Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or The Definition of Fora Conveniens Set Forth in the Rotterdam Rules

CHESTER D. HOOPER*

SUMMARY

I. SCOPE OF THE ROTTERDAM RULES 418
II. THE VOLUME CONTRACT EXCEPTION 420
III. THE CHARTERPARTY EXCEPTION 421
IV. RESTORATION TO A GREAT EXTENT THE LAW OF THE UNITED STATES BEFORE *SKY REEFER* 422
V. CONCLUSION 426

The Rotterdam Rules[1] will, with a few practical exceptions, allow cargo interests to litigate or arbitrate cargo loss or damage claims at a place convenient for cargo interests. Cargo interests will generally be able to choose to litigate or arbitrate in one of the following places:

(i) the domicile of the carrier;

---

* Member, Holland & Knight LLP; Past President, The Maritime Law Association of the United States; member of the United States Delegation to the United Nations Commission on International Trade Law (UNCITRAL) Transport Law Working Group; B.A. 1963, Hobart College; J.D. 1970, Albany Law School of Union University.

The views expressed in this paper are the personal views of the author. They are not necessarily the views of the MLA or of the United States.

The author gratefully acknowledges the valuable assistance of Lissa Schaupp, Holland & Knight LLP, B.A. 2002, Columbia University, J.D. 2005, Fordham Law School and Joakim N. Andersson, L.L.M. 2008, Lund University, Sweden.

1. Press Release, General Assembly, General Assembly Adopts Convention on Contracts on the International Carriage of Goods Wholly or Partly by Sea, UNIS/L/125 (Dec. 12, 2008), *available at* http://www.unis.unvienna.org/unis/pressrels/2008/unisl125.html. The General Assembly of the United Nations approved the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea on December 11, 2008. It will be open for signature at a signing ceremony to be held in Rotterdam, The Netherlands from September 21 through September 23, 2009. The Convention will probably be known as the Rotterdam Rules. This article will refer to the Convention as the "Rotterdam Rules."

(ii) the place of receipt agreed in the contract of carriage;

(iii) the place of delivery agreed in the contract of carriage; or

(iv) the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship . . . .[2]

If the contract of carriage contains a choice of court clause, the cargo claimants may choose to litigate in any of the above places or in the place designated in the choice of court clause. If the contract of carriage contains no choice of court or arbitration clause, the cargo claimant may choose to litigate in one of the above places. If the contract of carriage includes an arbitration clause, the cargo claimant must arbitrate but may choose to arbitrate in the place set forth in the arbitration clause, or one of the above places.

Cargo claimants may also file suit against a maritime performing party in a place relevant to the maritime performing party.[3]

There are several exceptions to the above provisions. Practitioners should be familiar with the exceptions to understand the jurisdiction and arbitration scheme of the Rotterdam Rules. Practitioners also should be familiar with the scope of application of the Rotterdam Rules to understand the jurisdiction and arbitration scheme. Parties to contracts not within the scope of the Rotterdam Rules will have freedom to choose any place they wish to litigate or arbitrate.

I. SCOPE OF THE ROTTERDAM RULES

The scope of application is set forth in Chapter 2, Articles 5, 6 and 7:

Chapter 2. Scope Of Application

Article 5. General scope of application

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:[4]

(a) The place of receipt;

(b) The port of loading;

(c) The place of delivery; or

2. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, G.A. Res. 63/122, ch. 14, art. 66(a), ch. 15, art. 75(2)(b), U.N. Doc. A/RES/63/122 (Dec. 11, 2008) [hereinafter Rotterdam Rules].

3. *Id.* ch. 14, art. 68 (providing that actions may be commenced in the domicile of the maritime performing party or in "[t]he port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.").

4. "Contracting State" refers to a state that has enacted, and is governed by, the Rotterdam Rules.

(d) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

Article 6
Specific exclusions

1. This Convention does not apply to the following contracts in liner transportation:

(a) Charterparties; and

(b) Other contracts for the use of a ship or any space thereon.

2. This Convention does not apply to contracts of carriage in non-liner transportation except when:

(a) There is no charterparty or other contract between the parties for the use of a ship or of any space thereon; and

(b) A transport document or an electronic transport record is issued.

Article 7
Application to certain parties

Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charterparty or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.[5]

It may be simpler to realize that the scope includes, and thus affects, choice of court or arbitration clauses in all contracts in the liner trade except charterparties or other contracts for the use of space on a ship. It does not include any contract in the non-liner (tramp) trade except a transport document or electronic record that is not between parties to a charterparty or other contract for use of space on a ship.

The scope in the liner trade has thus been expanded beyond bills of lading or similar documents of title to all contracts except charterparties and other contracts for the use of space on a ship.

The scope in the non-liner trade is confined to transport documents or electronic records that are not between parties to a charterparty or contract for the use of space on a ship.

Thus, the Rotterdam Rules would not apply to a slot charterparty in either the liner or non-liner trade. The Rotterdam Rules would apply to contracts not evidenced by a transport document or electronic record, as may be common in the

5. Rotterdam Rules, *supra* note 2, ch. 2, arts. 6–7.

ferry trade. The Rotterdam Rules would not apply to such a contract in the non-liner trade.

The exceptions to the Jurisdiction Chapter, which covers choice of court clauses, and to the Arbitration Chapter, which covers arbitration provisions, are similar. The exceptions may be found in volume contracts and in the non-liner (tramp) trade where a charterparty is present, even if the claimant is not a party to the charterparty.[6]

II. THE VOLUME CONTRACT EXCEPTION

Volume contracts have been referred to in the United States as "service contracts." They are very popular in the United States and have been said to apply to about 90% of the liner trade to or from the United States.

Parties to volume contracts were thought to be sophisticated parties of equal bargaining power, but many volume contracts negotiated in the United States at this time involve shippers with far more bargaining power than carriers. Many states involved in the UNCITRAL negotiations, however, feared that carriers would impose unfair volume contract provisions on small shippers. The article authored by Michael Sturley in this edition of the Journal explains the safeguards that have been built into the Rotterdam Rules to prevent such abuse.

Although the Rotterdam Rules give parties to volume contracts freedom to choose any place they wish to litigate or arbitrate their disputes, the Rules do not allow the same freedom to holders of transport documents or electronic records issued pursuant to volume contracts. A cargo claimant that is a third-party holder of a transport document or an electronic record could choose an Article 66 place to litigate or an Article 75 place to arbitrate, unless the parties to a volume contract satisfied an Article 67 or 76 requirement to extend the choice of forum clause or arbitration clause to that cargo claimant.

The holder of a transport document issued pursuant to a volume contract may be bound by the choice of forum or arbitration clause in the volume contract if certain requirements are met: the place chosen must be an Article 66 or 75 place; the choice of forum or arbitration clause must also be contained in the transport document or electronic record; the holder of the transport document or electronic record must be "given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and the law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement."[7]

---

6. *Id.* chs. 14–15.

7. *Id.* ch. 14, art. 67(2). *See id.* ch. 15, art. 75(4), for the similar arbitration provision of the Rotterdam Rules, which reads as follows:

> (a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article; (b) The agreement is contained in the transport document or electronic transport record; (c) The person to be bound is given timely and adequate notice of the place of arbitration; and (d) Applicable law permits that person to be bound by the arbitration agreement.

The Rotterdam Rules do not define "timely and adequate notice," nor did UNCITRAL Working Group III discuss a definition of those terms. A prominent statement on the face of a transport document or electronic record was thought by many involved in the UNCITRAL negotiations to constitute "timely and adequate" notice. The drafters realized that the purchaser of cargo often does not receive the transport document or electronic record until after it pays for the cargo. Thus, the cargo buyer may not learn of the choice of forum or arbitration provision until after it has paid for the cargo, but either the cargo seller or buyer will probably be a party to the volume contract and will know of the clause.

If a purchaser of cargo does not want the carrier to choose the Article 66 place to litigate or the Article 75 place to arbitrate, the purchaser should specify in a contract of sale or letter of credit that such clauses in the transport document or electronic record are not acceptable.

The volume contract will have been negotiated between the shipper and the carrier. The Rotterdam Rules define a carrier as "a person that enters into a contract of carriage with a shipper."[8] Under that definition, a receiver of the cargo could be both the consignee and the shipper. It is common for large U.S. importers of cargo to negotiate service or volume contracts with carriers.

Unless a negotiable transport document or electronic record is negotiated from one holder, not a party to the volume contract, to another non-party, one of the parties to the purchase and sale contract will have negotiated the volume contract and will be aware of the choice of forum or arbitration agreement.

If the receiver of the cargo negotiates the volume contract, the place of litigation or arbitration will likely be convenient to the receiver. The receiver will become the holder of the transport document or electronic record. If the shipper is the seller of the cargo and negotiated a volume contract including a choice of forum or arbitration clause with the carrier, the seller could advise the buyer of the clause.

These provisions improve the current law in the United States. At this time, a carrier may choose any place it wishes to litigate or arbitrate by placing a clause on the reverse side of a bill of lading. In all likelihood, under present law neither the sender nor the receiver of the cargo will be aware of such a clause unless loss or damage occurs.

III. THE CHARTERPARTY EXCEPTION

Charterparties (or other contracts for the use of a ship or any space on the ship) are outside the scope of the Rotterdam Rules and outside any restriction on choice of court clauses or arbitration clauses. An exception also exists for transport documents or electronic records that are issued pursuant to a charterparty or other contract for the use of a ship, or any space on a ship, to third parties. That exception is similar to the law in several U.S. circuits. A holder of a transport document or electronic record issued pursuant to a charterparty may bind its holder to the charterparty arbitration cause if certain conditions are met.[9]

8. *Id.* art. 1(5).

9. *See generally* Steel Warehouse Co. v. Abalone Shipping Ltd. of Nicosai, 141 F.3d 234 (5th Cir. 1998) (enforcing an arbitration clause in a charterparty because the party opposing the clause had constructive notice of the clause); Thyssen, Inc. v. M/V MARKOS N, 1999 A.M.C. 2515 (S.D.N.Y. 1999)

The transport document or electronic record must identify "the parties to and the date of the charterparty or other contract excluded from the application of [the Rotterdam Rules] . . . ,"[10] and it must incorporate "by specific reference the clause in the charterparty or other contract that contains the terms of the arbitration agreement."[11]

IV. RESTORATION TO A GREAT EXTENT THE LAW OF THE UNITED STATES BEFORE *SKY REEFER*

The Rotterdam Rules will restore to a great extent the holding of the en banc opinion authored by Judge Friendly in the case of *Indussa Corp. v. S.S. Ranborg, et al.*[12] It will provide the transportation industry with a clearer understanding of the place where claims for loss or damage may be resolved. The understanding will provide greater predictability than forum non conveniens concepts or the reasonableness standard announced by the Supreme Court in *M/S Bremen, et al. v. Zapata Off-Shore Co.*: "[f]orum-selection clauses . . . are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[13]

This vague "reasonable" standard was also used in both *Wm. H. Muller & Co., Inc. v. Swedish America Line, Ltd., et al.*[14] and *Indussa*.[15] The *Wm. H. Muller* court considered whether a clause requiring suit in Sweden was reasonable for a suit involving the loss of cargo when a Swedish built, owned, and crewed ship was lost at sea during a voyage from Gothenburg, Sweden to Philadelphia, Pennsylvania. The court noted, as if it were deciding a motion for forum non conveniens, that most of the evidence would be available in Sweden.[16] The *Indussa* court dealt with a $2,600 suit for damaged cargo that was carried from Antwerp, Belgium to San Francisco, California in 1963 aboard a Norwegian owned ship. The court reasoned that

(enforcing an arbitration clause under a theory of constructive notice when it was proved to exist by circumstantial evidence and was never received by the party opposing the clause); Lucky Metals Corp. v. M/V Ave, 1996 A.M.C. 265 (S.D.N.Y. 1995) (holding that the arbitration clause was clearly incorporated into the bill of lading because it required arbitration of any issue arising under the charterparty); Henkel, K.G. v. M/T Stolt Hippo, 1980 A.M.C. 2618 (S.D.N.Y. 1980) (holding that a bill of lading binds parties to an arbitration clause within, even though neither party signed the charterparty); Coastal States Trading, Inc. v. Zenith Navigation S.A., 446 F. Supp. 330 (S.D.N.Y. 1977) (holding that incorporation of an arbitration clause in the charterparty was sufficient to bind the parties to arbitrate even though a separate arbitration agreement was unenforceable); Midland Tar Distillers, Inc. v. M/T LOTOS, 362 F. Supp. 1311 (S.D.N.Y. 1973) (enforcing an arbitration clause because the clause plainly manifested the intent of the parties to arbitrate all disputes). *But see* Cont'l Fla. Materials, Inc. v. M/V Lamazon, 334 F. Supp. 2d 1294 (S.D.Fla. 2004) (holding that the charterparty containing the arbitration clause was not incorporated into the bill of lading because the bill of lading did not specifically reference the date of voyage); Macsteel Int'l USA Corp. v. M/V Jag Rani, 2004 A.M.C. 220 (S.D.N.Y. 2003) (requiring discovery by the parties to determine if the charterparty, and thus the arbitration clause, were incorporated into the bill of lading because the existing language was ambiguous); Cia. Platamon de Navegacion, S.A. v. Empresa Colombiana de Petroleos, 478 F. Supp. 66, (S.D.N.Y. 1979) (declining to enforce an arbitration clause in a charterparty that was not incorporated into the bill of lading).

10. Rotterdam Rules, *supra* note 2, art. 76(2).
11. *Id.*
12. 377 F.2d 200 (en banc) (2d Cir. 1967).
13. 407 U.S. 1, 9–10 (1972).
14. 224 F.2d 806, 808 (2d Cir. 1955).
15. *Indussa*, 377 F.2d 200.
16. *Muller*, 224 F.2d at 808.

requiring the plaintiff to travel to Norway to recover $2,600 would force the plaintiff to accept an unreasonably low settlement. Judge Friendly realized that the practical effect of the clause would be to reduce the carrier's liability in violation of § 3(8) of the Carriage of Goods by Sea Act (COGSA).[17]

The rationale of the *Indussa* court influenced U.S. courts' attitudes toward choice of forum clauses until the Supreme Court decided *Vimas Seguros of Reaseguros, S.A. v. M. V. Sky Reefer, et al.*[18] *Sky Reefer* noted the blanks left in COGSA by the Hague Rule drafters' decision to leave choice of forum legislation to each nation.[19] The Supreme Court, citing articles and briefs written by Professor Sturley, reasoned that limitations of the use of choice of forum clauses should be left to the legislature but that the legislature of the United States had not spoken to the issue. The Court noted that with regard to Section 3(8) of COGSA:

> The liability that may not be lessened is "liability for loss or damage . . . arising from negligence, fault, or failure in the duties or obligations provided in this section." The statute thus addresses the lessening of the specific liability imposed by the Act, without addressing the separate question of the means and costs of enforcing that liability.[20]

This rationale missed the practical effect of some choice of forum clauses. Judge Friendly realized that the *Indussa* choice of forum clause would reduce a carrier's liability. Clauses choosing a forum that was convenient or helpful to a plaintiff would obviously not reduce a carrier's liability. A plaintiff would not complain about such a clause.

The Supreme Court further noted that choice of forum clauses would be reasonable in some factual situations, but not in others:

> If the question whether a provision lessens liability were answered by reference to the costs and inconvenience of the cargo owner, there would be no principled basis for distinguishing national from foreign arbitration clauses. Even if it were reasonable to read §3(8) to make a distinction

---

17. *Indussa*, 377 F.2d at 201, 203; Carriage of Goods by Sea Act ch. 229, § 3(8), 49 Stat. 1207 (1936), *reprinted in* note following 46 U.S.C. § 30701 (*previously codified as* 46 U.S.C. app. § 1303(8)).

18. 515 U.S. 528 (1995).

19. Professor Michael F. Sturley, the Stanley D. and Sandra J. Rosenberg Centennial Professor at the University of Texas Law School, has written extensively on this subject. A good overview of the issue is provided in the brief amicus curiae that Professor Sturley wrote for the International Group of P&I Clubs in the *Sky Reefer* case. That brief refers to other authority on the issue, much of which was also authored by Professor Sturley. The citations for the articles are: Michael F. Sturley, *Forum Selection and Arbitration Clauses Under Section 3(8) of the U.S. Carriage of Goods by Sea Act: Statutory Intent and Judicial Interpretation*, *in* EKMETALLEYSE TOY PLOIOY KAI SYMBATIKE ELEYTHERIA: 20 DIETHNES SYNEDRIO NAYTIKOY DIKAIOY [SHIP'S OPERATION AND FREEDOM OF CONTRACT: SECOND INTERNATIONAL CONFERENCE ON MARITIME LAW] 141 (2000) (paper delivered in May 1995); Michael F. Sturley, *Bill of Lading Forum Selection Clauses in the United States: The Supreme Court Charts a New Course*, 1996 LLOYD'S MAR. & COM. L. Q. 164, *reprinted in* 1999 LLOYD'S MAR. & COM. L. Q. 1 (25TH ANNIVERSARY ISSUE); Michael F. Sturley, *Forum Selection Clauses in Cruise Line Tickets: An Update on Congressional Action "Overruling" the Supreme Court*, 24 J. MAR. L. & COM. 399 (1993); Michael F. Sturley, *Bill of Lading Choice of Forum Clauses: Comparisons Between United States and English Law*, 1992 LLOYD'S MAR. & COM. L. Q. 248; Michael F. Sturley, *Strengthening the Presumption of Validity for Choice of Forum Clauses: Carnival Cruise Lines v. Shute*, 23 J. MAR. L. & COM. 131 (1992).

20. *Sky Reefer*, 515 U.S. at 534.

> based on travel time, airfare, and hotel bills, these factors are not susceptible of a simple and enforceable distinction between domestic and foreign forums. Requiring a Seattle cargo owner to arbitrate in New York likely imposes more costs and burdens than a foreign arbitration clause requiring it to arbitrate in Vancouver. It would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier.
>
> Our reading of "lessening such liability" to exclude increases in the transaction costs of litigation also finds support in the goals of the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading, 51 Stat. 233 (1924) (Hague Rules), on which COGSA is modeled. Sixty-six countries, including the United States and Japan, are now parties to the Convention, see Department of State, Office of the Legal Adviser, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1994, p. 367 (June 1994), and it appears that none has interpreted its enactment of §3(8) of the Hague Rules to prohibit foreign forum selection clauses, see 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).[21]

The following cases represent just the tip of the iceberg of cases that could not be resolved in the United States after *Sky Reefer*: Korea,[22] China,[23] Croatia,[24] Egypt,[25] England,[26] Malta,[27] Germany,[28] London (arbitration),[29] Greece,[30] and Japan.[31] While

---

21. *Id*. at 536–37.

22. Courts in these cases have applied the reasoning developed in *Sky Reefer* and found that the foreign forum selection clauses, which gave Korean courts exclusive jurisdiction, were valid because they did not violate COGSA. *E.g.*, Fireman's Fund Ins. Co. v. M.V. DSR Atlantic, 131 F.3d 1336 (9th Cir. 1997); Stemcor USA v. Hyundai Merchant Marine Co., 386 F. Supp. 2d 229 (S.D.N.Y. 2005); Allianz Ins. Co. of Can. v. Cho Yang Shipping Co., 131 F. Supp. 2d 787 (E.D. Va. 2000); Int'l Marine Underwriters v. M/V Kasif Kalkavan, 989 F. Supp. 498 (S.D.N.Y. 1998); Union Steel America Co. v. M/V Sanko Spruce, 14 F. Supp. 2d 682 (D.N.J. 1998).

23. *E.g.*, Jewel Seafoods Ltd. v. M/V PEACE RIVER, 39 F. Supp. 2d 628, 632 (D.S.C. 1999) ("Under the *Sky Reefer* test, COGSA does not automatically invalidate foreign forum selection clauses. Instead, as the party seeking to avoid enforcement of the clause, Plaintiff bears the burden of proving that the otherwise applicable substantive law in China precludes statutory COGSA remedies or otherwise reduces [Defendant]'s obligations below what COGSA guarantees.").

24. *E.g.*, Pasztory v. Croatia Line, 918 F. Supp. 961 (E.D. Va. 1996) (applying the *Sky Reefer* test to enforce the foreign forum selection clause granting jurisdiction to Croatian courts).

25. *E.g.*, Nippon Fire & Marine Ins. v. M.V. EGASCO STAR, 899 F. Supp. 164, 167 (S.D.N.Y. 1995) (finding that Egyptian courts would provide a satisfactory remedy, since "Egypt [had] acceded to the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading . . . on which COGSA is modeled. . . .").

26. *E.g.*, Kelso Enterprises, Ltd. v. M/V WISIDA FROST, 8 F. Supp. 2d 1197, 1204 (C.D. Cal. 1998) (finding that the foreign forum selection clause granting jurisdiction to English courts was enforceable, despite the plaintiff's argument that English law limiting liability to $1.3m did not violate "COGSA's prohibition against limiting carrier's liability. . . .").

27. *E.g.*, Acciai Speciali Terni USA, Inc. v. M/V BERANE, 181 F. Supp. 2d 458 (D. Md. 2002) (finding that enforcement of the foreign forum selection clause was not unreasonable, pursuant to the test developed by the court in *Sky Reefer*).

most, if not all, the fora referred to above may be perfectly able to resolve a cargo dispute, none of the fora were chosen by cargo plaintiffs. Cargo plaintiffs have probably accepted unreasonably low settlements rather than commence suit or arbitration in the "chosen" forum.

In order to study the effects of *Sky Reefer*, Professors Force and Davies questioned attorneys for parties involved in cases dismissed by United States courts to uphold choice of forum clauses. They concluded, "Overall, the answers to question[s] . . . clearly show that plaintiffs settle at a considerable discount after dismissal (or stay) from a court in the United States."[32]

Professors Force and Davies also described an example of an inequitable result in a case that time-barred a plaintiff from bringing suit in a forum designated in a charterparty incorporated into a bill of lading, but which the carrier refused to disclose to the plaintiff.[33] The plaintiff had filed a timely action in another forum without knowledge of the choice of forum clause.[34]

Time-bar problems could be resolved if motions to dismiss in favor of chosen fora were treated as they used to be treated—as forum non conveniens motions.[35] Certainly, a choice of forum clause cannot oust a U.S. court from its jurisdiction. It may, however, cause a court to dismiss a case because the choice of forum clause amounted to an agreement that all fora other than the chosen forum were fora non conveniens. The non-chosen forum should condition a dismissal on the right of the plaintiff to file a timely action in the chosen forum as long as the suit brought in the non-chosen forum was timely.

Forum non conveniens is far more subjective, and thus more difficult to predict, than the Rotterdam Rules' scope, jurisdiction, and arbitration provisions. The Rotterdam Rules are silent on the effect, if any, of the jurisdiction and arbitration provisions on the doctrine of forum non conveniens. Any of the five places at which the Rotterdam Rules will permit cargo plaintiffs to bring suit would likely be considered a convenient forum, the jurisdiction of which would probably not be declined on the grounds of forum non conveniens.

The jurisdiction and arbitration provisions of the Rotterdam Rules will be "opt in" provisions. Many nations that participated in drafting the Rotterdam Rules

---

28. *E.g.*, Chisso America, Inc. v. M/V HANJIN OSAKA, 307 F. Supp. 2d 621 (D.N.J. 2003) (enforcing a forum selection clause because it was mandatory, not permissive); Jockey Intern., Inc. v. M/V "LEVERKUSEN EXPRESS," 217 F. Supp. 2d 447, 457 (S.D.N.Y. 2002) (holding that the forum selection clause in the express cargo bill of lading [ECB] was valid and enforceable, and therefore required "claims arising out of the ECB to be brought in the courts of Hamburg, Germany. . . .").

29. *E.g.*, Ventura Maritime Co., Ltd. v. ADM Export Co., 44 F. Supp. 2d 804 (E.D. La. 1999) (holding that the bill of lading contained an enforceable arbitration clause and therefore required the defendants to submit to arbitration in London).

30. *E.g.*, Marra v. Papandreou, 216 F.3d 1119 (D.C. Cir. 2000) (finding that a forum selection clause that required plaintiff to bring suit in Greece was unenforceable).

31. *E.g.*, Talatala v. Nippon Yusen Kaisha Corp., 974 F. Supp. 1321 (D. Haw. 1997) (finding that a forum selection clause that required action to be brought in Japan was unenforceable).

32. Robert Force & Martin Davies, *Forum Selection Clauses in International Maritime Contracts*, *in* JURISDICTION AND FORUM SELECTION IN INTERNATIONAL LAW 1, 10 (Martin Davies ed., 2005).

33. *Id.* at 12–17 (citing Thyssen Inc. v. Calypso Shipping Corp. SA, 2 Lloyd's Rep. 243, 244 (Q.B.D. Comm. Ct. 2000)).

34. *Id.* at 12–13 (citing Thyssen Inc. v. M/V Markos N, 1999 A.M.C. 2515 (S.D.N.Y. 1999)).

35. Cerro De Pasco Corp. v. Knut Knutsen O.A.S., 187 F.2d 990 (2d Cir. 1951).

opposed any provision for jurisdiction or arbitration. They thought that the parties to contracts for carriage should have complete freedom to choose the place of litigation or arbitration, even if the document that evidenced the contract of carriage was drafted by the carrier and was, in actuality, a contract of adhesion. In addition, no member of the European Union could ratify a treaty that included a jurisdiction provision unless the European Commission agreed to the jurisdiction provision. In fact, no member of the European Union could speak at the UNCITRAL Working Group Plenary Sessions on the subject of jurisdiction. Only representatives of the European Commission could speak to those issues.

The "opt in" provisions, which may be found at Articles 74 and 78, provide that the Jurisdiction or Arbitration chapters will only bind Contracting States that declare themselves to be bound by it.[36]

V. CONCLUSION

The Jurisdiction and Arbitration chapters the Rotterdam Rules are a significant improvement on the present law of the United States. Cargo interests generally will be able to commence suit or arbitration in a place convenient for them. Cargo interests also will realize that if a volume contract is involved, the volume contract might include one of the Article 66 or 75 places to litigate or arbitrate. If a charterparty is involved, the charterparty might include an arbitration clause.

The United States should opt into both the Jurisdiction and Arbitration chapters to take advantage of the improvements offered by both of the chapters.

36. Rotterdam Rules, *supra* note 2, at chs. 14–15.