule of article 69 is subject to several exceptions that permit a claimant, under certain circumstances, to sue the carrier in a court that is not included on the general list of permissible forums. Some of these exceptions have already been discussed. If the parties explicitly or implicitly conclude a post-dispute agreement to resolve their dispute in some other forum,<sup>158</sup> for example, the suit can proceed only in that forum (which need not be on the permissible list).<sup>159</sup> Or if the claimant sues the carrier and a maritime performing party in a single

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<sup>155</sup> Some have criticized this provision, and even the chapter as a whole, as being too complex. (Once again, the criticism has most often been heard from those who did not participate in the full project. *Cf. supra* note 29.) But neither this provision nor the chapter as a whole is more complex than the industry or the needs of that industry. We could have had a very simple solution, such as “enforce all choice-of-court clauses” or “ban all choice-of-court clauses.” But neither of these simple solutions would have accomplished the desired goal. *See supra* note 29. Or we could have simplified the chapter by omitting any provision to address the issue of maritime performing parties. But then we would not have met the needs of an industry in which performing parties do the overwhelming majority of the carrier's actual work.

<sup>156</sup> *See supra* notes 34-88 and accompanying text.

<sup>157</sup> *See supra* notes 136-154 and accompanying text.

<sup>158</sup> *See supra* notes 130-135 and accompanying text.

<sup>159</sup> *See Rotterdam Rules art. 72.*

action,<sup>160</sup> the carrier will sometimes be subject to suit in a forum that is on the permissible list only for the maritime performing party.<sup>161</sup>

The most significant exception to the general rule is required by the Arrest Convention.<sup>162</sup> Under article 70, the Rotterdam Rules do not interfere with any “provisional or protective measures.” Thus a claimant pursuing an action in a forum on the permissible list is free to seek security in furtherance of that action in another forum that is not on the permissible list. But the Rotterdam Rules do not authorize the court in which the provisional or protective measure was taken to assert jurisdiction over the merits on that basis.<sup>163</sup> In other words, a claimant may arrest a carrier’s vessel wherever it may be found to obtain security for its claim. The mere fact of the arrest, however, does not by itself give the arresting court the power to decide the merits of the case. If an international convention binding on that court grants jurisdiction over the merits based on the arrest — as the widely applicable Arrest Convention does<sup>164</sup> — then the Rotterdam Rules will recognize that jurisdiction in order to avoid a conflict of conventions.<sup>165</sup>

## IX. Recognition and Enforcement of Foreign Decisions

The Convention effectively leaves the recognition and enforcement of judgments to the national law of the country whose courts are asked to recognize and enforce a decision. Article 73 appears on cursory examination to require the courts in a country that has elected to be bound

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<sup>160</sup> See *supra* notes 150-154 and accompanying text.

<sup>161</sup> See Rotterdam Rules art. 71(1).

<sup>162</sup> See International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, 10 May 1952; *cf.* International Convention on Arrest of Ships, 12 Mar. 1999 (not yet in force).

<sup>163</sup> Of course the court may assert jurisdiction over the merits if it is on the permissible list or its jurisdiction is otherwise justified under chapter 14. *Cf.* Rotterdam Rules art. 70(a).

<sup>164</sup> See 1952 Arrest Convention art. 7(1); *cf.* 1999 Arrest Convention art. 7(1).

<sup>165</sup> Rotterdam Rules art. 70(b). See, e.g., 15th Session Report ¶ 131 (Spring 2005); 16th Session Report ¶ 48 (Fall 2005). This is one of several provisions in the Rotterdam Rules intended to avoid any conflict of conventions.

by chapter 14 to recognize and enforce the decisions of courts in other such countries that have jurisdiction under the Convention. But that recognition and enforcement is limited to what the law of the recognizing country provides,<sup>166</sup> and the “court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to its law.”<sup>167</sup> The article accordingly requires nothing that the relevant national law does not provide.<sup>168</sup> It simply facilitates recognition and enforcement for those countries that require a treaty basis to recognize and enforce a foreign decision.<sup>169</sup>

## X. Conclusion

I conclude with the confession that the jurisdiction chapter, like the Rotterdam Rules as a whole, is not perfect. I reject the common criticisms that some commentators have raised,<sup>170</sup> but I nevertheless recognize that we are dealing with a human creation and no human creation is perfect. But the jurisdiction chapter, like the Rotterdam Rules as a whole, is the best that could be achieved subject to existing constraints. Of course the frailty of the drafters was one constraint, and the need to complete the project in timely fashion was another. But the need to achieve a broadly acceptable compromise in the face of strongly held and divergent views was an even greater constraint. In the end, the jurisdiction chapter, like the Rotterdam Rules as a whole, achieved a broadly acceptable compromise that advanced international uniformity on some important (albeit not all) aspects of the subject. Ratifying the convention will be an im-

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<sup>166</sup> Rotterdam Rules art. 73(1).

<sup>167</sup> Rotterdam Rules art. 73(2). *See generally, e.g.*, 16th Session Report ¶ 71 (Fall 2005); 20th Session Report ¶ 199 (Fall 2007).

<sup>168</sup> The final paragraph of the article also preserves the rules applicable between member states of the European Union on the recognition and enforcement of each others’ judgments. *See* Rotterdam Rules art. 73(3).

<sup>169</sup> *See generally, e.g.*, 20th Session Report ¶ 199 (Fall 2007).

<sup>170</sup> *See supra* notes 29 and 155.

portant step toward restoring international uniformity to the rules governing the carriage of goods in maritime commerce.