

# FOREIGN JURISDICTION AND ARBITRATION CLAUSES IN THE NEW ZEALAND MARITIME CONTEXT

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## 1 INTRODUCTION AND SCOPE

### 1.1 Introduction

Parties to a contract have the freedom to choose the terms of their agreement. This is the keystone to the doctrine of party autonomy in the law of contract. The chosen terms may include an indicated forum where disputes under the contract are to be adjudicated. A court should enforce the parties' terms equally, including foreign jurisdiction and arbitration agreements. However, a court may be prevented from upholding these terms by legislation. This is the situation in New Zealand in relation to bills of lading evidencing the sea carriage contract. Under section 210(1) of the *Maritime Transport Act 1994* (the Act) the New Zealand courts will not recognise a clause in a bill of lading stipulating that dispute resolution must take place in a foreign forum.

In contrast, where the contract provides for a foreign arbitration agreement in the event of a dispute between the contracting parties, this choice will be respected by the New Zealand court and will be upheld by virtue of section 210(2) of the Act. The difference in treatment between these two types of dispute resolution process will be discussed in this paper. Whether the regulation of foreign jurisdiction clauses is justifiable will be assessed. An assessment of the UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] (the Draft Convention)<sup>1</sup> will be made.

It is important to balance both shippers' and carriers' interests when seeking a solution in this area of the law. I strongly support party autonomy and disagree with the idea of a third party, in this case the legislature, intervening to regulate the terms of the parties' agreement. In my opinion, this creates commercial uncertainty as parties will not always be aware of the overriding effect of such national legislation upon the law governing the contract. It also underestimates the commercial acumen of the involved parties. However, I do recognise the unique transferable nature of a bill of lading and its effect of adding terms to the carriage contract. Limitation of carrier liability has been regulated by the Hague Rules since 1924. This adds some weight to the argument that jurisdiction and arbitration clauses should also be regulated, but I would argue that regulation can be achieved with as little intervention to the parties' chosen forum as possible. In my view, the current international conventions regulating jurisdiction and arbitration are too intrusive. As a result, I would advocate minimum regulation in this area. The extent of such minimum regulation will become evident in this paper.

### 1.2 The Maritime Context

This paper examines foreign jurisdiction and arbitration clauses in the New Zealand maritime context. A comprehensive survey of the entire area is not possible here. As a result, the scope of this paper is limited to bills of lading issued directly by the shipowner or not subject to the terms of a charterparty. This paper also covers bills of lading held by third parties that successfully incorporate terms of a specified charterparty. The bill of lading has a significant impact in these circumstances upon the party in whose hands it lies. The nature of these documents has an important effect upon jurisdiction or arbitration clauses contained in them and is the basis for many of the concerns arising in this area.

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<sup>1</sup> Working Group III (Transport Law), *Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]*, A/CN.9/WF.III/WP.81, Nineteenth Session, New York, 16-21 April 2007.

### 1.2.1 The nature of a bill of lading

A bill of lading has three functions:

1. as evidence of the contract of carriage;
2. as a receipt for goods which have been shipped; and
3. as a document of title.

Where the carriage agreement is not subject to a charterparty, the bill of lading will provide the best evidence of the terms of that carriage agreement. These will normally have been agreed in advance of the issue of the bill, either orally, by letter or phone, or by presentation of the goods.<sup>2</sup> However, terms in a carriage agreement will override contrary statements in a bill of lading,<sup>3</sup> unless the parties agree beforehand that the terms in the bill of lading will supersede any earlier contractual provisions.<sup>4</sup> When the bill of lading has been transferred to a third party in good faith, the terms contained in the bill will constitute the carriage contract between the carrier and the third party transferee.<sup>5</sup>

A bill of lading also acts as a receipt for the goods shipped. This is particularly important in situations where the bill is issued to the charterer, as it will be the charterparty that governs the carriage, and not the terms in the bill of lading.<sup>6</sup> In its function as a receipt, the bill will also be prima facie evidence of certain particulars concerning the goods received, such as quality and quantity.<sup>7</sup>

Lastly, the bill of lading gives the holder the right to sue for possession of the goods. This right is transferable, so that the right continues in the event that bill of lading is acquired by another party. However, it is incorrect to say that the bill of lading represents title in the goods. A person not owning the shipped goods may still hold the bill and will be able to sue for possession.<sup>8</sup>

### 1.2.2 Bills of lading issued directly by the shipowner or not pursuant to a charterparty

The bill of lading provides *best* evidence of the carriage agreement where it is issued directly to the shipper, by the shipowner or charterer, and is not subject to the terms of a charterparty. This is a unique position in the law of contract, as the bill of lading may add terms to the earlier agreement. Furthermore, the bill will often be the only document containing written terms of the contractual relationship and will, therefore, provide the best evidence of the terms of agreement.<sup>9</sup> It can be difficult for a contesting party to displace the burden of proof that other terms should override those in the bill of lading.<sup>10</sup> Whether a jurisdiction or arbitration clause in the bill of lading has been validly incorporated by the bill of lading into the contract of carriage will depend on the governing law.<sup>11</sup> Even if such a term is validly incorporated, national legislation may render this type of term null, void or inoperative. This is the situation in New Zealand and this paper seeks to ascertain why, and whether such results are justified.

### 1.2.3 Bills of lading issued to third parties incorporating terms from a charterparty

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<sup>2</sup> Myburgh, P, 'Transport Law: New Zealand' in Blanpain, R (ed), *International Encyclopedia of Laws* (2002), 147; Gaskell, N, Asariotis, R, and Baatz, Y, *Bills of Lading: Law and Contracts* (2000), 41-42.

<sup>3</sup> Myburgh, above n 2, 147.

<sup>4</sup> Gaskell et al, above n 2, 69-74.

<sup>5</sup> Myburgh, above n 2, 148.

<sup>6</sup> Ibid.

<sup>7</sup> The Act, Article 3(4), Schedule 5. The International Convention for the unification of certain rules of law relating to bills of lading and protocol of signature "Hague Rules 1924" (Hague Rules); The Protocol to amend the International Convention for the unification of certain rules of law relating to bills of lading 25 August 1924 "Visby Rules" and the Protocol to amend the International Convention for the unification of certain rules relating to bills of lading as modified by the Amending Protocol of 23 February 1968 (SDR Protocol) (including the Hague Rules, Hague-Visby Rules); enacted into New Zealand in the Act, Article 3(4), Schedule 5.

<sup>8</sup> Myburgh, above n 2, 149.

<sup>9</sup> Ibid 147.

<sup>10</sup> Wilson, J, *Carriage of Goods by Sea* (5<sup>th</sup> Ed, 2004), 130.

<sup>11</sup> Hill, J, *International Commercial Disputes in English Courts* (3<sup>rd</sup> Ed, 2005), 301.

The bill of lading may include the terms of a charterparty when it is issued or transferred to a third party consignee. The terms must have been validly incorporated, which will occur when the relevant terms are to be deemed, or are consistent with those contained in the bill of lading.<sup>12</sup> Jurisdiction clauses do not pose a problem but arbitration clauses require more attention in order to be validly incorporated into the bill of lading held by a third party.<sup>13</sup>

#### 1.2.4 Scope of the paper

This survey does not cover jurisdiction or arbitration clauses in charterparties where bills of lading have been issued to the charterer. In that case, the charterparty is the contract of carriage and the bill of lading is merely a receipt.<sup>14</sup> This is the position in the Hague-Visby Rules which do not apply to charterparties, but do apply to bills of lading issued pursuant to a charterparty, which have since become the contract of carriage.<sup>15</sup>

This confinement of the topic also relates to the scope of section 210(1) and (2) of the Act, which regulates jurisdiction clauses in “bills of lading or a similar document of title”.<sup>16</sup> There is no definition of what exactly constitutes a bill of lading in either the Act or the *Mercantile Law Act 1908*. However, it is evident from the description in section 210(1) of the Act that “bill of lading” in the New Zealand context does not include charterparties.

While the Act denies the effect of foreign jurisdiction clauses in bills of lading, it does not prevent the courts from giving effect to foreign jurisdiction clauses in charterparties. This approach is inconsistent, and is not followed in Australia, where the relevant legislation appears to encompass charterparties. It is arguable that the exclusion of charterparties from the New Zealand legislation is acceptable, due to the different nature of a charter party as opposed to a bill of lading. A charterparty is normally directly agreed between two commercial parties with equal bargaining power. Greater consideration of the contractual documents will take place before the rights are assigned to a third party. A bill of lading, in contrast, is transferable between future consignees. There will be less opportunity to view and agree to the terms contained in the bill. A bill of lading is already subject to regulation, in regards to limitation of liability, as the carrier will often be in a stronger position than the cargo interest.

#### 1.2.5 The *sui generis* nature of bills of lading

As demonstrated above, bills of lading are unique in that their contents have the ability to constitute terms of a carriage contract after the agreement has been formed. This is in spite of the fact that it is the carrier who is the sole signatory on the bill.<sup>17</sup> The bill of lading has developed its own unique status in law and it is important to bear this in mind when considering impingements upon the doctrine of party autonomy.

## 2 CONTRACTUAL FREEDOM TO MANDATE THE LOCATION FOR DISPUTE RESOLUTION

### 2.1 General Principles

Freedom of contract and party autonomy are fundamental concepts of contract law. Freedom of contract allows parties to create mutual obligations.<sup>18</sup> A contract can be made for almost any type of obligation. Alongside this first principle is party autonomy, where the parties can choose the terms to put into an

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<sup>12</sup> Myburgh, above n 2, 151.

<sup>13</sup> Boyd, S, Burrows, A, and Foxton, D, *Scrutton on Charterparties and Bills of Lading* (20<sup>th</sup> Ed, 1996), 79-80.

<sup>14</sup> Myburgh, above n 2, 150.

<sup>15</sup> The Hague-Visby Rules Article 1(b), Schedule 5 of the Act; Myburgh, above n 2, 151.

<sup>16</sup> A “similar document of title” is taken to include seaway bills and ship’s delivery orders by virtue of the *Mercantile Law Act 1908* (NZ), section 13(1).

<sup>17</sup> *The Ardennes* [1951] 1 KB 55, 59.

<sup>18</sup> Garner, B (ed.), ‘Freedom of Contract’ in *Black’s Law Dictionary* (8<sup>th</sup> Ed, 2004).

agreement. The parties must be free to choose and to voluntarily agree to be bound by the contract between them.

A necessary corollary of these two principles is sanctity of contract. Sanctity of contract provides that a court should enforce the chosen terms of the agreement.<sup>19</sup> These three principles are self-perpetuating: contracts are held sacred because the parties entered into them at their own will, and parties continue to form contractual agreements relying upon the court's recognition of the inviolability of contractual autonomy.<sup>20</sup> Indeed, the courts themselves are aware of the dangerous potential to intrude upon the parties' independence:

[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice. Therefore you have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract.<sup>21</sup>

Despite the principled nature of this statement, regard must be had for the formal requirements necessary to determine the validity of a contract.<sup>22</sup> There are circumstances that negate the existence of party autonomy, so that when they arise the court will not enforce the contract.<sup>23</sup> Where no issues arise, the court will objectively interpret the terms in line with the parties' intentions, evidenced at the time of contracting.<sup>24</sup>

### 2.1.1 Economic rationale for freedom of contract

In the environment of commercial contracts, the agreed terms provide certainty in governing the parties' relationship. The terms will allocate the predicted risks between the parties.<sup>25</sup> A contract's price may also be influenced by the terms contained in the agreement: for example, the parties may have considered the cost of possible litigation, and adjusted the price to allow for this scenario. Judicial interference in this area leads to higher costs eventuating for the parties, and demonstrates disregard for economic fairness and efficiency.<sup>26</sup>

### 2.1.2 Social rationale for freedom of contract

Certainty is the most important social justification for freedom of contract. An individual will know that the agreement will be enforced, and this knowledge facilitates commercial interactions. The medium of contract reflects the democratic values held in western societies<sup>27</sup> and promotes ideals, such as individualism and equality:

[S]ince the individual is not inherently subordinated to society, each individual is autonomous and independent, equal to all other individuals, and free from all other individuals... . [E]quality among individuals means...equality of autonomy and an equal right to freedom from interference by other individuals in the exercise of control over one's own person and faculties. Equal freedom, in turn, entails equality of opportunity for each individual to exploit his or her own faculties as he or she best sees fit.<sup>28</sup>

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<sup>19</sup> Atiyah, P, *An Introduction to the Law of Contract* (3<sup>rd</sup> Ed, 1981), 5, quoted in *Black's Law Dictionary*, above n 18.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465.

<sup>22</sup> Such as the doctrine of consideration; see Burrows, J, 'Chapter 2: Some factors affecting modern contract law' in Burrows, J, Finn, J, and Todd, S (eds.), *Law of Contract in New Zealand* (2<sup>nd</sup> Ed, 2002), 13.

<sup>23</sup> Such as cases of duress and misrepresentation.

<sup>24</sup> Collins, L (ed.), *Dicey and Morris on the Conflict of Laws* Vol 2 (11<sup>th</sup> Ed, 1987), 1232-1233.

<sup>25</sup> Richardson, I, 'Law and Economics', (1998) 4 NZBLQ, 64, 66.

<sup>26</sup> *Ibid* 66-67, 71.

<sup>27</sup> Bigwood, R, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions Part I', (2000) 16 *Journal of Contract Law* 1.

<sup>28</sup> Rosenfeld, M, 'Contract and Justice: the Relation between Classical Contract Law and Social Contract Theory', (1985) 70 *Iowa Law Review* 769, 778 quoted in Bigwood, above n 27, 20.

Contract law not only promotes autonomy, but also enables respect for an individual's ability to determine their own best interests. The pursuance of individual benefit promotes efficiency, as these are ends that are meaningful to the individual. Respect for choice also includes respect for consequence. The role of contract law is not one of a knight in shining armour rescuing parties from their bad bargains. Instead, individuals are left to learn from their mistakes. Interventional behaviour by those who apparently "know better" is antithetical to contract's autonomous nature.<sup>29</sup>

It has been argued that the law of contract maintains a division in society. This division is between those better able to exercise their free choice — by means of wealth, knowledge or aptitude<sup>30</sup> - and those without an ability to engage in autonomous agreements.<sup>31</sup> This is not an accurate conclusion. A correct analysis recognises that, while the medium of contract may not redistribute "wealth", contract law seeks to protect advantages once they have been attained.<sup>32</sup> The role of redistribution can be fulfilled more appropriately by society's other institutions.<sup>33</sup>

### 2.1.3 Autonomy in foreign jurisdiction and arbitration clauses

A foreign jurisdiction or arbitration clause seeks to regulate the jurisdiction of the court. It cannot oust a court's jurisdiction, as discretion to retain the action will still exist.<sup>34</sup> The fact that a term of the contract pertains to jurisdiction should, in theory, not be a distinguishing factor which gives rise to different treatment. At present, the criteria for giving effect to jurisdiction clauses do not enforce absolute party autonomy. By comparison, arbitration has come to have a special status as an internationally enforceable commercial dispute resolution process.<sup>35</sup> International efforts, such as the New York Convention and the UNCITRAL Model Law, ensure that agreements to arbitrate in foreign tribunals are upheld. The situation in New Zealand, which treats foreign jurisdiction and arbitration clauses differently, will be discussed below.

## 2.2 The Effect Given to Foreign Jurisdiction Clauses in New Zealand

A jurisdiction agreement has the effect of conferring jurisdiction upon a court by consent.<sup>36</sup> There is no absolute recognition and enforcement of jurisdiction agreements in New Zealand. However, it is arguable that the current method generally gives effect to this type of term.<sup>37</sup> Before examining the mechanism the New Zealand court uses to determine its exercise of discretion to retain jurisdiction, it is first necessary to examine the nature of a foreign jurisdiction clause.

### 2.2.1 Exclusive and non-exclusive jurisdiction agreements

There are two different types of jurisdiction agreements that give rise to different legal implications. Exclusive jurisdiction agreements impose an obligation upon one or both of the parties to litigate in a specified forum.<sup>38</sup> This type of agreement has the concurrent effect of preventing parties from instituting proceedings in another jurisdiction, which is not indicated in the exclusive agreement. To do so would create a breach of contract.<sup>39</sup> In contrast, a non-exclusive jurisdiction agreement simply indicates an acceptance of the jurisdiction of the indicated court. It does not establish that court as being the solely

<sup>29</sup> Bigwood, above n 27, 21.

<sup>30</sup> P Atiyah *The Rise and Fall of Freedom of Contract* (1979) 6.

<sup>31</sup> Bigwood, above n 27, 23.

<sup>32</sup> Ibid 28-29.

<sup>33</sup> Such as through taxation, educational grants and disability benefits; Bigwood, above n 27, 30.

<sup>34</sup> Peel, E, 'Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws', [1998] *Lloyd's Maritime & Commercial Law Quarterly*, 182, 221.

<sup>35</sup> Ball, M, 'The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration', [2006] *Arbitration International*, 73, 92.

<sup>36</sup> Clarkson, C, and Hill, J, *The Conflict of Laws* (3<sup>rd</sup> Ed, 2006), 64.

<sup>37</sup> *Society of Lloyd's & Oxford Members' Agency v Hyslop*, above n 18, 142.

<sup>38</sup> *S & W Berisford Plc & Another v New Hampshire Insurance Co* [1990] 2 QB 631, 636; Fawcett, J, 'Non-exclusive Jurisdiction Agreements in Private International Law' [2001], *Lloyd's Maritime & Commercial Law Quarterly* 234, 234.

<sup>39</sup> *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87, 96; Fawcett, above n 38, 234-235.

acceptable forum.<sup>40</sup> Whether a specific clause is an exclusive or non-exclusive jurisdiction agreement will fall to be determined by the proper law of the contract.<sup>41</sup>

### 2.2.1.1 Non-exclusive jurisdiction clauses

Where the New Zealand court appears as a nominated forum in a non-exclusive jurisdiction agreement it will be able to exercise jurisdiction as of right. However, it will be possible to make an application for a stay upon the grounds of forum non conveniens.<sup>42</sup>

A non-exclusive jurisdiction clause that nominates a foreign court as having jurisdiction will not necessarily oust the jurisdiction of the New Zealand court. The agreement will simply be a relevant factor in the consideration of forum non conveniens factors assessed in order to determine the grant of a stay of proceedings.<sup>43</sup>

### 2.2.1.2 Exclusive jurisdiction clauses

An agreement that the New Zealand court will have exclusive jurisdiction will normally be given effect. If the contesting party is able to demonstrate that the “preponderance of convenience is so clearly in favour” of a court other than the exclusive New Zealand forum, the action may be stayed.<sup>44</sup>

The New Zealand court will prima facie hold the parties to a foreign jurisdiction agreement. This will be especially so where the terms of the contract support this conclusion.<sup>45</sup> However, the New Zealand court retains the discretion to refuse to grant a stay and to exercise jurisdiction over the dispute. The court will follow the principles set out in *The Eleftheria*.<sup>46</sup> These are contained in an oft-cited paragraph:

(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded: - (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of the trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in a foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.<sup>47</sup>

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<sup>40</sup> Fawcett, above n 38, 234-235.

<sup>41</sup> *Continental Bank NA v Aeakos Cia Naviera SA* [1994] 1 WLR 588, 592; Fawcett, above n 38, 235-236; Peel, above n 34, 183.

<sup>42</sup> Barnard, L, “New Zealand” in Fawcett, J, (ed.) *Declining Jurisdiction in Private International Law* (1995), 359; Myburgh, above n 4, 54.

<sup>43</sup> Myburgh, above n 2, 54.

<sup>44</sup> *Bramwell v The Pacific Lumber Co Ltd* (1986) 1 PRNZ 307, 311-312 considering *Unterweser Reederei GmbH v Zapata Off-Shore Co (The Chaparral)* [1968] 2 Lloyd’s Rep 158, 162-163.

<sup>45</sup> For example, a choice of law clause for the law of the state that is named in the exclusive jurisdiction clause; *Bramwell v The Pacific Lumber Co Ltd*, above n 44, 310.

<sup>46</sup> *Carberry Exports (NZ) Ltd v Krazzy Price Discount Ltd* (1985) 1 PRNZ 279, 283-284 applying factors from *The Eleftheria* [1970] P 94.

<sup>47</sup> *The Eleftheria*, above n 46, 99-100.

These factors help to determine the most appropriate forum. If New Zealand is not the natural forum, then the statement provides the considerations that will give rise to “strong cause” for overriding the prima facie position of enforcing the parties’ agreement.<sup>48</sup>

The test taken from *The Eleftheria* presumes that the foreign jurisdiction clause is substantively fair.<sup>49</sup> This allows the court to avoid the lengthy and difficult task of proving the validity of the agreement under the proper law of the contract. As a result, the orthodox rules of contract law play no part in the determination of whether to give effect to the jurisdiction agreement.<sup>50</sup>

In contrast, it has been argued that “public interest in the regulation of justice” can play a part in limiting the effect given to exclusive jurisdiction clauses.<sup>51</sup> Indeed, the criteria set out in *The Eleftheria* include such considerations. What constitutes “public interest” has been described as lengthy litigation,<sup>52</sup> the location of foreign witnesses, translation of evidence and the requirement that foreign law must be proven if it is to apply.<sup>53</sup> Peel has argued that this approach is acceptable where such circumstances were unforeseeable at the time of contracting for jurisdiction.<sup>54</sup>

In contrast, Bell asserts that this result is intolerable in the context of party autonomy. It should be left to the agreed-upon forum to decide whether it will be far too onerous for it to try the case. It is not a decision that should be made by a court determining whether to stay proceedings brought in breach of the foreign jurisdiction clause.<sup>55</sup> Likewise, lack of foreseeability as to the burdens created by litigation in the chosen forum should not be sufficient to override the agreement. Unforeseeable circumstances should only be given consideration where there has been a change in the procedure or the “socio-political situation” of that court.<sup>56</sup> I believe that Bell’s approach is more desirable in light of the need to respect the parties’ agreement. Practically, it creates an efficient process, as the court determining whether it has jurisdiction will not have to examine what would have been foreseeable at the time of contracting.

As evidenced by the above discussion, the New Zealand court will prima facie enforce an agreement to bestow jurisdiction upon a foreign court, unless strong reasons exist for retaining the action. While not having an absolute adherence to party autonomy, it is an adequate response to the determination of such agreements in light of their unique ability to influence the courts’ jurisdiction.

## 2.3 The Effect given to Foreign Arbitration Clauses in New Zealand

An agreement to arbitrate usually takes one of two forms. This may be as an arbitration clause in a contract, by which the parties agree to submit future disputes to arbitration, or it can appear as a separate agreement. A submission agreement, by comparison, is where a dispute has already arisen and the parties agree to attempt resolution through arbitration.<sup>57</sup> In terms of a foreign arbitration agreement, the only formal requirement is that it is evidenced in writing. There is no need for the agreement to be signed by one or both parties.<sup>58</sup> New Zealand law does allow for oral arbitration agreements.<sup>59</sup> However, unless the

<sup>48</sup> Justice Barker in *Carberry Exports (NZ) Ltd v Krazy Price Discount Ltd*, above n 46, 284, approving the assessment of *The Eleftheria* criteria in Barma, A, and Elvin, D, ‘Forum Non Conveniens: Where do we go from here?’, (1985) 101 *Law Quarterly Review*, 48, 66.

<sup>49</sup> Peel, above n 34, 221.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* 222.

<sup>53</sup> Bell, A, ‘Jurisdiction and Arbitration Agreements in Transnational Contracts Part I’ (1999) 10 *Journal of Contract Law*, 53, 63.

<sup>54</sup> Peel, above n 34, 223.

<sup>55</sup> Bell, above n 53, 63.

<sup>56</sup> *Ibid.* 65.

<sup>57</sup> Redfern, A, Hunter, M, Blackaby, N, and Partasides, C, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> Ed, 2004), 8.

<sup>58</sup> First Schedule, Article 7 of the Arbitration Act 1996; 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) Article II(2); 1985 UNCITRAL Model Law on International Commercial Arbitration, adopted 21 June 1985 by the United Nations Convention on International Trade, UN Document No A/40/17, annex 1 (UNCITRAL Model Law) Article 7; *Trackweld Group Ltd v Contship Container Lines Ltd* [1995] DCR 607.

<sup>59</sup> *Arbitration Act 1996* (NZ), First Schedule, Article 7(1).

proper law of the agreement is New Zealand law, or the dispute is to be arbitrated in New Zealand, this lower threshold may not be recognised in a foreign forum.

The *Arbitration Act 1996* enacts the New York Convention into New Zealand law. This Act gives the court a very limited role in determining arbitration agreements.<sup>60</sup> Schedule 1, Article 8, removes the court's discretion to retain jurisdiction in the face of a domestic or foreign arbitration clause. This is regardless of whether it concerns an exclusive or non-exclusive clause. Article 8 provides:

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement *shall*, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration *unless* it finds that the agreement is *null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties* with regard to the matters agreed to be referred. [Emphasis added]

The parties' selected seat of arbitration must be adhered to by the court unless it falls under one of the four exemptions listed in Article 8. The court may also stay its proceedings under the High Court's inherent jurisdiction or where there is an abuse of the court's process.<sup>61</sup> However, Salmon J in *The Property People Ltd v Housing New Zealand Ltd*<sup>62</sup> held that, where there is "precise parliamentary intervention" covering the circumstance, then there can be no justification for the court resorting to its inherent power.<sup>63</sup> It is essential that the party objecting to the court's intervention enter protest before or at the same time as making their first submissions on the substance of the dispute.<sup>64</sup>

Where the agreement to arbitrate denotes a foreign tribunal as the forum, and where the proper law of the agreement is not New Zealand law, it becomes necessary to determine which law governs the arbitration clause. Questions about the validity of the clause fall to be determined by the chosen law.<sup>65</sup> Where the agreement is severed from other clauses in a contract, and would be invalid under the proper law, then the clause's effect will be determined by the law of the arbitration forum.<sup>66</sup>

As the foregoing discussion demonstrates, the legislative infrastructure and the practical effect given to submissions to arbitration demonstrate that party autonomy is highly respected in this area. This is in stark contrast to foreign jurisdiction clauses, which do not receive such international respect or enforcement.

### 3 A JOURNEY THROUGH NEW ZEALAND'S LEGISLATIVE HISTORY CONCERNING PROVISIONS ON THE SEA CARRIAGE OF GOODS

#### 3.1 Jurisdiction and Arbitration Agreements in Contracts for Carriage of Goods by Sea

Despite the ideal of party autonomy in commercial contracts, Parliament has the ability to mandate to what extent, if at all, the parties may exercise this autonomy. The legislature can enact provisions to limit, or

<sup>60</sup> *Arbitration Act 1996* (NZ), First Schedule, Article 5(d).

<sup>61</sup> *High Court Rules* (NZ), Rule 447; Willy, A, *Arbitration in New Zealand* (2<sup>nd</sup> Ed, 2003), 31-32.

<sup>62</sup> [1994] 14 PRNZ 66, 71.

<sup>63</sup> *Ibid.*

<sup>64</sup> This was not always the case. Section 4 of the now repealed *Arbitration (Foreign Agreements and Awards Act) 1982* (NZ) allowed the parties to request a stay to arbitrate at any point during the court proceedings. The High Court in *Air New Zealand v The Ship Contship America* [1992] 1 NZLR 425, 434-435, held that the arbitration agreement in that case either did not cover the parties or, if it did, then the parties had made an unconditional acceptance of the jurisdiction of the court. Precedent, such as this, showed little respect for the parties' autonomous agreement to arbitrate. The section itself was also inadequate as it would allow a party to raise the arbitration agreement when the court proceedings were not moving in their favour. The new Article 8, Schedule 1, of the *Arbitration Act 1996* (NZ) avoids the problem of confusing submission to arbitration by requiring the parties to raise the arbitration agreement at the outset.

<sup>65</sup> Redfern, Hunter, Blackaby and Partasides, above n 57, 147-149.

<sup>66</sup> ICC Case No 6162 in Lew, J, 'The Law Applicable to the Form and Substance of the Arbitration Clause' *ICCA Congress Series No 14* (Kluwer, Paris, 1998) discussed in Redfern, Hunter, Blackaby and Partasides, above n 57, 149-150.



even remove the ability of parties to agree to some terms, in relation to certain types of agreements. Conversely, it may pass statutory sections to support and protect party autonomy. Issues have arisen as to whether such laws are of global mandatory application or purely of local effect.<sup>67</sup> This will be discussed below when examining the justification for legislation curtailing party autonomy.

### 3.2 Two Different Approaches in New Zealand

In the current New Zealand legislative scene, foreign jurisdiction clauses founder while foreign arbitration clauses are respected and upheld. Section 210 of the Act strikes down foreign jurisdiction clauses in specific circumstances but upholds foreign arbitration clauses:

#### **210 Jurisdiction of the New Zealand Courts**

(1) An agreement, whether made in New Zealand or elsewhere, has no effect to the extent that it purports to —

(a) Preclude or limit the jurisdiction of the Courts of New Zealand in respect of —

(i) A bill of lading or a similar document of title, relating to the carriage of goods from any place in New Zealand to any place outside of New Zealand or;

(ii) A non-negotiable document of a kind mentioned in section 209(2)<sup>68</sup> of this Act relating to such a carriage of goods; or

(b) Preclude or limit the jurisdiction of the Courts of New Zealand in respect of —

(i) A bill of lading, or a similar document of title, relating to the carriage of goods from any place outside New Zealand to any place in New Zealand; or

(ii) A non-negotiable document of a kind mentioned in section 209(2) of this Act relating to such a carriage of goods.

(2) Nothing in this section shall be construed as limiting or affecting any stipulation or agreement to submit any dispute to arbitration in New Zealand or any other country.

However, this has not always been the case. The history of these legislative provisions and the reasons for their existence in the New Zealand maritime context are discussed below.

### 3.3 Early Legislative Regulation

The initial piece of legislation on the regulation of jurisdiction clauses appeared nearly a hundred years ago. Section 9 of the *Shipping and Seamen Amendment Act 1911*, enacted to amend the *Shipping and Seamen Act 1908*, stated:

All parties to any bill of lading or other document relating to the carriage of goods from any place in New Zealand to any place outside New Zealand shall be deemed to have intended to contract according to the laws of New Zealand in force for the time being, and any stipulation or agreement to the contrary, or purporting to oust or restrict the jurisdiction of the Courts of New Zealand in respect of the bill of lading or document, shall be null and void.

Section 9 was an amended copy of section 6 of the *Sea Carriage of Goods Act 1904* (Cth).<sup>69</sup> It was “considered desirable that the provision should be law in the Dominion.”<sup>70</sup> There is no further discussion as to the reasons for adopting this section. It appears that the New Zealand Legislative Council and the House of Representatives thought that New Zealand was a society of exporters reliant upon foreign

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<sup>67</sup> Bell, A, ‘Jurisdiction and Arbitration Agreements in Transnational Contracts Part II (1996) 10 *Journal of Contract Law*, 97, 104-108.

<sup>68</sup> Section 209 of the Act states:

#### **209 Hague Rules to have force of law**

(1) The rules, as set out in Schedule 5 to this Act, shall have the force of law in New Zealand.

(2) Subsection (1) of this section shall apply to carriage of goods by sea evidenced by a non-negotiable document (other than a bill of lading or similar document of title) that contains express provision to the effect that the Rules are to govern the carriage as if the document were a bill of lading.

<sup>69</sup> Mo, J, *International Commercial Law* (1995), 19.

<sup>70</sup> (1911) 56 New Zealand Parliamentary Debates 715 (Sir J Findlay).

carriers, much like Australia, and that it was necessary to provide legislative direction in order to protect the nation's export economy.<sup>71</sup>

### 3.3.1 The nature of the protection

The protection given took a dual approach. Section 9 of the *Shipping and Seamen Amendment Act 1911* applied only to goods *exported* from New Zealand, and not imported into the country. It applied to carriage contracts that were evidenced by a bill of lading, or any document that related to carriage of goods in this circumstance. The dual approach was, first, that New Zealand law would govern to the agreement regardless of the parties' intentions demonstrated in the contract. Second, if the contract for the carriage of goods from New Zealand had a foreign jurisdiction clause, which excluded the jurisdiction of the New Zealand courts, this clause would be rendered "null and void".

### 3.3.2 A buttress to neighbouring provisions

No explanation is given in the Parliamentary Debates,<sup>72</sup> or by the Statutes Revision Committee,<sup>73</sup> for deeming New Zealand law to govern contracts of carriage falling under section 9. However, an examination of the original sections in the *Shipping and Seamen Act 1908*, which related to the exportation of goods from New Zealand, demonstrates why it was desirable to have New Zealand law apply to these agreements. Sections 300-303 enacted several important protections for shippers.<sup>74</sup> First, this Act prevented shipowners from entirely exempting themselves from liability for any damage to the carried goods caused on their part. New Zealand's initial shipping legislation was based upon the *Merchant Shipping Act 1894* (Imp) which largely reflected the position of a shipowning nation; there being little reason to focus on protection for cargo interests.<sup>75</sup> Any clause in any bill of lading purporting to negate liability was to be held "null and void". It appears that shipowners were successfully managing to exclude themselves from liability by applying English law to the contract of carriage.<sup>76</sup> It was, therefore, necessary for the fledgling colony to look to the *Harter Act 1893* (US) and use its own creativity in order to provide a balance.<sup>77</sup>

Second, through section 302 in the *Shipping and Seamen Act 1908*, New Zealand law allowed consignors or consignees of goods to sue the agent of a non-New Zealand registered ship for any damage, short-delivery or pillage to the cargo. This provision made it viable for cargo interests to pursue small claims where it would be uneconomic to pursue the shipowner overseas. The enactment allowed the agent to be held liable for its principal's obligations under the contract without excluding the liability of the shipowner should the consignee later wish to attach the owner to the action.<sup>78</sup>

Third, section 303 of the *Shipping and Seamen Act 1908* provided that a bill of lading became binding upon the master and owner of the ship if signed by an authorised person. This section included the manager and agent of the ship as authorised persons. To ensure that the protections in these statutory provisions would always be available to shippers suing for damage under the bill of lading or similar document, it was necessary to provide for the mandatory application of New Zealand law to these agreements in the 1911 amendment.

### 3.3.3 Geographic isolation

<sup>71</sup> Mo, above n 69, 19.

<sup>72</sup> (1911) 56 New Zealand Parliamentary Debates 585-587, 651, 714-718, 838, 937, 1014-1015.

<sup>73</sup> Schedule of Select Committees [1911] AJHR xxxii (New Zealand).

<sup>74</sup> These sections were obviously important enough to be re-enacted in the *Sea Carriage of Goods Act 1922* (NZ) at sections 4, 6 and 8.

<sup>75</sup> Imrie, M, 'Marine Cargo Claims in New Zealand: The Former Role of Section 11 of the Sea Carriage of Goods Act 1940 in the Recovery Process', [1995] 11 *MLAANZ Journal*, 46, 50.

<sup>76</sup> *The New Zealand Shipping Company (Ltd) v Tyree* [1912] 31 NZLR 825 (SC).

<sup>77</sup> Imrie, above n 75, 50.

<sup>78</sup> *Ibid* 47, 52.

Another explanation for the prohibition of clauses which remove the jurisdiction of the New Zealand courts can be found by examining the reasons behind Australia's enactment of section 6 in the *Carriage of Goods Act 1904* (Cth). The Australian concern was that exporters would have to travel a long way, and at great expense, in order to gain access to justice if foreign jurisdiction clauses in sea carriage of goods contracts were enforced.<sup>79</sup> The same concerns would be present in New Zealand, so that foreign jurisdiction clauses in bills of lading may have been viewed with suspicion. The prohibition on foreign jurisdiction clauses sits nicely with the first limb of section 9, which applied New Zealand law. It would be far easier for a New Zealand court to apply New Zealand law, whereas a foreign court would have problems with, first, proving the content of New Zealand law and then, second, actually applying New Zealand law. There also would have been a significant — and well-founded — fear that the foreign court would have ignored the application of the New Zealand statute altogether. As Tetley correctly suggests, this approach is evidence of "legislative chauvinism".<sup>80</sup>

### 3.3.4 A repeal and some fancy footwork

It is interesting to take note of the statutory repeal which took place concurrently with the enactment of section 9 of the *Shipping and Seamen Amendment Act 1911*. Section 8 of the 1911 amendment repealed section 41 of the *Shipping and Seamen Amendment Act 1909*. This former Act had inserted a new subsection into section 300 of the *Seamen and Shipping Act 1908*. Section 300 of the 1908 Act stated:

- (1) Where any bill of lading or shipping document contains —
- (a) Any clause, covenant or agreement whereby the manager, agent, master, or owner of any ship, or the ship itself shall be relieved from liability for loss or damage arising from the harmful or improper condition of the ship's hold, negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge; or
- (b) Any covenant or agreement whereby the obligations of the owners of the ship to exercise due diligence to properly equip, man, provision and outfit the ship to make the hold of the ship fit and safe for the reception of cargo, and to make her seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver the same, are in any wise lessened or avoided —

such clause, covenant, or agreement shall be null and void and of no effect, unless the Court before which any question relating thereto is tried shall adjudge the same to be just and reasonable.

Section 41 of the *Shipping and Seamen Amendment Act 1909* inserted the following provision into section 300:

- (3) This section applies to all bills of lading and shipping documents in respect of merchandise or property to be carried to or from any port or place in New Zealand, whether the ship is a British or a foreign ship, and whether the loss or damage has occurred in New Zealand or at sea or in any port or place out of New Zealand, and whether the contract of carriage is made in New Zealand or elsewhere, or is governed in other respects by the law of New Zealand or by the law of any other country.

This section prevented the aforementioned parties from limiting their liability in the bill of lading via the mandatory application of section 300 to the carriage agreement.

The "Imperial authorities" objected to this insertion and claimed it was an interference with their prerogative. The Bill was delayed and, later, only passed on the condition that the offending section be

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<sup>79</sup> Mo, above n 69, 19.

<sup>80</sup> Tetley, W, 'Arbitration & Jurisdiction in Carriage of Goods by Sea and Multimodal Transport — Can we have international uniformity?', [1998] *ETL*, 735, 752-753.

removed, this being the main reason for the 1911 amendment.<sup>81</sup> However, Parliament appeared to find an alternative means by which to achieve part of the aims of the offending section. This was through the implementation of section 9 in the 1911 Act. Section 9, as stated above, applies New Zealand law, as enforced by the New Zealand courts, to all exports from New Zealand. Section 300 of the 1908 Act was thereby made mandatorily applicable to bills of lading for such transactions. This did not appear to be objectionable to the “Imperial authorities” — possibly because they did not appreciate the true implications of the 1911 amendment — and the Bill was passed with section 9 included.

### 3.3.5 The beginning of the end of party autonomy

Section 9 provided the mechanisms for the successful operation of the sections concerning the liability of shipowners in the 1908 Act. It was to be the start of New Zealand legislation that interfered with the parties’ autonomy to contract freely as to the law to be applied to the carriage agreement, and the right to determine the forum in which any disputes may be adjudicated.

## 3.4 The First *Sea Carriage of Goods Act*

In 1922 the New Zealand Parliament enacted its first piece of legislation aimed to bring together all the sections in the *Shipping and Seamen Act 1908* that concerned carriage of goods by sea.<sup>82</sup> The new Act re-enacted section 9 of the *Shipping and Seamen Amendment Act 1911* in its entirety as section 9(1) of the *Sea Carriage of Goods Act 1922*. However, several additions were made to the section:

- 9 Contracts for carriage of goods from New Zealand to be governed by New Zealand Law. —**
- (1) ...
- (2) Every bill of lading or other shipping document relating to the carriage of goods from any place in New Zealand to any place outside New Zealand shall bear upon the face of it in conspicuous type a clause in the following terms or to the effect thereof: -
- “It is agreed that this [bill of lading, *or as the case may be* [sic]<sup>83</sup>] shall be subject to the *Sea Carriage of Goods Act, 1922*. Every provision or exception herein which by that Act is made illegal or void when contained in bills of lading or other documents to which that Act refers is hereby cancelled and annulled as effectively as if the provisions of that Act had been set out herein as the overriding and paramount conditions of carriage, and this notwithstanding anything to the contrary herein expressed or implied”
- (3) Every owner, master or agent who issues any such bill of lading or other shipping document without complying with this section shall be liable on summary conviction to a fine of one hundred pounds.

These two sub-sections were enacted to ensure that it was impossible for carriers to contract out of the *Sea Carriage of Goods Act*,<sup>84</sup> which regulated the ability of ship owners to limit their liability.<sup>85</sup> If parties attempted to do so, they would face a fine.

The requirements upon carriers issuing bills of lading and shipping documents became more onerous because of the mandatory inclusion, on the face of the document, of the clause set out in section 9(2). This safeguarded New Zealand exporters through the compulsory application of the protective provisions in the *Sea Carriage of Goods Act 1922*. Benefits also included a section providing that, where the bill of lading or shipping documents stated that goods were delivered in “good or apparent good order” and upon delivery the goods were found to be otherwise, the prima facie presumption was that the packages were

<sup>81</sup> (1911) 56 New Zealand Parliamentary Debates 585 (J Millar).

<sup>82</sup> (1922) 196 New Zealand Parliamentary Debates 1074 (E Lee).

<sup>83</sup> Presumably “as the case my be” would apply to documents that were not necessarily stated to be a bill of lading but conformed to the characteristics of a bill of lading.

<sup>84</sup> (1922) 196 New Zealand Parliamentary Debates 1075-1076 (E Lee).

<sup>85</sup> *Sea Carriage of Goods Act 1922* (NZ), Sections 3 and 4.

delivered in good order, and that any damage was caused while in the carrier's care.<sup>86</sup> Again, carriers were prevented from excluding liability in its entirety, and the New Zealand agents of a non-New Zealand registered ship were deemed to be the legal representatives of the master and owner of the ship once the ship had departed New Zealand's shores.<sup>87</sup>

This new statute effectively tidied up any loose ends remaining from the *Shipping and Seamen Amendment Act 1911* and ensured that New Zealand law applied to the agreement evidenced in bills of lading and shipping documents for goods exported from New Zealand. However, whether this statute would have had effect overseas is questionable. There have been no reported cases in the English or Australian records where a party has argued the application of the New Zealand statute. In order to succeed, the party arguing for the application of New Zealand law would have had to convince the foreign forum that its conflict rules accommodated such a result. In terms of the English court, this would not have been easy. Where the proper law of the contract was English then the clause will not be rendered illegal by virtue of a foreign law stating it is so.<sup>88</sup> The alternative argument would be recognition of the New Zealand statute upon the grounds of judicial comity but this would be a difficult argument to make in the face of a jurisdiction clause evidencing that the parties' intentions were otherwise. These issues would have been circumvented by the agency provision, section 7, which again allowed for suit of the carrier's New Zealand agents. Exporters would have been able to avoid the issue of suing in the foreign forum stated in the contract by litigating against the carrier's agent in New Zealand.

### 3.5 A 28 Year Hiatus

In 1940 the *Sea Carriage of Goods Act 1922* was repealed and replaced by an Act of the same name.<sup>89</sup> While New Zealand was not an actual signatory to the Hague Rules, the new legislation was enacted to give domestic effect to most of the Rules which replaced the original sections regulating carrier liability influenced by the *Harter Act*.<sup>90</sup> There was no section corresponding to section 9 of the *Sea Carriage of Goods Act 1922* in the new Act. No explanation is to be found in the parliamentary debates as to why this section was excluded.<sup>91</sup>

In 1968 an amendment was made to the *Sea Carriage of Goods Act 1940* in the form of section 11A. The inserted section stated:

#### **11A New Zealand Law And Jurisdiction Of New Zealand Courts**

(1) All parties to any bill of lading or other document relating to the carriage of goods by sea from any place in New Zealand to any place outside New Zealand shall be deemed to have intended to contract according to the laws of New Zealand, and any stipulation or agreement to the contrary, or purporting to oust or restrict the jurisdiction of the Courts of New Zealand in respect of such a bill of lading or other document, shall be of no effect.

(2) Any stipulation or agreement, whether made in New Zealand or elsewhere, purporting to oust or restrict the jurisdiction of the Courts of New Zealand in respect of any bill of lading or other document relating to the carriage of goods by sea from any place outside New Zealand to any place in New Zealand shall be of no effect.

For the first time in its history, this type of section included both importation and exportation of goods from New Zealand which were covered by bills of lading or similar documents relating to the contract for carriage of goods by sea. This was a result of greater levels of imported goods arriving in New Zealand than in the Dominion's early days.<sup>92</sup> Section 11A, again, provided for New Zealand law to apply to exports

<sup>86</sup> *Sea Carriage of Goods Act 1922* (NZ), Section 5(2).

<sup>87</sup> *Sea Carriage of Goods Act 1922* (NZ), Section 7.

<sup>88</sup> *Furness Withy (Australia) Pty Ltd v Metal Distributor UK Ltd* [1990] 1 Lloyd's Rep 236, 249.

<sup>89</sup> *Sea Carriage of Goods Act 1940* (NZ), Section 15.

<sup>90</sup> *Dairy Container v The Ship "The Tasman Discoverer"* [2002] 3 NZLR 353, 359.

<sup>91</sup> (1940) 258 New Zealand Parliamentary Debates 265, 403-405, 449, 532-533; (1968) 355 New Zealand Parliamentary Debates 1516 (M Finlay).

<sup>92</sup> (1968) 356 New Zealand Parliamentary Debates 1514 (M Walker).

and prevented the ousting of the jurisdiction of the New Zealand courts in regards to international exports and imports.

The Contracts and Commercial Law Reform Committee recommended that legislation based on section 9 of the Australian *Sea Carriage of Goods Act 1924* should be adopted. As early as 1965, the Council of New Zealand Marine Underwriters' Associations had complained that foreign jurisdiction clauses were causing difficulty and uncertainty for New Zealand merchants and underwriters.<sup>93</sup> The primary complaint was the inconvenience and expense of having to litigate a claim in a foreign court. Legal fees were often higher than those in New Zealand, it was expensive to translate documents, and most of the documentary and physical evidence was often located in New Zealand.<sup>94</sup> There was also the concern that successful parties to a suit may be prevented from recuperating costs under foreign civil procedure rules. These rules may also require onerous steps in order to obtain legitimate evidence. The Ministry of Industries and Commerce examined legal opinion for a lawsuit required to be undertaken in Japan. The difficult steps involved simply outweighed pursuance of the claim even where such an action was considered to be defensible.<sup>95</sup>

The Right Honourable J R Marshall quoted from the report of the Contracts and Commercial Law Reform Committee during the debate of the Bill:<sup>96</sup>

New Zealand lives by trade and its law must properly protect its traders. New Zealand's geographical distance from the world's centres of commerce make it necessary to give special protection to New Zealand importers in the matter of pursuing claims against sea carriers.

New Zealand traders, and their insurers, continued to dominate the carriage of goods scene. It is also interesting to note that most of the shipping line did not entirely object to the proposed legislative change.<sup>97</sup> The re-enactment of a section concerning jurisdiction was for many of the same reasons as the first enactment in 1911. This would ensure that New Zealand traders would receive the benefits of the surrounding legislation, such as allowing for domestic suit of the New Zealand agents of shipping lines.<sup>98</sup> It was also generally agreed that such legislation was desirable as it brought New Zealand law into line with Australian law, and the section would be as effective as its Australian counterpart.<sup>99</sup>

### 3.5.1 The nature of section 11A protection

The 1940 Act states that the jurisdiction of the New Zealand court could not be ousted by a jurisdiction agreement in regards to the *importation* of goods at section 11A(2). This was supposed to allow parties to litigate in another forum should they so choose.<sup>100</sup> By comparison, it was believed that the provision legislating for foreign jurisdiction clauses in regards to exports of goods provided for stricter treatment of such agreements by the New Zealand courts. First, New Zealand law was to apply to the bill of lading or document evidencing the carriage of the goods and, second, it was thought that the section provided for exclusive jurisdiction of the New Zealand court.<sup>101</sup>

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<sup>93</sup> (1968) 355 New Zealand Parliamentary Debates 1511 (J Marshall); Letter from The Council of New Zealand Marine Underwriters' Associations to the Minister of Transport (J McAlpine), 8 June 1965, located at Archives New Zealand (File AAQWW3379, Box 10, 3/1/24, Part 3).

<sup>94</sup> (1968) 355 New Zealand Parliamentary Debates 1513 (J Marshall).

<sup>95</sup> Letter from The Council for New Zealand marine Underwriters' Associations to the Minister of Industries and Commerce (J Marshall) 10 December 1965, located at Archives New Zealand, above n 94.

<sup>96</sup> (1968) 355 New Zealand Parliamentary Debates 1513 (J Marshall).

<sup>97</sup> The Contracts and Commercial Law Reform Committee *Report on the Procedure for Claims by Importers and Exporters Against Sea Carriers* LRC/C/6 located at Archives' New Zealand, above n 94, and The Alexander Turnbull Library, MS-papers-1403-24314, para 11; Letter from the Secretary of the Law Drafting Office (W Iles) to the Minister of Industries and Commerce (J Marshall), 3 August 1968, located at Archives New Zealand, above n 94, and The Alexander Turnbull Library MS-papers-1403-24314.

<sup>98</sup> *Ibid* para 8.

<sup>99</sup> (1968) 355 New Zealand Parliamentary Debates 1513, 1516-1517 (J Marshall and M Finlay).

<sup>100</sup> *Ibid* 1515-1516 (M Finlay).

<sup>101</sup> *Ibid*.

However, this would not have been the case, as the wording in section 11A(1) in regards to the jurisdiction of the New Zealand courts is identical to that of section 11A(2).<sup>102</sup> It is arguable that, if the courts had had an opportunity to examine this particular aspect of the sub-section, Parliament's intention may not have been given effect.<sup>103</sup> There are no reported cases testing whether section 11A(1) or (2) removed the court's discretion to determine that New Zealand is *forum non conveniens*. The section may or may not have had a mandatory effect. It seems likely that a court would have required absolutely definitive legislation on the matter before it allowed the courts' inherent discretion to be overridden. This is a similar scenario to the current Canadian situation, discussed below. Regardless of what was the actual position, it seems likely that a court would have treated both sections 11A(1) and (2) in an identical manner.

The 1968 amendment also extended the time for claims to be made against any agent in New Zealand of a foreign registered ship in section 11, which was the re-enactment of section 302 of the Shipping and Seamen Act 1908. By virtue of section 11A, claims against the agent could be pursued in a New Zealand court and no longer had to be litigated overseas, as had been the case, if the agent could bring itself under the terms of the carriage contract set out by the shipowner.<sup>104</sup> Section 11 of the 1940 Act merely provided for suit of a New Zealand agent in "any Court of competent jurisdiction". Therefore, if a carriage contract was governed by a foreign law, the New Zealand agent could argue that the courts of that foreign jurisdiction were competent. A strategic agent could even have gone so far as to assert that, as New Zealand law did not apply, there were no grounds upon which to sue the agent. The enactment of section 11A removed the possibility of this situation occurring.

### 3.5.2 Why it pays to look before you leap

There may have been an oversight in the enactment of section 11A(2) in that the section became less useful without the stipulation that New Zealand law was mandatorily applicable to contracts for the carriage of goods to New Zealand. If there is an agreement that a foreign law should apply, a savvy carrier may choose the law of a country that does not apply the Hague or Hague-Visby Rules. The carrier may then be free to limit its liability below the Hague threshold, or exclude it altogether.

Where there is no express choice of law, a bill of lading issued overseas will be governed, if not by the putative proper law of the contract, then by the *lex loci actus* — this being the law of the place where the bill of lading was issued.<sup>105</sup> The futility of section 11A(2) is emphasised further by the fact that a foreign law, which does not apply the Hague or Hague-Visby Rules, must be proven when it is being applied in the New Zealand court, and this can cause some expense through the engagement of expert witnesses and longer court proceedings. This cost may not be too onerous in all cases, as section 40 of the Evidence Act 1908 allows a broad range of materials to be presented to the court as evidence of the foreign law. It is, nevertheless, a relevant consideration when examining the worth of section 11A.

There have been no reported cases under section 11A(2). While the section is useful in that it provides grounds for service out of the jurisdiction in an action in personam against a foreign shipowner, and prevents the stay of an action in rem commenced in New Zealand, this may not necessarily be a commercially desirable avenue to take if the governing foreign law becomes difficult to litigate in New Zealand. This lop-sided outcome of section 11A(2), as compared with section 11A(1), can be partly blamed in the almost wholesale importation of the Australian legislation at section 9(2) of the *Sea Carriage of Goods Act 1924* into New Zealand law without proper examination of its effects and implications. The current New Zealand legislation does not resolve this issue, as section 210(1) of the Act provides for a similar result.

## 3.6 Arbitration Agreements Get a Mention

<sup>102</sup> The wording of section 11A(2) did not change from the form it was in when debated in the House despite the suggested scrutiny in regards to this presumed difference in the Commerce Committee; Report of the Commerce Committee [1968] AJHR I11 p 3; Sea Carriage of Goods Amendment Bill [1968] New Zealand Parliamentary Bills Explanatory Memoranda M-Z 12-1 and 12-2.

<sup>103</sup> There are no reported or searchable unreported cases discussing this distinction.

<sup>104</sup> (1968) 356 New Zealand Parliamentary Debates 1513 (J Marshall).

<sup>105</sup> Myburgh, P, 'Current Developments Concerning the Form of Bills of Lading — New Zealand', in Yiannopoulos, A (ed), *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995), 243.

It was not until 1985 that the status of arbitration agreements — as opposed to foreign jurisdiction clauses — in bills of lading, and like documents involved in sea carriage of goods, was made clear. The *Sea Carriage of Goods Amendment Act 1985* inserted a provision into section 11A of the 1940 Act stating:

- (3) Nothing in this section shall be construed as limiting or affecting any stipulation or agreement to submit any dispute to arbitration in New Zealand or to arbitration in any other country which is a party to an international convention or protocol relating to arbitration to which New Zealand is also a party.

The sub-section was passed as part of the Law Reform (Miscellaneous Amendments) Bill 1985. No comment was made as to the reasons for the insertion, either in the House<sup>106</sup> or by the Statutes Revision Committee that considered the Bill.<sup>107</sup> The reasons for implementing this legislation must be gleaned from the Law Commission's report,<sup>108</sup> the sub-section itself and its interpretation by the New Zealand courts.

### 3.6.1 Legislative reasons

It is apparent from section 11A(3) that New Zealand considers its obligations under international conventions to be paramount. International arbitration agreements have had a firm place in our law since the ratification and entry into force of the New York Convention in 1983.<sup>109</sup> The New York Convention was enacted into New Zealand legislation in the *Arbitration (Foreign Agreements and Awards) Act 1982* (AFAA). The fact that the section 11A(3) amendment in 1985 followed hard on the heels of this implementation would indicate that the New Zealand legislature felt the need to emphasise foreign arbitration clauses were distinct, and to be treated differently, from foreign jurisdiction clauses, for which no convention exists to ensure their effect.

This legislation was considered necessary to signal to the international community that New Zealand was willing to live up to its international obligations. This was important in light of the fact the New York Convention provides essential benefits in terms of recognition of foreign arbitral awards. If New Zealand wanted its arbitration awards to be recognised overseas, it needed to ensure that the New York Convention was firmly ensconced in domestic legislation, governing all arbitration issues from stays of proceedings in domestic courts, through to the final enforcement of the arbitration award.

If New Zealand had refused to recognise foreign arbitration agreements in bills of lading, foreign courts may have, in turn, refused to recognise New Zealand arbitration clauses. This is made clear from the fact that this section was to apply only to situations where the foreign seat of arbitration was in a country that was a signatory to the same treaties to which New Zealand was also a signatory. This was the bare minimum required by the New York Convention. Recognition of foreign arbitration agreements outside of the signatory States was not guaranteed in the same manner. This result only caused a partial requirement that the New Zealand courts respect the parties' autonomy to choose the seat of arbitration. There was no absolute recognition and enforcement of all foreign arbitration clauses in bills of lading for all or any nation. Nevertheless, international political comity required that New Zealand enact legislation to reflect the basic position in the New York Convention.

### 3.6.2 Judicial application

Cases that have considered section 11A(3) have regarded it as a “preserving”<sup>110</sup> or a “saving”<sup>111</sup> provision requiring courts to uphold a foreign arbitration agreement to which section 11(3) applies. This requires the

<sup>106</sup> (1984-85) 460 New Zealand Parliamentary Debates 2740-2745; (1985) 462 New Zealand Parliamentary Debates 4213-4217, 4469-4473.

<sup>107</sup> Report of the Statutes Revision Committee for 1984-85 [1984-85] AJHR I5 p 7.

<sup>108</sup> New Zealand Law Commission *Arbitration Report 20* (NZLC R20, October 1991) 234.

<sup>109</sup> 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards “Status” (2006)

UNCITRAL<[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)> (at 26 February 2006).

<sup>110</sup> *Trackweld Group Ltd v Contship Container Lines Ltd*, above n 58, 612.

<sup>111</sup> *Mobil Oil New Zealand Ltd v The Ship “Stolt Sincerity”* [14 March 1995] HC, Auckland, AD 628/93, 5.



New Zealand court to ascertain whether the arbitral seat, to which the parties have agreed to submit, is situated in a country which is “a party to an international convention or protocol relating to arbitration” to which New Zealand is also a signatory.<sup>112</sup> The court will then examine the validity of the arbitration clause under the relevant legislation which was, at this time, section 4 of the AFAA.<sup>113</sup> Therefore, the application of section 11A(3) of the *Sea Carriage of Goods Act 1940* is reliant upon the validity of the arbitration agreement under section 4 of the AFAA. This serves to promote the intention under section 4 of the AFAA that court proceedings be stayed in deference to foreign arbitration.

Arbitration agreements in bills of lading have caused some contention for the New Zealand courts. The decision in *Air New Zealand Ltd v The Ship “Contship America”*<sup>114</sup> held that the presence of such agreements in bills of lading, which contain the contract of the carriage of goods, are unexpected and should not be assumed as a common occurrence. These clauses would not form part of the contract of carriage.<sup>115</sup> There has been a mixing of both liberal and strict approaches when interpreting arbitration clauses in bills of lading. While the court has been more liberal on matters of form, such as not requiring the actual signature of the party claiming under the agreement to be present on the contract,<sup>116</sup> a strict approach has been taken, under the 1940 Act, as to who is actually a party to the arbitration agreement.<sup>117</sup> It is clear, however, that once an arbitration agreement has been found to be valid under section 4 of the AFAA, the requirement under that section that the court proceedings be stayed is preserved by section 11A(3) of the *Sea Carriage of Goods Act 1940*. Thus, a stay would have been granted, even if it would have been more suitable to hear the action in the New Zealand court.<sup>118</sup> This indicates that the judiciary has viewed section 11A(3) of the *Sea Carriage of Goods Act 1940* as a provision supporting New Zealand’s international obligations and has applied the section, without issue, where the occasion has called for its application.

### 3.7 A Shadow of its Former Self

The present legislative enactment concerning foreign jurisdiction and arbitration clauses in bills of lading is contained in section 210 of the Act, set out above. The most notable difference in the new section is the removal of the mandatory application of New Zealand law to both international import and export contracts. The section now only applies to the jurisdiction of the New Zealand courts and will prevent any limitation upon this jurisdiction in bills of lading for either the import or export of goods. Again, subsection (2) states this provision will not affect the enforcement of an arbitration agreement.

There was no Parliamentary debate about this section in the Transport Law Reform Bill, as clause 258,<sup>119</sup> or in the Maritime Transport Bill, as clause 208.<sup>120</sup> The Transport Committee Report on the Maritime Transport Bill did not discuss the reasons for the re-enactment and amendment of section 210 of the *Sea Carriage of Goods Act 1940*.<sup>121</sup>

<sup>112</sup> Ibid.

<sup>113</sup> *Trackweld Group Ltd v Contship Container Lines Ltd*, above n 58, 613-614.

<sup>114</sup> Above n 64.

<sup>115</sup> Ibid 433.

<sup>116</sup> *Trackweld Group Ltd v Contship Container Lines Ltd*, above n 58, 614-615.

<sup>117</sup> An agent rendered liable under section 11 of the *Sea Carriage of Goods Act 1940* (NZ) was able to claim a stay of proceedings based upon an arbitration agreement in the bill of lading issued by the carrier. Where it is the case that the bill of lading creates the legal relationship upon which the plaintiff uses as the grounds to sue the agent, then the agent may raise the arbitration agreement and claim the right to stay the court proceedings by virtue of section 11(3) of the *Sea Carriage of Goods Act 1940*, thus bringing section 11A(3) of the same Act into force; *Trackweld Group Ltd v Contship Container Lines Ltd*, above n 58, 617-619; *Mobil Oil New Zealand Ltd v The Ship “Stolt Sincerity”*, above n 111, 9. Where the claims are not made under the bill of lading containing the agreement to arbitrate or through or under any party to this agreement, then the shipowner could not claim the application of this agreement. Privy of contract prevented the shipowner from suing upon the agreement made by two different parties, unless it was expressly for the shipowner’s benefit; *Air New Zealand Ltd v The ship “Contship America”*, above n 64, 433. It would appear that this is a similar requirement to that found under section 4 of the Contracts (Privity) Act 1982, although Greig J does not mention this legislation but makes the point based upon *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1974] 1 NZLR 505.

<sup>118</sup> *Trackweld Group Ltd v Contship Container Lines Ltd*, above n 58; *Mobil Oil New Zealand Ltd v The Ship “Stolt Sincerity”*, above n 111.

<sup>119</sup> (1993) 535 New Zealand Parliamentary Debates 15241-15260.

<sup>120</sup> (1994) 541 New Zealand Parliamentary Debates 2090-2325; (1994) 544 New Zealand Parliamentary Debates 4568-4597.

<sup>121</sup> [1993-96] XLII AJHR I13A p 24.

### 3.7.1 The changing tide of legislation

New Zealand law is now no longer deemed to apply to the carriage contract. Also removed from the Act is the section granting the shipper the ability to sue the carrier's New Zealand agent, and the section rendering the shipowner or master liable if the bill of lading was signed by an authorised person. There was no explanation for this adjustment, and it did not feature in the Select Committee submissions before the passing of the legislation, as most of the (often heated) debate over the Maritime Transport Bill focused upon the removal of cabotage and the liberalisation of New Zealand coastal shipping. The removal of the section allowing for suit of New Zealand agents is particularly concerning, as it is not possible to sue the agent unless they actually caused the damage. This has caused an increase in ship arrests to ensure security for the shipper's suit.<sup>122</sup>

It appears that the loop-hole in section 210(1) would allow a carrier to contract out of the Hague-Visby Rules for carriage of goods to New Zealand from a non-contracting state. A carrier may provide for a choice of law clause for a country that is not a signatory to the Rules, and section 210 no longer provides for New Zealand law to override such a choice of law. However, it has been held that, where it would be contrary to the mandatory rules of the forum to enforce a choice of law clause, it cannot be given effect.<sup>123</sup> It seemed likely that this decision would be followed in New Zealand, should a choice of law clause allow circumvention of the Rules and permit a lessening of the carrier's liability.<sup>124</sup> However, this approach will not apply in all cases.<sup>125</sup>

Article X of the Hague-Visby Rules provides for the Rules' scope of application:

The provisions of these rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

- (a) the bill of lading is issued in a Contracting State, or
- (b) the carriage is from a port in a Contracting State, or
- (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

The Hague-Visby Rules will not apply mandatorily to any bill of lading that does not fall within the Rules' scope of application. Where Article X does not apply, the carrier can limit its liability contractually, either by modifying the Rules' terms to suit its purposes,<sup>126</sup> or by departing from the Rules altogether. This does not pose a major problem for New Zealand exporters, as their goods will be protected by virtue of Article X(b). However, it does present difficulties for New Zealand importers, who may not be protected against a carrier who successfully limits its liability.

There exists a second loop-hole via which a carrier can limit its liability. Where the law of the chosen forum applies the Hague-Visby Rules, and the contract is not mandatorily governed by the Rules, a jurisdiction clause will not also amount to a choice of law clause. In this situation, the jurisdiction clause does not take effect to apply the Hague-Visby Rules contained in the legislation governing the law of the chosen forum.<sup>127</sup> This issue is a failing in the drafting of the Hague-Visby Rules.<sup>128</sup> The requirements of

<sup>122</sup> Imrie, above n 75, 61; for an example see *Turners & Growers Ltd v The Ship "Cornelis Verolme"* [1997] 2 NZLR 110.

<sup>123</sup> *The Hollandia* [1983] 1 AC 565.

<sup>124</sup> *Fletcher Industries Ltd v Japan Line (NZ) Ltd* [18 October 1984] High Court, Wellington A313/83, A314/83 18.

<sup>125</sup> For an example of this issue see the Privy Council's decision in *Dairy Containers v Tasman Orient Line CV* [2005] 1 NZLR 433 where the contract stipulated the application of the Hague Rules but applied an actual monetary value to the package limitation for liability rather than the gold standard provided in the Rules. The Privy Council held that the correct amount owing was to be measured in pounds sterling despite the fact that the plaintiff received less than the Hague Rules would have provided.

<sup>126</sup> *Ibid.*

<sup>127</sup> In *Hellenic Steel Co v Svolamar Shipping Co Ltd (The "Komninos S")* [1991] Lloyd's Rep 370, 376-377, a cargo of steel coils deteriorated en route to Italy from Greece. Greece was not a signatory to the Hague-Visby Rules. Nor did the contract contain a provision electing for the application of the Rules. There was an English jurisdiction clause which led to the Court of Appeal applying English law. The Plaintiff argued that this was sufficient to incorporate the *Carriage of Goods by Sea Act 1971* (UK) which applied

international uniformity mean that this problem is not best solved through national laws mandating the application of New Zealand law — including the Hague-Visby Rules — to the bill of lading for goods arriving in New Zealand. Moreover, simply legislating for the New Zealand jurisdiction to apply does not rectify the situation. To achieve this result, the mandatory application of New Zealand law to the bill of lading is required which, as noted above, does not respect aims of international uniformity.

### 3.7.2 Retention of jurisdiction

The enactment of the Hague-Visby Rules may provide an explanation for section 210(1). The Rules have no mechanism by which to determine which forum, or forums, are entitled to exercise jurisdiction over a dispute arising under the contract of carriage.<sup>129</sup> Section 210(1) of the Act provides this access to the New Zealand courts. A party's choice to litigate in New Zealand cannot be prevented by a prior contractual provision in the bill of lading. Even if a foreign law governs the dispute, the New Zealand forum will be able to take jurisdiction, if capable of doing so, notwithstanding the foreign jurisdiction clause. However, this reason does not adequately justify the existence of section 210(1) of the Act. No other type of transnational commercial contract requires national legislation to provide access to the New Zealand court for dispute resolution. There is no reason to treat bills of lading under the Hague-Visby Rules any differently.

### 3.7.3 A mandatory effect

Section 210(1) leaves open the question as to whether the doctrine of *forum non conveniens* may still apply, even if the foreign jurisdiction clause is rendered ineffective. As of yet, *forum non conveniens* has not been argued in New Zealand in the context of section 210(1). However, the section does not explicitly state that the New Zealand court *must* assume jurisdiction. Nor does it unequivocally state that the courts' inherent discretion to choose not to exercise jurisdiction on the basis of *forum non conveniens* is no longer available. It is not appropriate that such a fundamental discretion, which courts exercise in the interests of achieving overall justice between the parties, should be overridden by implication. It would therefore seem possible for the New Zealand courts to continue to exercise their discretion in a manner similar to the Canadian courts, which will be discussed below.

### 3.7.4 The expense of justice

Economic arguments may still play a part in the desire for the New Zealand courts to be able to allow service overseas,<sup>130</sup> or retain jurisdiction in the face of a clause nominating a foreign forum. We are still a nation of shippers, geographically isolated from the world's trading centres. To litigate overseas remains complicated, expensive and time-consuming. Whether this provides a sufficient justification for section 210(1) in the age of high-speed electronic communication, providing a global market for litigation, is questionable, and will be discussed below.

Nevertheless, the fact remains that it is expensive to pursue an overseas claim and this is demonstrated by foreign arbitration clauses which can be prohibitive to recovery.<sup>131</sup> Where the chosen law of the carriage contract applies the Hague-Visby Rules, it becomes less problematic and expensive to prove the foreign law and litigate in the New Zealand courts.<sup>132</sup> This was a highly persuasive reason for the continued legislative retention of New Zealand jurisdiction. Whether this remains justifiable will be debated below.

### 3.7.5 Arbitration provision re-enacted

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the Hague-Visby Rules. Their Honours held that the English jurisdiction clause was not sufficient to give effect to English legislation applying the Hague-Visby Rules. Incorporation must be more specific. The carrier succeeded in limiting its liability through contract.

<sup>128</sup> Myburgh, P, "All that Glitters": the Gold Clause, the Hague Rules and Carriage of Goods by Sea' [2002] 8 NZBLQ, 260.

<sup>129</sup> Hetherington, S, *Jurisdiction and Arbitration*, Document 7 (2003) 245 (CMI Yearbook Part II - The work of the CMI).

<sup>130</sup> Email from John McKelvie (Underwriting and Risk Manager, Vero Marine Insurance Ltd, New Zealand) to Author, 30 March 2007, quoting Matthew Flynn (Partner, McElroys, Auckland New Zealand).

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

Similarly, arbitration agreements are exempt from the same fate as jurisdiction clauses under section 210(2) of the Act. Differing slightly from its 1940s predecessor, the section states:

(2) Nothing in this section shall be construed as limiting or affecting any stipulation or agreement to submit any dispute to arbitration in New Zealand or any other country.

Section 210(2) is a saving provision, preventing the New Zealand courts from striking down an arbitration agreement and thereby giving effect to Schedule 1, Article 8 of the *Arbitration Act 1996*. The court must stay its proceedings in deference to the parties' agreement to arbitrate. This new section is broader than that provided in section 11A(3) of the *Sea Carriage of Goods Act 1940*. The earlier Act provided that the foreign arbitration tribunal had to be in a state that was a signatory to the same conventions to which New Zealand was also a signatory. In section 210(2) the arbitration may take place either in New Zealand or in any other country; the latter not being limited by any conditions whatsoever.

Recognising that arbitration agreements for any foreign jurisdiction should be upheld demonstrates the continued growth of the importance of arbitration agreements in the international commercial arena. More so than ever, New Zealand is required to uphold its obligations under the New York Convention and the UNCITRAL Model Law and this is reflected by the enactment of section 210(2). In fact, New Zealand has gone beyond this bare minimum and applied the saving provision to any arbitration agreement, no matter where the foreign forum is situated. This provides great respect for the parties' autonomous right to decide the seat of arbitration.

However, there has been no consideration as to how the sub-section for arbitration operates alongside the sub-section on jurisdiction clauses. All a carrier has to do in order to circumvent the New Zealand jurisdiction is to insert a foreign arbitration clause in the carriage contract. This will be sufficient to require the New Zealand courts to stay proceedings in favour of foreign arbitration. Unless jurisdiction clauses are treated in exactly the same manner as arbitration clauses, or New Zealand denounces the New York Convention, it will be impossible to have harmony of legislation in this area. Jurisdiction clauses may continue to be undermined by arbitration clauses. In reality this situation does not occur. Nearly all of the bills of lading in use in the New Zealand maritime context contain foreign jurisdiction clauses.<sup>133</sup> However, as a theoretical issue, the ability for arbitration clauses to undermine jurisdiction clauses remains a weakness of section 210(1) of the Act.

### 3.7.6 The status of third parties

There has been some concern in New Zealand for third parties who have found themselves bound by arbitration provisions in bills of lading, either through assignment, or where a bill of lading has been affected by terms in a sub-bailment.<sup>134</sup> This concern also exists for third parties who become bound by choice of court provisions.<sup>135</sup> The developing position in the maritime context has been that these types of clauses should be enforced on grounds of "commercial policy". This moves beyond the normal rules of privity of contract due to the unique nature of the bill of lading.<sup>136</sup> I agree with the approach, set out by Giles J, that a party with an interest in the transaction should be bound by reasonable terms contained in the bill of lading.<sup>137</sup>

The question arises, however, as to whether this approach is too strict where the third party had no actual notice of the jurisdiction or arbitration clause's content. This is especially problematic in light of the

<sup>133</sup> Email from Associate Professor Paul Myburgh to Author, 24 April 2007, concerning an informal survey conducted by Professor Myburgh in May-June 1993 discussed in Yiannopoulos, above n 107. Professor Myburgh found only one bill of lading contained an arbitration clause.

<sup>134</sup> Giles, B, 'Some Concerns Arising from the Enforcement of Arbitration Clauses in Bills of Lading', The Cedric Barclay Memorial Lecture 1991, Maritime Law Association of Australia and New Zealand <[www.mlaanz.org/docs/99journal6a.html](http://www.mlaanz.org/docs/99journal6a.html)> (at 28 February 2007).

<sup>135</sup> Such as the situation in *Owners of Cargo Lately Laden on Board the KH Enterprise v Owners of the Pioneer Container* [1994] 1 Lloyd's Rep 593 where a sub-bailment upon terms bound the shipper to a jurisdiction clause made between the carrier and the actual carrier.

<sup>136</sup> Ibid; *The Mahkutai* [1996] AC 650 (PC).

<sup>137</sup> Giles, above n 134.

unique nature of bills of lading discussed above. Where these clauses are validly part of, or validly incorporated into, the bill of lading, they will bind the third party. In the case of foreign jurisdiction clauses in New Zealand, these will be defeated by section 210(1) of the Act. However arbitration clauses will be upheld as a result of section 210(2), along with the application of the *Arbitration Act 1996*. Section 210(1) does provide protection for third parties to foreign jurisdiction clauses by allowing suit in New Zealand, but this is done through an absolutist approach.<sup>138</sup> There are no protections provided for third parties in New Zealand who are bound by foreign arbitration agreements.<sup>139</sup> As a result of the international instruments in the area of arbitration, this situation may need an international approach. What is required is a balance between supporting party autonomy and protecting third party interests.

### 3.8 The Bigger Picture

Before determining whether legislation limiting jurisdiction clauses and promoting arbitration clauses is justified in the modern New Zealand economy, similar legislation in Australia and Canada will be examined. This will enable an understanding of the importance of these types of provisions. It will also be helpful to assess the available and proposed international instruments dealing with foreign jurisdiction and arbitration clauses. This will, in turn, allow an assessment of the current justifications for such impingements upon party autonomy. It will also help to indicate whether, and why, it is justifiable to treat foreign jurisdiction clauses differently from foreign arbitration clauses. The results of this comparative analysis will provide a point from which to seek out the best possible solution to the issues raised.

## 4 APPLES AND ORANGES IN THE AUSTRALIAN *CARRIAGE OF GOODS BY SEA* LEGISLATION

### 4.1 The Port of Origin

As much of the reason in New Zealand for creating legislation regulating foreign jurisdiction provisions arose from Australian initiatives, it is helpful to consider the Australian reasons for their version of this legislation. A comparison of Australian current law will also help to determine whether this type of law remains viable and justifiable in New Zealand.

### 4.2 An Improvement upon the Early New Zealand Example

Legislative regulation of jurisdiction clauses began with the Sea Carriage of Goods Bill 1904 (Cth). The Senate introduced this Bill in order to provide a regime to regulate the liability of carriers in relation to the sea carriage of goods *from* the Commonwealth only.<sup>140</sup> The proposed section concerning liability was similar to that enacted in New Zealand at the time, which was based originally upon the United States *Harter Act* of 1893.<sup>141</sup>

The enactment of legislation to regulate liability came about as a result of vigorous lobbying by fruit growers and exporters. Consignments of Australian apples were reaching England in poor condition, as a result of the carrier's neglect or fault. As the carriers were exercising their right to freedom of contract by exempting themselves from all types of liability, the shippers of the apples had no redress.<sup>142</sup> The problem was further compounded by the unequal bargaining position between shippers and shipowners. There was a monopoly created by the shipowning companies whose carriage contracts contained identical terms on liability. Furthermore, Australia was not a shipowning nation. Australian shippers, therefore, had little option but to agree to these terms in order to have their goods exported to overseas markets.<sup>143</sup> It became

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<sup>138</sup> Ibid.

<sup>139</sup> *Trackweld*, above n 58.

<sup>140</sup> *Sea Carriage of Goods Act 1904* (Cth), Section 4

<sup>141</sup> Australia (1904) XXII Commonwealth of Australia Parliamentary Debates, Senate, 7288-7289 (Sir J Symon).

<sup>142</sup> Ibid 7287.

<sup>143</sup> Ibid 7286.

necessary for the Australian legislature to intervene and institute legislation to prevent shipowners from excluding their liability.

However, concern was expressed that a law to prevent limitation of liability could be evaded through the contractual choice of law for another forum that did not regulate liability. The Senate examined a decision in the English court concerning carriage of goods from the United States.<sup>144</sup> The Court, in that case, decided that English law was intended to apply to the contract and that the provisions of the *Harter Act* did not apply to prevent lessening of liability.<sup>145</sup> The senators expressed concern that shipping companies would contrive ways to avoid the application of Australian law by contractually deeming another law to apply, or by signing bills of lading in London through an agent.<sup>146</sup> Senators also noted that in contracts of affreightment the law of the ship's flag had been held to be the proper law covering damage and incidents at sea.<sup>147</sup> It was obvious that there was ample scope for avoiding the applications of the proposed Australian law.

Parliament decided to insert a clause into the Sea Carriage of Goods Bill to deem that the parties had contracted under Australian law. This clause would also remove the effect of any agreement lessening the jurisdiction of the Australian court:<sup>148</sup>

6 All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

This section imposed the law of "the place of shipment" upon the carriage agreement for the transport of goods from Australia. This would allow for both Australian Commonwealth and State law to apply<sup>149</sup> and was intended to show respect of individual state law, in light of the fact that admiralty law falls under the federal jurisdiction. It is also important to note that the section is not limited to bills of lading, in order to prevent carriers from inserting jurisdiction provisions into collateral agreements governing the carriage of goods, and thereby preventing the application of Australian law.<sup>150</sup> It was hoped that this section would provide a "water-tight"<sup>151</sup> application of the provisions in the *Sea Carriage of Goods Act 1904*.

### 4.3 Re-enactment and Upgrade?

As a result of accession to the Hague Rules, it became necessary in 1924 for the Parliament of the Commonwealth of Australia to review its legislation concerning liability for carriage of goods by sea.<sup>152</sup> The section preventing the ousting of the Australian courts' jurisdiction was expanded to include contracts for the carriage of goods to Australia. The House of Representatives thought that foreign jurisdiction clauses in bills of lading created undue expense for Australian importers.<sup>153</sup> The new section stated:

9 (1) All parties to any bill of lading or document relating to the carriage [of goods] from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

<sup>144</sup> *In re Missouri Steamship Co* (1889) 42 Ch D 321.

<sup>145</sup> Australia (1904) XXII Commonwealth of Australia Parliamentary Debates, Senate, 7288-7289 (Sir J Symon) 7290.

<sup>146</sup> *Ibid* 7298-7299, 7302-7303 (R Best, H Dobson and J Keating).

<sup>147</sup> *Ibid* 7304-7306 (J Keating).

<sup>148</sup> *Ibid* 7306, 7392, 7403 (J Keating and Sir J Symon).

<sup>149</sup> Australia (1904) XXIV Commonwealth of Australia Parliamentary Debates, Senate, 8413 (Sir J Symon).

<sup>150</sup> *Ibid* 8553-8554 (G Reid) discussed in relation to clause 4 of the Bill (section 5 of the Australian act) but arguably applicable to section 6 of the Australian Act.

<sup>151</sup> Australia (1904) XXIII Commonwealth of Australia Parliamentary Debates, Senate, 7293 (J Clemons).

<sup>152</sup> Australia (1924) 108 Commonwealth of Australia Parliamentary Debates, Senate, 3352 (M Pratten).

<sup>153</sup> *Ibid* 3353 (M Pratten); *Ibid* 3514 (G Pearce).

(2) Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect.

The effect of this section was to ensure that Australian law, which enacted the Hague Rules, would apply to prevent carriers from exporting cargo without liability. It would also prevent the insertion of foreign jurisdiction clauses into carriage contracts for imports and exports.

This legislation appears one-sided and would have encountered the same problems as the New Zealand *Sea Carriage of Goods Act 1940*. Australian law would apply to prevent exemption of liability on the part of the carrier for exportation of goods. Australian law is not mandatorily applied to importation of goods. Therefore, a carrier may choose a foreign law to govern the carriage contract which freely allows limitation or exclusion of liability, or modification of the Hague-Visby Rules if they are to be incorporated by contract. As has been discussed above, the best remedy for this problem would be a re-examination of the mandatory application of the Hague-Visby Rules.

Section 9(2) would have caused more harm than good by allowing the Australian consignee to sue in the Australian court with the expensive application of foreign law, and no guarantee that any legislative provisions governing the carrier's ability to limit liability would apply. Such legislation may have been more justifiable in Australia in the 1920s due to the great expense and time consuming travel to major trading nations, such as England, in order to litigate. In modern times, with the improvements in travel, there is not such a persuasive reason for this part of section 9. However, this legislative inequality has not been rectified in the current *Carriage of Goods by Sea Act 1991* section 11(2)(c). Australian legislation, unlike the New Zealand equivalent, continues to treat carriage contracts for exportation of goods differently from contracts for the importation of goods.

#### 4.4 Re-enactment and Expansion?

Attempts to modernise the Australian legislation in relation to sea carriage of goods failed in September 1990.<sup>154</sup> A further attempt in August 1991 was ultimately successful, culminating in the *Carriage of Goods by Sea Act 1991*. This new Act was different from its predecessor in that it enacted a unilaterally amended version of the Hague Rules.<sup>155</sup> It also provided for a future application of the Hamburg Rules<sup>156</sup> in Part 3 of the Act. The Hamburg Rules were to come into effect three years after the 1991 Act unless deferred by the government — which it subsequently was — until 1997 when the trigger was removed.<sup>157</sup> It is now the responsibility of the Minister — presumably the Minister of Transport, although this is not precisely stated anywhere in the 1997 Amendment — to review, from time to time, whether the Hamburg Rules should replace the Hague-Visby Rules and there must be, at the very least, a 5 yearly review.<sup>158</sup> At present, an amended version of the Hague-Visby Rules remain in force in Australia.<sup>159</sup>

##### 4.4.1 Section 11

<sup>154</sup> "Carriage of Goods by Sea Bill 1991, Crimes Amendment Bill 1991, Crimes (Aviation) Bill 1991, Freedom of Information Amendment Bill 1991: Second Reading" (14 August 1991) *Commonwealth of Australia Parliamentary Debates Online — Senate Hansard* <[http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=250782&TABLE=Hansards](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=250782&TABLE=Hansards)> (M Tate) (at 12 March 2007).

<sup>155</sup> Myburgh, P, 'Uniformity or Unilateralism in the Law of Carriage of Goods by Sea' [2000] VUWLRev, 22 <[www.austlii.edu.au/na/journals/VUWLRev/2000/22.html](http://www.austlii.edu.au/na/journals/VUWLRev/2000/22.html)> (at 18 April 2007).

<sup>156</sup> United Nations Hamburg Rules of 1978, opened for signature 31 March 1978, entered into force 1 November 1992 (hereinafter the "Hamburg Rules").

<sup>157</sup> "Carriage of Goods by Sea Amendment Bill 1997: Second Reading" (18 June 1991) *Commonwealth of Australia Parliamentary Debates Online — House Hansard* <[www.aph.gov.au/hansard/rep/dailys/dr189697.pdf](http://www.aph.gov.au/hansard/rep/dailys/dr189697.pdf)> (M Ronaldson) (at 12 March 2007) 5554-5555.

<sup>158</sup> *Carriage of Goods by Sea Act 1991* (Cth), Section 2A(1) and (2).

<sup>159</sup> There are two provisions in the *Carriage of Goods by Sea Act 1991* (Cth) which are designed to regulate party autonomy. Section 11 of the Act applies to amend the application of the Hague-Visby Rules. Section 16 of the Act applies to the application of the Hamburg Rules. As it appears unlikely that the Hamburg Rules will be enacted in Australia anytime in the near future, if at all, this discussion will focus on section 11, which regulates Australian jurisdiction in respect of the current carrier liability regime.

This section was included as it was believed to be necessary in order to avoid “the potential delays, increased costs and language difficulties” thought to occur when disputes are adjudicated under foreign laws. It is questionable whether this section actually resolves these issues. Section 11 of the *Carriage of Goods by Sea Act 1991* states:

### 11 Construction and jurisdiction

(1) All parties to:

- (a) a sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia; or
- (b) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii),<sup>160</sup> relating to such a carriage of goods;

are taken to have intended to contract according to the laws in force at the place of shipment.

(2) An agreement (whether made in Australia or elsewhere) has no effect so far as it purports to:

- (a) preclude or limit the effect of subsection (1) in respect of a bill of lading or a document mentioned in that subsection; or
- (b) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of a bill of lading or a document mentioned in subsection (1); or
- (c) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of:
  - (i) a sea carriage document relating to the carriage of goods from any place outside Australia to any place in Australia; or
  - (ii) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii) relating to such a carriage of goods.

The section applies Australian State and Federal law to carriage of goods covered by the documents in sections 11(1)(a) and (b). The parties cannot contract out of this provision, as stated in section 11(2)(a). Section 11(2)(b) renders ineffective a foreign jurisdiction clause for outward bound carriage contracts. As with the 1924 Act, section 11(2)(c)(i) and (ii) prevents an agreement limiting any of the Australian courts’ jurisdiction in respect of a related contract for the carriage of goods imported into Australia. Australian law is, again, not mandatory to carriage contracts for inward bound goods.

Does section 11 in fact prevent “the potential delays, increased costs and language difficulties” which were assumed to be a corollary of disputes adjudicated under foreign laws? The section seems to cover and successfully prevent these circumstances with regard to outward bound goods carried by sea from Australia, as it mandatorily applies Australian law, and provides for Australian jurisdiction. However, the same cannot be said for section 11(2)(c), which simply requires litigation in Australia. This does not prevent the application of foreign law to the dispute. It may cause increased expense and possible language difficulties when litigating a foreign law in the Australian court, though this will not be a problem where the foreign law also applies the Hague-Visby Rules. The section works in relation to outbound goods, but at the cost of party autonomy. It is less effective with regards to inbound goods.

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<sup>160</sup> Section 10 of the *Carriage of Goods by Sea Act 1991* (Cth) states:

#### 10 Application of the amended Hague Rules

(1) The amended Hague Rules only apply to a contract of carriage of goods by sea that:

- (a) is made on or after the commencement of Schedule 1A and before the commencement of Part 3; and
- (b) is a contract:
  - (i) ...
  - (ii) ...
  - (iii) contained in or evidenced by a non-negotiable document (other than a bill of lading or similar document of title), being a contract that contains express provision to the effect that the amended Hague Rules are to govern the contract as if the document were a bill of lading.



#### 4.4.2 The mandatory application of section 11?

A contract with a governing foreign law will not prevent the application of section 11 of the *Carriage of Goods by Sea Act 1991*.<sup>161</sup> It is a protective provision. The Australian courts have held that, in order for the section to have effect and to prevent parties from avoiding its operation, section 11 must apply regardless of the applicable law.<sup>162</sup> A foreign court may not necessarily take this view if Australian law is not the governing law of the agreement. The foreign court will not be under the same mandatory obligation to apply the statute. It will depend on whether the party asserting the application of the Australian statute can convince the foreign court that it should apply to the agreement. This will include arguing that the application of the 1991 Act is within the conflict rules of that foreign court.

Like New Zealand's section 210(1), there has been no statement either in the legislation or in the Australian court stating that section 11 of the Australian Act defeats the doctrine of *forum non conveniens*. There have been no cases under the 1991 Act arguing for the application of *forum non conveniens*.<sup>163</sup> The statute does not mandatorily remove discretion, and the Australian court may be able to apply *forum non conveniens* in the same manner as the Canadian courts, the approach of which will be examined below.

#### 4.4.3 The documentary scope of section 11

The original enactment at section 11(1)(a) and section 11(2)(c)(i) applied only to bills of lading. This form was chosen to bring legislation into line with the Hague-Visby Rules at Article 5. This states that the Rules do not apply to charterparties except where a bill of lading is issued under such an agreement.<sup>164</sup> This wording was amended<sup>165</sup> in June 1998 to clarify the position.<sup>166</sup> However, the section was again amended by way of a regulation to broaden the scope of its application. The Carriage of Goods by Sea Regulations 1998 (No 2) amended section 11(1)(a) and section 11(2)(c)(i) so that the sections now apply to "a sea carriage document relating to the carriage of goods".<sup>167</sup> This would include a broader range of documents, such as seaway bill. It was probably also to reflect the fact that judicial interpretation of the section was excluding charterparties.<sup>168</sup>

This broad legislation was evident in judicial interpretation of the former section 9 of the *Sea-Carriage of Goods Act 1924*. It was held that the words "bill of lading or document relating to the carriage of goods" included a voyage charter, itself under which there had been no actual issue of a bill of lading.<sup>169</sup> This wide scope given to the court by section 11 increases the risk that other terms in the parties' agreement will be affected. Section 11 of the 1991 Act does little to define what types of documents are actually considered to contain agreements as to jurisdiction and arbitration, which will be affected by the legislation. Nor does the Act contain a definition of a "bill of lading", or "document relating to the carriage of goods".

<sup>161</sup> *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577, decided in relation to section 9 of the *Sea-Carriage of Goods Act 1924* (Cth) but approved in relation to section 11 of the Carriage of Goods by Sea Act 1991 in *Hi-Fert Pty Ltd v United Shipping Adriatic Inc* (No 5) (1998) 165 ALR 265, 277-278.

<sup>162</sup> *Bulk Chartering & Consultants Australia Pty Ltd v T&T Metal Trading Pty Ltd* (The "Krasnogorsk") (1993) 114 ALR 189; followed in *Hi-Fert*, above n 164, 278.

<sup>163</sup> *GRD Minproc Ltd v Shanghai Flying Wheel Non-Ferrous Company* (No 2) [2005] FCA 180; *Alkimos Shipping Co v Hind Lever Chemicals Corp Ltd* [2004] FCA 969; *Hifert Pty Ltd v United Shipping Adriatic Inc*, above n 159. This was also the interpretation given to section 9 of the Sea Carriage of Goods Act 1924 where Fullagar J in *Compagnie des Messageries Maritimes v Wilson*, above n 159, 585, stated that an arbitration clause is void by virtue of the section with the result that the "only possible basis of the application [for a stay] is thus destroyed."

<sup>164</sup> "Carriage of Goods by Sea Bill 1991: Second Reading" (10 October 1991) *Commonwealth of Australia Parliamentary Debates Online — Senate Hansard* <[http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=181934&TABLE=HANSARDS](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=181934&TABLE=HANSARDS)> (R Collins) (at 12 March 2007).

<sup>165</sup> Section 21 of the *Carriage of Goods by Sea Act 1991* (Cth) allows the Governor-General to make required or necessary regulations.

<sup>166</sup> *Carriage of Goods by Sea Regulations 1998* (Cth) reg 6 <<http://frli.law.gov.au/s97.vts?action=View&VdkVgwKey=1998B00160&Collection=FRLI&ViewTemplate=frlview.htm>> (at 13 March 2007).

<sup>167</sup> *Carriage of Goods by Sea Regulations 1998* (Cth) (No 2) reg 3, sch 1 <<http://frli.law.gov.au/s97.vts?action=View&VdkVgwKey=1998B00341&Collection=FRLI&ViewTemplate=frlview.htm>> (at 13 March 2007).

<sup>168</sup> *Hi-Fert*, above n 161.

<sup>169</sup> *Sonmex Denizcilik Ve Ticaret Anonim Sirketi v MV "Blooming Orchard"* (1990) 99 ALR 138, 145-146.

The *Carriage of Goods by Sea Act* does not purport to govern time, voyage, slot or any other types of charterparty. The object of a charterparty is the ship and shipping arrangements and not the goods themselves.<sup>170</sup> This concurs with the purpose of the 1991 Act which is the carriage of goods by sea; an interpretation also supported by the Hague-Visby Rules. The Rules were designed to cover the carriage of goods by sea and exclude their effect upon charterparties as set out in Article 5.<sup>171</sup> At the time of writing, there has been no reported judgment concerning section 11 of the 1991 Act and carriage of goods under a charterparty where no bill of lading has been issued. The Australian courts may apply an interpretation restricted to bills of lading and seaway bills as contained in the State Acts.<sup>172</sup> However, it is highly likely, given the broad wording of section 11(1)(a) and section 11(2)(c)(i), along with previous Australian decisions,<sup>173</sup> that a charterparty will incorrectly be held “a sea carriage document relating to the carriage of goods”, as inappropriate as this may be.

Such a scenario is supported by the decision in *GRD Minproc Ltd v Shanghai Flying Wheel Non-Ferrous Company (No 2)*<sup>174</sup>. The case concerned service overseas for an application regarding injunctive relief to prevent arbitration occurring in Sweden. This was against GRD for alleged breaches of a contract for the commission, supply and installation of a recycling plant. As the contract involved the transshipment of goods from Australia to Shanghai by sea, it was held that section 11 of the *Carriage of Goods by Sea Act 1991* applied.<sup>175</sup> GRD, the applicant, was successful and service overseas was permitted.

This decision suggests that any type of contract which even touches on sea carriage will become subject to section 11 of the 1991 Act. Surely such a reach is beyond what any party to an ordinary commercial contract intended, especially where, for example, sea carriage constitutes only a minor part of the agreement? Under this interpretation, section 11 will have an ability to affect the whole agreement, including the parts that are entirely unrelated to the sea carriage aspect.

Giving section 11 the ability to regulate contracts whose primary purpose is other than for sea transport unrealistically reads up the nature of the contract. This decision of the Federal Court opens the door for pro-Australian litigants to argue for the application of section 11 whenever international sea carriage is mentioned in any type of contract. This is a consequence which raises important implications. It impacts upon the parties’ autonomy in agreements in a manner that the legislature did not even contemplate when debating the 1991 Act.<sup>176</sup>

## 4.5 Australian Arbitration

Initially, agreements to arbitrate were routinely struck down as impinging on the Australian courts’ jurisdiction.<sup>177</sup> However, there were judicial efforts to circumvent this result caused by the 1991 Act. In *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc*,<sup>178</sup> the Court attempted to read the expression “so far as it purports to” in section 11(2) as severing the agreement to arbitrate from a submission to the jurisdiction in which the arbitration must take place.<sup>179</sup> This would have the effect of removing the “foreign” aspect of the arbitration and allowing it to proceed in Australia. However, a forum non conveniens assessment was

<sup>170</sup> This is indicated by the fact that either in demise, time or voyage charterparties the charterer pays “hire” for the ship and not “freight” as is the custom with cargo transportation; Boyd et al, above n 13, 61-64.

<sup>171</sup> The Hague-Visby Rules as incorporated into the law of the Commonwealth of Australia by the *Carriage of Goods by Sea Act 1991* (Cth).

<sup>172</sup> For example see: section 3 of the *Sea-Carriage Documents Act 1996* (Qld); section 5 of the *Sea-Carriage Documents Act 1997* (NSW); section 5 of the *Sea-Carriage Documents Act 1997* (WA); and, section 5 of the *Sea-Carriage Documents Act 1998* (Vic).

<sup>173</sup> *The Blooming Orchard*, above n 169.

<sup>174</sup> Above n 163.

<sup>175</sup> Ibid paras [18], [24] and [27].

<sup>176</sup> See above n 164.

<sup>177</sup> *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577; *Blooming Orchard*, above n 169; *The “Krasnogorsk”*, above n 162, per Kirby J (dissent) 193-197.

<sup>178</sup> *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (1996) 71 FCR 172.

<sup>179</sup> Ibid 183-184.

permitted,<sup>180</sup> to determine that the arbitration could occur in a foreign forum if appropriate.<sup>181</sup> This approach would lead one to believe that the discretion could also be applied, in the same manner, for foreign jurisdiction clauses, as discussed above.

Nevertheless, this novel attempt to rescue an arbitration agreement was swept aside on appeal to the Federal Court of Australia<sup>182</sup> where the Court thought that the phrase did not sever the arbitration agreement. Instead their Honours held:<sup>183</sup>

The word “purports” refers to the purpose and object of the clause. An express obligation to refer a dispute to a non-judicial forum and the promise not to refer the dispute to a judicial forum are simply different aspects of a single stipulation. Both aspects have the same consequence, namely, that access to the jurisdiction of a court is precluded or limited.

The arbitration clause in the charterparty, incorporated into the bills of lading, was therefore ineffective and the Court reasserted a literal interpretation of the legislation.

Reform of the situation eventually came in the form of the Carriage of Goods by Sea Amendment Bill 1997, where a sub-section was introduced as part of section 11 to prevent the courts from striking down agreements to arbitrate. The new sub-section reads:

(3) An agreement, or a provision of an agreement, that provides for the resolution of a dispute by arbitration is not made ineffective by subsection (2) (despite the fact that it may preclude or limit the jurisdiction of a court) if, under the agreement or provision, the arbitration must be conducted in Australia.

As yet, there have been no reported cases examining section 11(3). It will be interesting to see what the Australian courts decide to do when confronted with a foreign arbitration clause. The legislature has only specified how to treat Australian arbitration clauses, and not their foreign counterparts. It is possible that the entire foreign arbitration agreement will be held to be void and the Australian court will retain jurisdiction. Alternatively, the foreign aspect of the arbitration may become a nullity and the parties will be required to arbitrate in Australia. The solution will depend on whether the Australian courts are willing to adopt a more radical interpretation of the legislation, similar to the approach of Tamberlin J in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc.*<sup>184</sup> However, as the Federal Court of Australia overturned this decision,<sup>185</sup> it seems likely that the Australian court will retain jurisdiction over the action.

## 4.6 Implications for New Zealand

One positive aspect of section 11 of the *Carriage of Goods by Sea Act 1991* is that it functions efficiently to ensure that Australian law applies to exported goods, at section 11(1), while simultaneously retaining Australian jurisdiction in section 11(2)(a) and (b). Combining the relevant law and jurisdiction for outbound goods simplifies the process, and ensures that Australian exporters are not exposed to carriers using a foreign law to contract out of their liability. This result would probably be achieved anyway, by virtue of the Hague-Visby Rules applying to carriage of goods from a contracting state,<sup>186</sup> as by definition this will apply to goods exported from Australian ports. This further strengthens the conclusion that Australia's stifling approach to foreign jurisdiction and arbitration clauses in bills of lading is no longer justified. This will be discussed below.

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<sup>180</sup> As in *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 141 ALR 374 as noted by Davies, M, 'A Chink (Or Two) in the Bill of Lading Plaintiff's Jurisdictional Armour?: Good News for Australian Maritime Arbitration?' [1998] 26 *Australian Business Law Review*, 70.

<sup>181</sup> *Hi-Fert* above n 178.

<sup>182</sup> *Hi-Fert*, above n 178, 142.

<sup>183</sup> *Ibid* 165.

<sup>184</sup> Above n 178.

<sup>185</sup> Above n 161.

<sup>186</sup> Article X(b) of the Hague-Visby Rules.

Moreover, the Australian provisions governing jurisdiction and arbitration in carriage of goods by sea contracts demonstrates the scenario that might occur, should New Zealand decide to enact stricter nationalistic legislation. Section 210(1) of the Act evidently applies only to bills of lading or “similar documents of title” and it would be hard to read this phrase widely enough to include a charterparty itself. A charterparty is not a document of title but a document of hire. Charterparties would, therefore, correctly fall outside the scope of section 210(1) of the Act. Nor would New Zealand legislation regulating foreign jurisdiction or arbitration clauses apply to any other type of contract that merely contains provisions pertaining to sea carriage of goods.

In this sense, the Australian experience serves as a warning to adopting an exorbitant approach in respect of this issue. The Australian legislation is overly parochial and, at the same time, paternalistic in trying to encompass every element of a contract of carriage. Australia also fails significantly in its international obligations by not recognising foreign arbitration clauses.<sup>187</sup> If this type of legislation becomes a global phenomenon, there would be little hope for international uniformity in relation to the regulation of jurisdiction and arbitration agreements in contracts for the carriage of goods by sea.

## 5 THE MORE LIBERAL CANADIAN APPROACH

### 5.1 Introduction to the Canadian Approach

Canada has had a much briefer flirtation with legislation that regulates jurisdiction and arbitration clauses. Before the current regime was enacted in 2001, there was a gap of 65 years where no provision existed to support the ability of the Canadian courts to take jurisdiction in marine cargo claims.

### 5.2 Early legislative history

Section 5 of the *Water Carriage of Goods Act 1910* prevented clauses in bills of lading, or documents relating to the carriage of goods, from ousting the jurisdiction of the Canadian court, with regards to goods loaded at a Canadian port. The relevant section stated:<sup>188</sup>

[A]ny stipulation or agreement purporting to oust or lessen the jurisdiction of any court having jurisdiction at the port of loading in Canada in respect of the bill of lading or document shall be illegal, null and void, and of no effect.

The Canadian courts, unlike their Australian counterparts, refused to strictly apply the Act, including section 5, to contracts governed by foreign law.<sup>189</sup> Acting as practical restrictions upon the court’s jurisdiction, arbitration clauses would presumably have suffered a similar fate under this section.

The Canadian *Water Carriage of Goods Act 1910*, like the Australian and New Zealand Acts, was concerned to prevent shippers from excluding their liability.<sup>190</sup> It was evidently believed that Canadian cargo claimants loading their goods in Canadian ports should have a right to sue for damage in their home jurisdiction.

### 5.3 Party Autonomy Reigns ... For a While

However, this legislation did not remain in force for long. Section 5 of the 1910 Act was not re-instated in the *Water Carriage of Goods Act 1936*. Nor was such legislation implemented in any of the later Acts up to and including the *Carriage of Goods by Water Act 1993*. As a result, a series of case law on the effect to be given to jurisdiction and arbitration clauses developed. This culminated in the position outlined below.

<sup>187</sup> Australia is a signatory to the New York Convention. Australia has also implemented the UNCITRAL Model Law. Both the Convention and the Model Law are enacted in the *International Arbitration Act 1974* (Cth).

<sup>188</sup> Tetley, W, *Marine Cargo Claims* (3<sup>rd</sup> ed., Blais, Montreal, 1988), 784.

<sup>189</sup> *Vipond v Furness Withy & Co* (1916) 54 SCR 521, para [16].

<sup>190</sup> Gutteridge, H, ‘The Limitation of the Liability of Shipowners’ [1921] 2 *Economica*, 180, 187.

### 5.3.1 Jurisdiction clauses

The prima facie position in regards to jurisdiction clauses in bills of lading was to hold the parties to their agreement. However, section 50(1) of the *Federal Court Act*<sup>191</sup> allowed the court to exercise its discretion. A “strong cause” is required for not upholding the agreement and obtaining a stay from the court. The “strong cause” test was derived from the English decision of *The Eleftheria*.<sup>192</sup> The presumption was that parties would be held to the agreed forum, unless the plaintiff could satisfy the court there was an adequate reason why the agreement should not have been enforced.<sup>193</sup> This test provided a measure of flexibility in that the judge was required to take into account all the surrounding factors of the case in determining whether to grant a stay.<sup>194</sup>

This treatment of foreign jurisdiction clauses in bills of lading gave greater respect to party autonomy and concurred with the position set out above.<sup>195</sup> The “strong cause” test ensured uniform treatment between the types of contracts that contain foreign jurisdiction clauses, and provided greater certainty that the parties’ agreement would be enforced.

### 5.3.2 Arbitration Clauses

The *United Nations Foreign Arbitral Awards Convention Act 1985 (C)*<sup>196</sup> enacts the New York Convention. Schedule 1, Article II(3) provides:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Tetley states that, where there is a valid foreign arbitration clause, the Canadian court must refer the dispute to arbitration in the agreed-upon forum in light of this legislation.<sup>197</sup> However, an examination of decisions under the *United Nations Foreign Arbitral Awards Convention Act 1985 (C)* indicates that the Act is used more for enforcement of foreign arbitral awards rather than as a provision to stay proceedings brought in breach of a foreign arbitration agreement.<sup>198</sup>

It seems that Canadian courts have preferred to use the *Commercial Arbitration Code (C)*,<sup>199</sup> which is based upon the UNCITRAL Model Law on International Commercial Arbitration 1985, to grant a stay of court proceedings where the bill of lading contained a foreign arbitration clause.<sup>200</sup> Article 8(1), Schedule 1, of the *Commercial Arbitration Code* states:

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

<sup>191</sup> RS, 1985, c F-7; *ZI Pompey Industrie v ECU-Line NV* [2003] SCC 27, para [19].

<sup>192</sup> *The Eleftheria* above n 46; *ZI Pompey Industrie v ECU-Line NV*, above n 191.

<sup>193</sup> *ZI Pompey Industrie v ECU-Line NV*, above n 191, para [20].

<sup>194</sup> Ibid paras [19] and [20] quoting from *The Eleftheria*, above n 46.

<sup>195</sup> See above at 2.1.

<sup>196</sup> SC 1986, c 21.

<sup>197</sup> Tetley, above n 191, 1018; Tetley, W, “National Summaries — Canada” *Marine Cargo Claims* (4<sup>th</sup> Ed, to be published 2008) <<http://www.mcgill.ca/maritimelaw/maritime-admiralty/>> (at 19 March 2007).

<sup>198</sup> See for example *TMR Energy Ltd v State Property Fund of Ukraine* Federal Court, 22 September 2004, Docket T-60-03; *Compania Maritima Villa Nova SA v Northern Sales Co* [1992] 1 FC 550 (Fed CA).

<sup>199</sup> Contained in the *Commercial Arbitration Act 1985 (Canada)*, c 17 (2<sup>nd</sup> Supp).

<sup>200</sup> *Thyssen Canada Ltd v Mariana Maritime SA* [2000] 3 FC 398 concerning a London arbitration clause contained in a charterparty incorporated in the bills of lading; *Ruhrkohle Handel Inter GmbH v Federal Calumet* [1992] 3 FC 98 concerning a New York arbitration clause in a charterparty to which the bill of lading was subject; *Methanex New Zealand Ltd v Fontain Navigation SA* [1998] 2 FC 583 stay of proceedings in favour of a London arbitration clause in a contract of affreightment, containing the entire agreement, refused as a result of a letter of undertaking to be served in Canada.

This provision, though not identical, is extremely similar to its New Zealand counterpart,<sup>201</sup> and had the same effect in cases concerning bills of lading. In *Thyssen Canada Ltd v Mariana Maritime SA*<sup>202</sup> the Canadian Federal Court of Appeal considered the issue of whether a London Arbitration Clause in a charterparty agreement was validly incorporated into the bills of lading for a shipment of steel coils. The Court held that, where the clause was successfully incorporated<sup>203</sup> and it was not rendered null, void or inoperative under Article 8, the proceedings were required to be stayed in favour of arbitration in the foreign forum.<sup>204</sup> This was to the same effect as Schedule 1, Article 8 of the New Zealand *Arbitration Act 1996*.<sup>205</sup>

#### 5.4 The Current Legislative Position in the *Marine Liability Act 2001*

In 2001 the Canadian Senate initiated a Bill that was passed through the House of Commons to consolidate the marine liability regime.<sup>206</sup> The new legislation re-enacted the Hague-Visby Rules but, like the Australian Parliament, with the view that these would be eventually be superseded by the Hamburg Rules. There was some concern over the lack of provisions in the Hague-Visby Rules for issues of the jurisdiction of foreign courts and arbitral tribunals.<sup>207</sup> Canada is a shipping nation and the Canadian government wished to protect the country's economic interests.<sup>208</sup> A section was enacted, based on Article 21 of the Hamburg Rules, to allow for Canadian jurisdiction. Canadian jurisdiction will exist even where the bill of lading, as evidence of the contract of carriage, stipulates for a foreign forum. Section 46 of the *Marine Liability Act 2001* states:

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

This section applies to all types of carriage contracts to which the Hamburg Rules do not apply, thus covering contracts under the Hague-Visby Rules. In order for this section to apply, the Canadian court must first be able to take jurisdiction as if the contract had provided for Canadian jurisdiction. Second, the claim must fall under one of the three conditions at (a), (b) and (c). An agreement to jurisdiction made after the dispute has arisen is allowed at sub-section (2). Unlike its Australian counterpart, section 46 does not apply Canadian law to the dispute.

Shipowning interests in Canada were opposed to the insertion of section 46 preferring to retain the right to dictate the forum for dispute resolution. However, the majority of the Members of Parliament believed that the small Canadian exporter would be at a disadvantage pursuing claims against the larger and more

<sup>201</sup> *Arbitration Act 1996* (NZ), Schedule 1, Article 8.

<sup>202</sup> Above n 200.

<sup>203</sup> Article 7(2) of the *Commercial Arbitration Code* (C), above n 200.

<sup>204</sup> *Thyssen*, above n 200, para [24]. Leave to appeal to the Supreme Court refused; *Thyssen Canada Ltd v Mariana Maritime SA* Supreme Court of Canada, 9 November 2000, Docket 27928.

<sup>205</sup> Discussed above at 2.3.

<sup>206</sup> "Marine Liability Act — Second reading" *Canadian Parliamentary Debates Online — House Hansard* <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=37&Ses=1&DocId=2332086#LINK158>> (O Jackson) (at 16 March 2007).

<sup>207</sup> Government of Canada "E. Part 5 — Liability for Carriage of Goods by Water (clauses 41-46)" *Legislative History of Bill S-2 The Marine Liability Act* <<http://dsp-psd.communication.gc.ca/Pilot/LoPBdP/LS/371/s2-e.htm>> (at 16 March 2007).

<sup>208</sup> *OT Africa Line Ltd v Magic Sportswear Corp* [2006] FCA 284, para [57].

powerful carrier in an unfamiliar foreign forum.<sup>209</sup> An examination of the judiciary's interpretation of section 46 will indicate whether any advantages have been created by this legislation.

#### 5.4.1 Canadian judicial interpretation of foreign jurisdiction clauses

The recent case of *OT Africa Line Ltd v Magic Sportswear Corp*<sup>210</sup> clarified the position in relation to section 46 and foreign jurisdiction clauses. The case concerned the partial loss of cargo on a journey from New York to Monrovia, Liberia. While the carrier's head office was in London, it also operated through agents in Toronto. The consignor was a company situated in Delaware, the United States, and the consignee was a Liberian company. The bill of lading evidencing the contract of carriage was issued in Toronto, and the plaintiffs claim had been subrogated to the insurance company which was also situated in Toronto.<sup>211</sup> The defendant carriers had obtained an anti-suit injunction from the English court to prevent the plaintiff from continuing the Canadian action.<sup>212</sup>

The Canadian Federal Court of Appeal upheld the lower courts' decisions that section 46 prevented a court from declining jurisdiction, merely on the grounds of a foreign forum clause.<sup>213</sup> However, the Court interpreted *ZI Pompey Industrie v ECU-Line NV*<sup>214</sup> as standing for the proposition that, even if jurisdiction exists under section 46, the section does not mandate that the court must retain the dispute. Nor does section 46 remove the court's discretion under section 50 of the *Federal Courts Act*.<sup>215</sup> The doctrine of *forum non conveniens* is not inconsistent with section 46, and may also be applied to determine the most appropriate forum.<sup>216</sup> To prevent this analysis would lead to incongruous results where, simply because there was a foreign jurisdiction clause, a Canadian court could take jurisdiction. According to their Honours, this was comparable to the situation where there was no such clause, and the court would have to decline to exercise its jurisdiction on the application of the doctrine of *forum non conveniens*.<sup>217</sup>

On the application of this doctrine, the Federal Court of Appeal differed from the lower courts. It considered that the English judgments were relevant factors to be taken into account. This was to reflect the interests of international comity and the concern to prevent parallel proceedings.<sup>218</sup> The Court also held that the foreign jurisdiction clause, while not being conclusive, was a relevant consideration.<sup>219</sup> This was because the clause was not rendered null and void by the operation of section 46(1).<sup>220</sup> In the circumstances of the case before the court, it was held that the defendant carriers had displaced the burden to show that England was a more convenient forum in which to hear the dispute. A stay of proceedings was granted.<sup>221</sup>

#### 5.4.2 Canadian judicial interpretation of foreign arbitration clauses

<sup>209</sup> "Marine Liability Act — Second reading" *Canadian Parliamentary Debates Online — House Hansard* <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=37&Ses=1&DocId=2332110#LINK198>> (N Doyle) (at 16 March 2007).

<sup>210</sup> Above n 208.

<sup>211</sup> Ibid paras [5]-[10].

<sup>212</sup> *Magic Sportswear Corp v OT Africa Line Ltd* [2005] 2 Lloyd's Rep 170.

<sup>213</sup> *OT Africa Line Ltd v Magic Sportswear Corp*, above n 208, para [33].

<sup>214</sup> Above n 191.

<sup>215</sup> *OT Africa Line Ltd v Magic Sportswear Corp*, above n 208, paras [26] and [27].

<sup>216</sup> The Court, at para [92], followed the decision of *Spar Aerospace Ltd v American Mobile Satellite Corp* [2002] SCC 78, following the decision in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, which stated that no one factor was determinative in this assessment. It is important to note that the old test, based on *The Eleftheria*, above n 48, is not used here. This gives prima facie effect to the foreign jurisdiction clause and is perhaps why the Canadian court was not eager to follow this test as it would give rise to a biased assessment of the appropriate forum when deciding whether to exercise jurisdiction under section 46. The refusal to give the foreign jurisdiction clause prominence demonstrates a lack of respect for the parties' right to freely negotiate the terms of the contract of carriage, as evidenced in the bill of lading. However, when taking into account the aims of section 46 to protect small Canadian exporters, it would then seem to be a slap in the face, and rather inefficient, to have the burden of proving that the Canadian court should retain jurisdiction, as required in *The Eleftheria* test, even though section 46 has already granted jurisdiction. In effect, the legislation fulfills the first stage of the *Spiliada* inquiry leaving only the second stage to be examined.

<sup>217</sup> *OT Africa Line Ltd v Magic Sportswear Corp*, above n 208, para [31].

<sup>218</sup> Ibid para [70].

<sup>219</sup> Ibid para [88].

<sup>220</sup> Ibid para [84].

<sup>221</sup> Ibid paras [101] and [102].

The only case to consider an arbitration clause to which section 46(1) applies was *Nestlé Canada Inc v The "Viljandi"*.<sup>222</sup> In my opinion, the result of the case is questionable, as it allows section 46 to apply to fact situations arising before the enforcement of the section, if the claim arising from those facts has been lodged in the court after the enactment of section 46.<sup>223</sup> The decision is, however, useful in its examination of the effect section 46(1) has upon foreign arbitration clauses.

The case concerned a shipment of evaporated milk from Quebec to Puerto Rico which was destroyed en route. The New York arbitration clause in the sub-carrier's bill of lading was found to be binding upon Nestlé Canada. The court then had to consider the application of section 46(1) to the arbitration agreement in order to determine whether the action could continue in Canada.<sup>224</sup> Faced with the finding that Nestlé Canada was bound by the arbitration clause, along with the finding that section 46 could apply to the facts, the Prothonotary's only course of action was to dismiss the motion in favour of arbitration.<sup>225</sup> In the course of his decision, Prothonotary Morneau did not discuss the effect that section 46 would have upon the arbitration proceedings once the court had stayed the action. Presumably, in reliance upon section 46(1), Nestlé Canada could institute valid arbitration proceedings in Canada. Issues may arise should the Canadian arbitration tribunal refuse to assume jurisdiction because it considers itself not to be the appropriate seat.<sup>226</sup> What would then be the resulting situation? Would the parties be able to return to the jurisdiction of the Canadian court? Or would the stay be maintained in favour of arbitration in the foreign seat? There has been no reported decision dealing with what ought to take place in this scenario. In light of the international community's emphasis upon the importance of arbitration, my submission is that it would be reasonable to assume the action should be sent to arbitration in the foreign tribunal.

There is no clear conclusion to be drawn from the decision in *Nestlé Canada*. The Court does not enunciate whether the action is to be stayed in deference to the foreign arbitration clause, or for the election of arbitration in Canada. It is also disappointing that the Court, like their Australian counterparts, did not examine the relationship between the *Commercial Arbitration Code* and section 46 of the *Marine Liability Act*. Presumably, as with section 50 of the *Federal Courts Act*, the *Commercial Arbitration Code* remains effective to require that the arbitration is sent to the foreign forum. However, this conclusion would undermine the intention of section 46(1) to allow arbitration to take place in Canada at the plaintiff's election. If section 46 allows the foreign arbitration clause to be overridden, it would impinge upon Canada's international obligations as a signatory to the New York Convention and the Canadian enactment of the UNCITRAL Model Law. This is an area that would benefit from legislative and judicial review, in order to clarify the conflicting legislation. Whatever the conclusion, the effect of section 46(1) is to continue to protect the arbitration aspect of agreements, regardless of any ensuing confusion as to the status of the agreement.

## 5.5 Something for Everyone?

### 5.5.1 Jurisdiction clauses

Tetley has favourably compared the more liberal and less restrictive approach of Canada's section 46 with the equivalent legislation in New Zealand and Australia.<sup>227</sup> I agree with his statement. The Canadian approach allows the shipper plaintiffs to decide where it is in their best interests to sue. The balance for defendant carriers arises from the list of factors connecting the dispute to the Canadian jurisdiction.<sup>228</sup> A shipper may take into account the expense of litigating a claim, to which a foreign law applies, in the

<sup>222</sup> [2002] FCT 987.

<sup>223</sup> [2003] FCT 28 where the Federal Court upheld this decision. The lower Court relied upon *Incremona-Salerno Marmi Affini Siciliani (ISMAS) snc v "Castor" (The)* [2001] FCT 1330 in order to reach this decision but that case has since been overruled in *"Castor" (The) v Incremona-Salerno Marmi Affini Siciliani (ISMAS) snc* [2004] FCA 313. It is, therefore, open to question whether the decision with regards to the retroactive application of section 46 in *Nestlé Canada* still stands.

<sup>224</sup> *Nestlé Canada*, above n 222, para [19].

<sup>225</sup> *Ibid* para [25].

<sup>226</sup> Redfern, Hunter, Blackaby and Partasides, above n 57, 295-296 states the grounds for a tribunal not having jurisdiction.

<sup>227</sup> Tetley, W, 'Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea', *Tetley's Maritime and Admiralty Law* <<http://www.mcgill.ca/maritimelaw/maritime-admiralty/>> (at 17 February 2007), 12.

<sup>228</sup> *Marine Liability Act 2001* (Canada), Section 46(1)(a), (b) and (c).



Canadian courts, or arbitration tribunal, as opposed to undertaking the action overseas in the contractually chosen forum. The section also provides a system by which to determine an available forum to bring claims under the Hague-Visby Rules — a mechanism lacking from this Convention.

The interpretation of section 46(1) given by the Canadian courts to foreign jurisdiction clauses is flexible and results in sensible conclusions. By retaining the court's discretion the surrounding circumstances may be considered, meaning that, in turn, the most appropriate forum for resolving the dispute can be determined. This means that the Canadian court can take into account requirements of international comity; any attempts at forum shopping on the part of one of the parties; and help to prevent court systems from being inundated with a multiplicity of proceedings spread out over different jurisdictions.<sup>229</sup> This discretion also gives due consideration to the parties' jurisdiction agreement. While not adopting a purist approach to freedom of contract, it is not as absolutist as the Australian and New Zealand legislation. The main issue with discretion is that it does not lend itself to uniformity; a discretionary power is just that, and the consideration of the surrounding circumstances will differ between courts and members of the judiciary.

### 5.5.2 Arbitration Clauses

The same cannot be said for foreign arbitration clauses governed by section 46(1). While the intention behind the legislation, namely to allow foreign arbitration clauses to become subject to the Canadian jurisdiction, appears laudable, in reality the legislation undermines international uniformity in this area. As to the effect of section 46(1), Tetley has stated that section 46(1) of the *Marine Liability Act* is not inconsistent with the New York Convention and the UNCITRAL Model Law. He argues that, as section 46(1) only applies to contracts for the carriage of goods by water and, as these documents are often standard forms, they do not represent an "agreement" under the terms of these conventions.<sup>230</sup> Tetley's assessment of the nature of carriage documents, including bills of lading, is accurate. However, I disagree with his conclusion that these documents do not constitute agreements within the meaning of the Conventions. It should not be forgotten that bills of lading are consistently viewed as the best evidence of the carriage agreement. This interpretation also gives little weight to the fact that, certainly in relation to bills of lading which successfully incorporate terms of a charterparty, courts have applied the principles from the New York Convention and the UNCITRAL Model Law as enacted in national legislation.<sup>231</sup>

Tetley's statement that a bill of lading, as best evidence of the carriage contract, "is actually incomplete, [and] cannot in itself constitute an agreement" under the two international regimes is more problematic.<sup>232</sup> It is arguable that the head agreements of carriage, from which the bill of lading stems, could provide that any clauses in the bill of lading are to form part of the main agreement.<sup>233</sup> Taking Tetley's argument a step further, it should not be possible to add terms to the agreement as the bill of lading is issued after the ship has sailed, thus preventing the shipper from knowing the terms beforehand.<sup>234</sup> Yet it is possible that, if the carriage agreement makes it clear that the terms of the bill of lading are to be incorporated, and there is an opportunity for the shipper to view these terms on a standard form bill of lading, these terms should form part of the carriage agreement.

For Tetley, the fact that both parties do not sign the bill of lading is fatal to its status as a contractual document.<sup>235</sup> However, in practical terms, such a requirement would lead to substantial delays in carriage transactions. It would become necessary to send the bill of lading to the shipper for signature. A carrier may refuse to actually carry the goods unless the shipper consents to the terms. Moreover, the bill of lading

<sup>229</sup> *OT Africa Line Ltd v Magic Sportswear Corp*, above n 208, provides an example. While there was drawn-out litigation in Canada concerning jurisdiction, the Canadian courts did not enter into the merits of the case.

<sup>230</sup> Tetley, W, 'Jurisdiction and Arbitration Clauses in Carriage of Goods by Sea in Canada — The New Law and *OT Africa Line Ltd v Magic Sportswear Corp*' *Tetley's Maritime and Admiralty Law* <<http://www.mcgill.ca/maritimelaw/maritime-admiralty/>> (at 17 February 2007), 18-20.

<sup>231</sup> *Thyssen*, above n 200 (Canada — decided before the *Marine Liability Act* 2001); *Trackweld Group Ltd v Contship Container Lines Ltd*, above n 58 (New Zealand); *Mobil Oil New Zealand Ltd v The Ship "Stolt Sincerity"*, above n 111 (New Zealand); *Anglia Oils v Owners and/or Demise Charterers of the Marine Champion* [2002] EWCH 2407 (England).

<sup>232</sup> Tetley, above n 230, 19.

<sup>233</sup> See discussion in relation to supersession, above at 1.2.3.

<sup>234</sup> Tetley, above n 230, 19.

<sup>235</sup> *Ibid.*

is not the contract of carriage. It simply provides evidence of the contractual terms. The bill of lading is issued to show that the carrier has loaded the goods, and this aspect of the carriage contract does not require any action on the part of the shipper. To insist that both parties to the carriage contract sign the bill of lading is practically unrealistic, and commercially undesirable.

International courts have adopted a more lenient approach as to what constitutes an “agreement in writing” under Article II of the New York Convention. An exchange of letters and telegrams, coupled with conduct, has been found to amount to an agreement to arbitrate in relation to a charterparty.<sup>236</sup> This flexible approach has also been adopted in Canada.<sup>237</sup> There is, then, no reason why the New York Convention and the UNCITRAL Model Law should not apply to the contract of carriage including the terms in the bill of lading. Bills of lading have consistently been recognised as unique documents. Despite their unusual nature, they still constitute best evidence of the carriage contract and the entire contract of carriage when in the hands of a third party transferee.

This is a complicated area, which I believe requires Canadian Parliamentary intervention to resolve the tension between competing legislation. Unlike Australia and New Zealand, the Canadian position is more optimistic in that the basic intention to respect the parties’ autonomy to choose arbitration exists in the legislation, even if Canada has not achieved the standard envisaged by the relevant international convention; to recognise and enforce the foreign element of the parties’ choice. Canada presents a less invasive approach that is more in favour of party autonomy.

## **6 JUSTIFICATION FOR REGULATING FOREIGN JURISDICTION AND ARBITRATION CLAUSES IN THE NEW ZEALAND MARITIME CONTEXT?**

### **6.1 Justification?**

The preceding discussion concerning New Zealand, Australia and Canada’s regulation of jurisdiction and arbitration clauses indicates some interesting factors that must be considered in greater depth, in order to determine whether such regulation is justified. There are historical and technical factors to be examined in order to reach a finding upon this issue.

### **6.2 Does History Justify the Modern Position?**

These regulating provisions have had a long history, certainly in New Zealand and Australia. However, historical reasons are not necessarily a sound basis upon which to support their continued existence. In *The Krasnogorsk*,<sup>238</sup> Kirby P gave six reasons for these provisions:

1. Considerations of national pride;
2. The assertion of national jurisdiction;
3. The determination of the local legislature to protect the economic interests of local traders;
4. Mistrust of overseas courts, tribunals, arbitrators and their laws;
5. Reaction to the prevailing dominance of sea trade by foreign powers; and
6. Recognition of the inconvenience and cost inherent in arbitrations in distant places which might prevent local traders from pursuing claims.<sup>239</sup>

An important addition to Kirby P’s list would be that provisions regulating jurisdiction arose to support other legislation enacted at the time. These reasons will be examined in turn below.

#### **6.2.1 An international approach**

<sup>236</sup> *Comandante Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, para [155]; Rares, S, ‘Some Lessons from Pan’s Odyssey’, Paper presented to Third Biennial Conference of the New South Wales Branch of the Maritime Law Association of Australia and New Zealand, Australia, 24 February 2007, 14

<sup>237</sup> *Proctor v Schellenberg* [2003] 2 WWR 621; Rares, above n 236, 15.

<sup>238</sup> Above n 162.

<sup>239</sup> Ibid 194.

Reasons 1, 2 and 4 can briefly be dealt with together, by recognising the growing global trend of government and judicial internationalism. This requires respect and acknowledgement of the foreign nation's courts. Although there may be a gap between the rhetoric and reality, courts have waxed lyrical on the theme that foreign courts are not to be regarded as suspect entities.<sup>240</sup> Governments have now realised that, in order to prosper economically and to attract industry to their regions, there must be a reliable legal system for parties to turn to in the event of a commercial dispute. This demands recognition of the validity of other legal systems which will, in turn, respect and uphold the jurisdiction of the New Zealand legal system. In theory, provisions that retain jurisdiction over foreign court and arbitration proceedings are no longer justifiable on the basis that foreign legal systems are somehow inferior or untrustworthy. This approach is in conformity with the fact that most courts are desirous to give effect to the parties' jurisdiction agreement.<sup>241</sup> While the goal of judicial internationalism is yet to be achieved, courts worldwide are moving away from a completely nationalistic approach.

When adjudicating upon carriage contracts that have been closely connected to legislation retaining jurisdiction, foreign courts have found ways around these nationalist provisions.<sup>242</sup> Likewise, where a court has taken jurisdiction over a matter based on these nationalistic provisions, the resulting judgment may not be recognisable or enforceable in a foreign jurisdiction.<sup>243</sup> This indicates that such legislation is eyed with disfavour, and is simply ignored or afforded little respect in overseas courts.

### 6.6.2 Protecting local traders' economic interests

As local shippers increasingly bore the brunt of the costs when their goods were damaged, and the carriers had exempted themselves from all forms of liability, there developed a concern within to protect the interests of local traders, and thus local economic interests. As a response, the domestic legislature enacted provisions to prohibit lessening of liability. These provisions relied on the fact that New Zealand or Australian law was to apply to the dispute and retaining jurisdiction over the action was the means by which to ensure that this application of domestic law took place. Once this applied, the shipowner was unable to claim total exemption from liability. While at the time this was a major concern, as not all nations had such laws preventing carriers from lessening their liability, it is not such an issue in the modern sea carriage environment. The Hague Rules, the Hague-Visby Rules and also, albeit to a lesser extent, the Hamburg Rules are now widely-used Conventions to prevent the ouster of a carrier's liability.

This is an important point because, where the Hague-Visby Rules or the Hamburg Rules are not contractually incorporated,<sup>244</sup> these Conventions will only apply where the carriage transaction comes within the mandatory scope of Article X of the Hague-Visby Rules or Article 2 of the Hamburg Rules. In terms of protection for New Zealand, all of our exports will be covered by the Hague-Visby Rules. Imports into New Zealand are also very well protected, as out of the top 25 countries from which we import,<sup>245</sup> only 7 are not signatories to one of the forms of the Hague Rules or the Hamburg Rules or do not apply similar rules regarding liability in their national law.<sup>246</sup> This will help to prevent carriers from using gaps in the Hague-Visby Rules' mandatory application by choice of law.<sup>247</sup> The Hamburg Rules and the proposed UNCITRAL Draft Convention have a broader scope of application. Both conventions become mandatorily

<sup>240</sup> *The Abidin Daver* [1984] AC 398, 411.

<sup>241</sup> Davies, M, 'Carriage of Goods by Sea: Changes to the Law in Australia', Paper presented to 25<sup>th</sup> MLAANZ Annual Conference, Cairns, Australia, 26 to 30 September 1998.

<sup>242</sup> In *Furness Withy (Australia) Pty Ltd v Metal Distributor UK Ltd*, above n 88, the Court of Appeal held that an arbitration agreement was subject to English law, as it was a new agreement, and was not an illegality under section 9 of the Sea Carriage of Goods Act 1924 (Cth). The charterparty that the arbitration agreement was made pursuant to was governed by Australian law.

<sup>243</sup> Davis, M, 'Fruits of the Blooming Orchard' (1991) *Australian Business Law Review* 217, 221, discussing section 32(1)(a) of the Civil Jurisdiction and Judgments Act 1982 (UK) where a foreign judgment will not be recognised if it was given contrary to a jurisdiction agreement.

<sup>244</sup> Hague-Visby Rules Article 10(c); Hamburg Rules Article 2(1)(e).

<sup>245</sup> Statistics New Zealand *Table of Imports by Country of Origin Month Ended December 2006*

<<http://www.stats.govt.nz/NR/rdonlyres/6077E4DB-5C12-4E28-A038-7990484B653F/17643/omtdec06alltables1.xls>> (at 19 March 2007).

<sup>246</sup> Informare *International Conventions — Membership List* <[www.informare.it/dbase/convuk.htm](http://www.informare.it/dbase/convuk.htm)> (at 28 March 2007).

<sup>247</sup> For an example see *Vita Food Products Inc v Unus Shipping Co Ltd (In Liq)* [1939] AC 277; for a discussion of this case see Reynolds, F, 'The Hague Rules, the Hague-Visby Rules and the Hamburg Rules' (1990) 7 *MLAANZ Journal*, 16, 20.

applicable when the port of loading is in a convention state and, also, where the port of discharge is a convention state.<sup>248</sup> On this basis, the historical justification of ensuring a national law would apply to prevent limitation of liability is no longer valid. This includes the requirement to retain jurisdiction to ensure that the domestic law is applied. There is now successful international recognition and protection of this concern.

### 6.2.3 Foreign powers dominating sea trade

At the same time, the nature of shipping trade has fundamentally changed. Maritime ventures are no longer the indication of a nation's strength and prestige that they once were. Shipowning is now a commercial venture, dominated not by single states but by bodycorporates. This is illustrated by the fact that the top 20 countries with the largest number of companies holding beneficial ownership of ships<sup>249</sup> are not equivalent to the top 20 largest shipping flags in the world.<sup>250</sup> Shipping and world trade is no longer a national but a commercial enterprise and legislation that retains jurisdiction cannot be justified on the grounds of protecting New Zealand traders from foreign powers. In all practicality, the effect is the same for the New Zealand shipper as it is overseas companies who own these fleets. The shift in power has been from public bodies to private entities. Thus, while the situation is not ideal for the New Zealand shipper, legislation regulating foreign jurisdiction clauses is no longer justifiable on the grounds that a foreign state holds a monopoly in the area.

### 6.2.4 Geographical isolation and the economic factor

Modern transportation has brought the world closer together; international travel is now readily accessible and increasingly convenient. Technological advances, such as the internet, have made it possible to conduct court and arbitration proceedings via video link. Evidentiary documents may be conveyed instantaneously via email. While, *prima facie*, it may be cheaper for a New Zealand plaintiff to sue in the New Zealand forum, where a foreign law governs the dispute the cost of travel may, in fact, prove to be outweighed by the expense and time involved in proving a foreign law in the New Zealand court. This is especially so where there is no straightforward application of the Hague-Visby Rules.

There may also be added benefits in litigating or arbitrating overseas. These include access to experienced tribunals, such as the London Maritime Arbitration Association, or the advantage of experienced specialist admiralty judges. The fact that these options may be more costly might be outweighed by the adjudicators' grasp upon the area, the quality of the judgment, and the speed in which they are able to reach a decision. Furthermore, the law should not rescue parties from a bad bargain simply because the chosen forum for dispute will impose greater costs upon one party. It is not an issue concerning access to justice, even in regards to small claims. There is justice available — it simply costs more. The parties involved are commercial parties and a legally paternalistic approach is not as warranted, as it may be in, for example, a straightforward consumer situation requiring protective legislation.

Lawyers who argue for a nationalistic retention of disputes in order to sharpen expertise of our own lawyers<sup>251</sup> are acting for inappropriate reasons rather than with a view to what may be in the client's best interests — that is, a forum which is competent and able to speedily pronounce upon the dispute. In some cases the parties have, intentionally, chosen a neutral forum where they know that the judicial expertise they receive will be specialised, neutral and efficiently delivered.<sup>252</sup> However, this situation is unusual and the shipper will normally have to accept the carrier's terms in order to obtain carriage for their goods. Nevertheless, it is not appropriate to justify legislation regulating jurisdiction and arbitration clauses simply on the basis of domestic legal training.

<sup>248</sup> Article 2 of the Hamburg Rules, Article 5 of the Draft Convention.

<sup>249</sup> The Round Table of International Shipping Associations "Top 20 Beneficial Ownership Countries (January 2005)" *Shipping Facts* <[www.marisec.org/shippingfacts/worldtrade/ownership\\_countries.php](http://www.marisec.org/shippingfacts/worldtrade/ownership_countries.php)> (at 16 March 2007).

<sup>250</sup> The Round Table of International Shipping Associations "Top 20 largest shipping flags (January 2006)" *Shipping Facts* <[www.marisec.org/shippingfacts/worldtrade/flags.php](http://www.marisec.org/shippingfacts/worldtrade/flags.php)> (at 16 March 2007).

<sup>251</sup> Overall, R, 'At the Bar — Stuart Hetherington' *The Maritime Advocate* Issue 3, April 1999 <[www.maritimeadvocate.com/i3\\_atth.htm](http://www.maritimeadvocate.com/i3_atth.htm)> (at 13 March 2007).

<sup>252</sup> Williams, H, *Chartering Documents* (4<sup>th</sup> Ed, 1999) 126.

Regardless of whether the dispute is heard in either the forum chosen by the shipper or by the carrier, the cost may nevertheless fall back upon the shipper. This transference of cost will occur in one of two ways. If the carrier is made to sue in a forum of the plaintiff shipper's choice, this will lead to fragmentation of action and increased cost for the carrier. The carrier will have to recoup this cost downstream, by increasing the cost of contracts of carriage, thus charging the shipper greater prices. However, if the shipper has to sue in a foreign forum chosen by the carrier, the cost of this will often fall to the insurer. In this circumstance, insurance premiums for shippers will rise.<sup>253</sup> Put in this way, one might forgive the shipper for thinking that they drew the short straw in this area of jurisdiction for carriage disputes.

On balance, since uneventful carriage is the norm, and the majority of contracts do not give rise to disputes — or at least litigated disputes as, in many cases, settlement will be reached before litigation or arbitration takes place — it may be cost-effective for the shipper if courts uphold foreign jurisdiction and arbitration clauses.<sup>254</sup> In light of this, there will not be such a financial burden placed on insurance companies, meaning premiums will not be increased. Likewise, the shipowner will not experience fragmentation of actions and not have to raise its carriage cost to pay for this multiple litigation. It is a risk that shippers may have to take but it appears to be risk that is unlikely to eventuate. This solution will be financially favourable for both shipper and carrier.

New Zealand is still a nation of shippers. However, individuals involved in the maritime industry should not be presumed to be naïve, and there is no sound reason for the legislature to treat the maritime industry differently from any other commercial industry. Evidence that this is not a major problem area is demonstrated by the fact that there are relatively few claims which reach the court before settlement takes place.<sup>255</sup> Particularly in the shipping industry, where long-term relationships between carrier and shipper are common, it is in the best interests of both parties that the entire transaction flows smoothly.<sup>256</sup> An exception to this general principle occurs only with marginal carriers,<sup>257</sup> presumably because they do not have such a valuable reputation to protect.

If New Zealand traders want to gain the respect of overseas business parties, it is not in the interests of the industry for the government to intervene where a risk allocation or circumstance is not in favour of domestic interests. In reality, it is the shipping insurers who will deal with the disputes, and these parties are invariably large and sophisticated enough to handle the international dispute resolution scene.<sup>258</sup> In the case of goods exported to certain countries on FOB terms,<sup>259</sup> these goods will usually be insured by the insurance companies in the destination country.<sup>260</sup> In these circumstances, legislating so that the New Zealand court may retain jurisdiction over the claim is unlikely to be of any advantage to foreign insurance companies. These companies will prefer to pursue the claim in other more specialised forums, such as London, where they have established agencies to deal with the dispute. Thus, section 210(1) may be of little value to any non-New Zealand actors.

## 6.2.5 A buttress to surrounding legislation

The New Zealand *Seamen and Shipping Act 1908* and the *Sea Carriage of Goods Acts 1922* and *1940* both included a section, discussed above, which allowed New Zealand traders to sue the carrier's New Zealand agent. These Acts also included sections concerning the binding nature of a bill of lading when signed by an authorised person. The relevant sections regulating jurisdiction agreements applied New Zealand law,

<sup>253</sup> Navigator June 1999 "Shipping Companies Avoid Cargo Claims" *Vero Marine*

<[www.veromarine.co.nz/dirvz/marine/marine.nsf/Content/PublicationsNavigatorJun1999](http://www.veromarine.co.nz/dirvz/marine/marine.nsf/Content/PublicationsNavigatorJun1999)> (at 23 March 2007).

<sup>254</sup> While there are no exact statistics for the number of goods which arrive damaged, it has been estimated that it would be under 2% per value and under 1% when considering conference lines and containerized shipments; McKelvie, above n 130.

<sup>255</sup> Interview with Bruce Northey (General Counsel 1991-1997, New Zealand Kiwifruit Marketing Board) (Auckland, New Zealand, informal discussion) 18 March 2007; McKelvie above n 130.

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*

<sup>259</sup> "Free on Board". See "Texts of Other Organisations Endorsed by UNCITRAL: 2000 — Incoterms" *UNCITRAL* <[http://www.uncitral.org/pdf/english/texts\\_endorsed/INCOTERMS2000\\_e.pdf](http://www.uncitral.org/pdf/english/texts_endorsed/INCOTERMS2000_e.pdf)> (at 30 April 2007).

<sup>260</sup> For example, goods destined for Japan or Korea are usually insured by their national insurance companies; McKelvie, above n 130.

while at the same time as mandating for New Zealand jurisdiction. This was necessary in order to ensure that these helpful provisions applied. However, the 1994 Act did not re-enact sections of this type, and the requirement that New Zealand law applied was also removed. With these omissions went the supporting nature of section 210(1), deeming New Zealand jurisdiction. In my opinion, the section remains an unsatisfactory, nationalistic, and absolutist approach to allow suit under the Hague-Visby Rules. There is undoubtedly a better method by which to do this, as will be recommended below.

### 6.3 Justification for Arbitration

New Zealand has little choice but to enforce foreign arbitration agreements, due to its international obligations. It is entirely unrealistic to recommend that New Zealand denounce the New York Convention or stop applying the UNCITRAL Model Law. There are too many advantages to be derived from applying these systems, such as the recognition of arbitral awards made in New Zealand. It appears that, unless there is a change in the international arena with regards to arbitration, New Zealand will have to maintain its current position on arbitration, as protected by section 210(2) of the *Maritime Transport Act 1994*.

This justification focuses on the historical and international reasons for the system, rather than the benefits associated with the current regime. In its present state, the legislation allows for a foreign arbitration clause to undermine the system preventing foreign jurisdiction clauses. The ideal situation would, I submit, treat both foreign arbitration and jurisdiction clauses identically to prevent one from undermining the other.

### 6.4 Caught on a Technicality

It is the unique nature of bills of lading that justifies an impingement upon party autonomy. There are technical reasons for and against enforcing jurisdiction and arbitration clauses, which are discussed below.

#### 6.4.1 Adding terms to the contract

As discussed above, a bill of lading has the effect of adding to, but not altering, the terms of the carriage contract after it has been formed. The law is wary of this situation as a central principle of contract law is that the parties must know their obligations under the contract in order to perform them and to justly be able to enforce such obligations. One solution to this difficulty may be to make the jurisdiction terms available prior to shipment, or prior to the transfer of a bill of lading to a third party.<sup>261</sup> However, commercial reality may mean that this is not always possible, and the first opportunity for a shipper to view written terms of the carriage contract may be upon reading the standard form contents set out on the reverse of a bill of lading. This is certainly a problem for one-off shippers, who may not understand the nature of the transaction. Repeat commercial shippers will be likely to understand the importance of being aware of a jurisdiction or arbitration clause in the carriage contract. Even so, terms incorporated into a bill of lading by reference to a charterparty can cause uncertainty. This issue constitutes a proper reason to regulate jurisdiction and arbitration clauses; however, in my submission, it is not significant enough to destroy a need for these clauses altogether.

New Zealand shippers have little opportunity to negotiate individual terms of the carriage contract, which are often set out in standard form formulated by the carrier.<sup>262</sup> One could argue that, as bills of lading contain standard form terms, these should receive greater scrutiny by the courts, but it has been noted that these types of contracts are commercially practical<sup>263</sup> and this position has been recognised.<sup>264</sup>

#### 6.4.2 Unclear terms

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<sup>261</sup> For example, bills of lading are printed and sold by firms of stationers and shippers are subsequently able to fill in the particulars before giving the bill to the loading broker of the carrier; Boyd et al, above n 13, 68.

<sup>262</sup> McKelvie, quoting Flynn, above n 130.

<sup>263</sup> Sing, TK, 'Jurisdiction Clauses in Bill of Lading — the Cargo Claimant's Perspective' [1995] *Lloyd's Maritime & Commercial Law Quarterly*, 183, 184.

<sup>264</sup> *Trackweld*, above n 58; *The Pioneer Container*, above n 135, 597.

Linked to the concern of the post-agreement nature of the bill of lading is the requirement of knowing in which forum the shipper should lodge an action or commence arbitration. Professor Sing argues that a problem in the area of jurisdiction clauses is the lack of clarity in deeming the location for suit, such as deciding where the carrier's principal place of business is, or where there is conflicting fora stated in different carriage contracts.<sup>265</sup> The issue of where to sue, or institute arbitral proceedings, becomes urgent when one realises the short time bar involved in carriage contracts.<sup>266</sup> Thus, the confusing structure of jurisdiction and arbitration clauses may add to the difficulties in the technical area of bills of lading, increasing the need for some form of regulation. Indeed, even Sing has acknowledged that judicial consideration of circumstances of the shipper's knowledge and understanding of the clause could provide some balance to this issue.<sup>267</sup> Allowing the plaintiff shipper to elect which forum where there is a conflict of fora could be a viable solution to this problem.

### 6.4.3 Third parties

As outlined above, there is a concern that terms in bills of lading may affect third parties. It will often be the case that these third parties do not receive a copy of these terms, or they received them too late to disagree or renegotiate these terms.<sup>268</sup> It is arguable that it is unreasonable to expect parties to uphold a term of which they are unaware, and this is a valid concern in the assessment of whether to regulate jurisdiction or arbitration agreements. It has been argued that carriage of goods inherently incurs these types of obligations.<sup>269</sup> That may be so, but fairness dictates that some knowledge of a significant term, such as where to resolve disputes, should at least be made known to the shipper, either at some point during the actual carriage or shortly thereafter.

### 6.4.4 Multiple actions

Traditionally courts have been at pains to avoid fragmentation of judicial proceedings, in the interests of avoiding multiple — and conflicting — judgments, clogging the legal system and avoiding unnecessary expenditure by the parties.<sup>270</sup> This is an issue, particularly in the case of sea carriage of goods, as carriers are responsible for the goods of many different parties and, if each were allowed to sue in a different jurisdiction, this would lead to chaos.<sup>271</sup> Sing argues that the risk of being sued in different jurisdictions is part and parcel of the carrier's enterprise.<sup>272</sup> Even so, the fact that it is a risk inherent in the industry is not a justification for preventing the carrier from seeking to lessen or remove this hazard. Carriers are already precluded from lessening their liability, and the quid pro quo to this restriction should be that they are allowed the contractual freedom to save money in other ways. A carrier will normally opt to have any disputes settled in their own jurisdiction<sup>273</sup> to save on costs. From a practical position, it is undesirable to cause the bankruptcy of carriers, or to cause their enterprises to become commercially unviable, for the simple reason that they fulfil an indispensable role in the shipping industry.

However, the bigger picture, beyond the parties, requires an examination of access to justice for small claims. As argued previously, there is access to justice, even if this access is expensive. Financial arrangements would have a large influence on the shipper's choice of carrier. The price of the contract would reflect the terms contained therein. In my opinion, there are no justifiable grounds for upsetting this bargain simply because it later turns out to cause further expense to the shipper. The shipper's savings on the price of the contract is in light of possible expenses that may develop at a later date, for example in litigating or arbitrating a claim.

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<sup>265</sup> Sing, above n 263, 188-190.

<sup>266</sup> Ibid 189.

<sup>267</sup> Ibid.

<sup>268</sup> Ibid 185.

<sup>269</sup> *The Pioneer Container*, above n 135, 603.

<sup>270</sup> Ibid 597.

<sup>271</sup> Ibid.

<sup>272</sup> Sing, above n 263, 188.

<sup>273</sup> Williams, above n 252.

Sing further argues that foreign jurisdiction and arbitration agreements act as barriers to litigation by causing settlement once an action has been stayed. According to Sing, this undermines the ethos of sanctity of contract.<sup>274</sup> The fact that a settlement is induced as a result of a stay does not mean that party autonomy in regards to jurisdiction and arbitration clauses is a façade. It may be a corollary risk to such clauses, but it is by no means an inescapable outcome. The parties have entered into a contract containing terms, and if a party breaches these terms then they must be liable for this breach. If the shipper sues in a forum that is not the contractually chosen court, then they should be held to the consequences in the event that a stay is granted, and they are unable to take the action further in the correct forum. In some respects, settlement can be seen as a positive consequence, in that it frees up court or tribunal time, and saves both parties further expense. It is not a challenge to sanctity of contract; both parties retain the right to still enforce the jurisdiction or arbitration clause, and resolve the dispute in the chosen forum.

The issue of multiple actions, although yet to eventuate, is a real threat where legislation, such as section 210(1) of the Act, demands that the national court retains jurisdiction. This is especially so where an overseas court is unable to stay another action arising from the same claim against the carrier in favour of the New Zealand court, because it will not be possible for the carrier to join another party to the New Zealand action.<sup>275</sup> Sing's arguments and the effect of section 210(1) of the Act do not provide sufficient grounds for allowing multiplicity of actions.

## 6.5 A Case for Regulation

It is clear to see from the above discussion that the historical reasons for regulating jurisdiction clauses no longer exist, or are no longer sufficient to support their continued existence. While it is expensive to litigate overseas, this is outweighed by the fact that sophisticated insurance companies, rather than the individual cargo holder, usually pursue this course of action. Of greater concern than the direct expense of litigating overseas, is the threat of multiple actions that the legislation has the potential to cause. The expense to the carrier of defending these multiple claims will eventually fall back onto the shipper through increased freight. The economic interests of both the shipper and the carrier are best served by allowing choice, and enforcing foreign jurisdiction clauses.

Arbitration clauses, in contrast, retain their position simply by virtue of the international position. This is regardless of whether or not this is the best possible treatment for foreign arbitration clauses in bills of lading. The technical nature of foreign jurisdiction and arbitration clauses do require some regulation. This is certainly the case in respect of the bill of lading being the best evidence of the terms of the contract once the agreement has been formed, and their knock-on effect upon third parties. The parties need to have knowledge of the jurisdiction and arbitration terms contained in the bill of lading in order for a balance to exist.

However, I do not believe these issues are serious enough to prevent foreign jurisdiction and arbitration clauses from being enforced altogether — indeed, the enforcing position in relation to foreign arbitration clauses is upheld by international convention. There is some requirement for checks to be made upon the enforcement of foreign jurisdiction clauses. This does not need to be absolutist legislation that causes the court to retain jurisdiction, such as section 210(1) of the Act, as there are good reasons for enforcing these clauses, for example, to prevent multiple actions and to promote commercial expediency.

It is now necessary to consider whether a solution for this regulation exists in the international arena as uniformity always plays a desirable part in any provision controlling international trade

## 7 THE INTERNATIONAL ATTEMPTS TO REGULATE JURISDICTION AND ARBITRATION AGREEMENTS

<sup>274</sup> Sing, above n 263, 188.

<sup>275</sup> For an example of this difficulty and the importance of consolidating litigation see *Societe Nationale Industrielle Aerospatiale (SNIA) v Lee Kui Jak* [1987] AC 871.



## 7.1 Uniformity, Uniformity and Uniformity

The process and contractual framework of carrying goods by sea is, by its very nature, an international venture.<sup>276</sup> Uniformity in international law is desirable as it leads to efficiency and certainty. Parties will be assured that the same rules apply in all jurisdictions.<sup>277</sup> It also prevents a party from forum shopping in order to gain favourable disputes when litigating. As a result, international uniformity can provide many benefits and prevent misbehaviour.

However, the voyage towards international uniformity in carriage of goods by sea has not experienced plain sailing. There was relative uniformity when the first set of Hague Rules was adopted after the Second World War, but this has since deteriorated, with not all signatories subscribing to the amendments.<sup>278</sup> Countries have also enacted their own versions of these rules which are not identical to the international template.<sup>279</sup> The creation — and adoption in some jurisdictions — of the Hamburg Rules has added a further layer of variance in this area. With this disarray in mind, UNCITRAL began work on a new convention in 2001 to prepare an instrument which would regulate issues relating to international carriage of goods. This was based upon the CMI Draft Instrument on Transport Law,<sup>280</sup> which incorporated aspects of the Hamburg Rules. The discussion below concerning the Draft Convention is in relation to the most recent official version released on the UNCITRAL website.<sup>281</sup>

While the Hague Rules and its amendments do not contain any provisions governing jurisdiction and arbitration clauses, the Hamburg Rules and the UNCITRAL Draft Convention have attempted to regulate these agreements.<sup>282</sup>

## 7.2 Jurisdiction, Arbitration and the Hamburg Rules

### 7.2.1 Jurisdiction rules

The Hamburg Rules attempt to govern jurisdiction clauses in contracts for the carriage of goods by sea, by allowing the claimant, who will most often be the shipper or consignee, a choice of where to sue from a specified list. The relevant part of Article 21 states:

1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated in one of the following places:
  - (a) the principal place of business or, in the absence thereof, that habitual residence of the defendant; or
  - (b) the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or
  - (c) the port of loading or the port of discharge; or
  - (d) any additional place designated for that purpose in the contract of carriage by sea.

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<sup>276</sup> For a detailed exposition of the international nature of maritime law see Tetley, W, 'Uniformity of International Private Maritime Law — The Pros, Cons and Alternatives to International Conventions — How to Adopt an International Convention', *Tetley's Maritime and Admiralty Law* < <http://www.mcgill.ca/maritimelaw/maritime-admiralty/uniformitymarlaw/> > (at 20 March 2007). See also Sturley, M, 'Uniformity in the Law Governing the Carriage of Goods by Sea', [1995] 25 *Journal of Maritime Law & Commerce*, 553.

<sup>277</sup> Tetley, above n 276.

<sup>278</sup> Sturley, above n 276, 560-561.

<sup>279</sup> Myburgh, above n 155.

<sup>280</sup> For a detailed comparison of the CMI's proposal see Herber, R, 'Jurisdiction and arbitration — should the new Convention contain rules on these subjects?', [2002] *Lloyd's Maritime & Commercial Law Quarterly*, 405.

<sup>281</sup> Above n 1. This differs from the Joint Proposed Text proposed by the European Community, Japan, Norway and the United States of America which was put forward in 2005, A/CN.9/WG.III/XVI/CRP.3 which Professor Sturley discusses in Sturley, M, 'Overruling Sky Reefer in the International Arena: A Preliminary Assessment of Forum Selection and Arbitration Clauses in the New UNCITRAL Transport Law Convention', [2006] 37 *Journal of Maritime Law & Commerce* 1, 14-16.

<sup>282</sup> Article 2 of the Hamburg Rules and Article 5 of the UNCITRAL Draft Convention.

The Hamburg Rules also allow for the court at the place of an arrested ship to have jurisdiction.<sup>283</sup> The provision explicitly states that no action, aside from provisional or protective measures, may be brought in a jurisdiction that is not mentioned in Article 21.<sup>284</sup>

As can be seen, jurisdiction agreements are allowed under the Hamburg Rules. However, exclusive jurisdiction agreements will not be enforced. A claimant's right to choose will override the exclusivity, and the clause will merely provide an additional choice of fora in which to pursue the claim. An exclusive jurisdiction clause will be enforced if it was concluded after the dispute arose.<sup>285</sup>

### 7.2.2 Arbitration rules

Arbitration agreements, permitted by Article 22(1), follow a similar formula to jurisdiction clauses:

3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:
  - (a) a place in a State within whose territory is situated:
    - (i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or
    - (ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
    - (iii) the port of loading or the port of discharge; or
  - (b) any place designated for that purpose in the arbitration clause or agreement.

Arbitration clauses in charterparties must be properly incorporated into a bill of lading in order to be binding on third parties,<sup>286</sup> and the arbitration tribunal must apply the Hamburg Rules to the dispute.<sup>287</sup> The Rules are binding upon every arbitration agreement falling under the Rules' scope. Parties cannot contract out of them.<sup>288</sup>

Exclusive arbitration clauses will not be upheld because, as with jurisdiction clauses, the claimant will have a choice of where to arbitrate. The named forum in the agreement will simply provide a further possible location. Exclusive jurisdiction agreements will only be enforced if they are concluded after the dispute has arisen.<sup>289</sup>

### 7.2.3 The Hamburg smorgasbord of choice

The Hamburg Rules have some small regard for party autonomy by allowing jurisdiction and arbitration agreements in contracts for the carriage of goods by sea. However, the Rules provide little further support of this choice, as they also allow the claimant several options of where to sue or arbitrate. This system provides some balance towards the situation of carriers suing under standard form clauses, evidenced in bills of lading. It does not scrutinise the level of the parties' knowledge of such clauses or any of the documentation involved beyond the mere existence of such a clause. By requiring that arbitration agreements are to have similar requirements to jurisdiction clauses, parties are prevented from inserting an arbitration clause to circumvent the other's effect. However, carriers can attempt to influence the choice of jurisdiction by instigating a writ for a declaration of liability, thereby removing the cargo claimant's right to choose. In this situation, the cargo claimant could retaliate by arguing *forum non conveniens*.

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<sup>283</sup> Article 21(2)(a) of the Hamburg Rules.

<sup>284</sup> Article 21(3) of the Hamburg Rules.

<sup>285</sup> Article 21(5) of the Hamburg Rules.

<sup>286</sup> Article 22(2) of the Hamburg Rules.

<sup>287</sup> Article 22(4) of the Hamburg Rules.

<sup>288</sup> Article 22(5) of the Hamburg Rules.

<sup>289</sup> Article 22(6) of the Hamburg Rules.

As far as the jurisdiction agreement is concerned, it will most often be the cargo claimant who institutes proceedings. Enforcement of the foreign jurisdiction or arbitration clause is likely to be the carrier's defence. The effect of Articles 21 and 22 of the Hamburg Rules skew the position in favour of the cargo claimant who has a choice.<sup>290</sup> This would be a factor explaining why the Hamburg Rules have not enjoyed a high level of adoption by international signatories. This position is also unfavourable to the doctrine of party autonomy. The Rules have the appearance of balance, but they do not provide a middle road. Too much choice is given to the shipper, with little counterbalance provided for the carrier.

## 7.3 Jurisdiction, Arbitration and the UNCITRAL Draft Convention

### 7.3.1 The jurisdiction chapter

Chapter 15 of the Draft Convention sets out several detailed, and complicated, provisions governing jurisdiction clauses in contracts of carriage. The relevant provisions are:

#### **Article 69 Actions against the carrier**

*Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 70 or 75, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:*

- (a) In a competent court within the jurisdiction of which is situated one of the following places:
  - (i) The domicile of the carrier;
  - (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; or
- (b) In a competent court or courts 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.

#### **Article 70 Choice of court agreements**

- (1) The jurisdiction of a court chosen in accordance with article 69, paragraph (b), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:
  - (a) Is contained in a *volume contract*<sup>291</sup> that clearly states the names and addresses of the parties and either (i) is individually negotiated; or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and
  - (b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.
- (2) A person that is not a party to the volume contract is only bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article if:
  - (a) The court is in one of the places designated in article 69, paragraph (a);
  - (b) That agreement is contained in the contract particulars of a transport document or electronic transport record that evidences the contract of carriage for the goods in respect of which the claim arises;
  - (c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and
  - (d) [The law of the court seized] [The law of the [agreed] place of delivery of the goods] [The law of the place of receipt of the goods [by the carrier]] [The applicable law pursuant to the rules of private international law of the law of the

<sup>290</sup> Tetley, above n 80, 759-760.

<sup>291</sup> "Volume contract" is defined in Article 1(2) as "a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range."

forum] recognizes that that person may be bound by the exclusive choice of court agreement.

(...)

(emphasis added)

Article 70 goes on to allow Contracting States to give effect to agreements that do not meet the requirements of paragraphs (1) and (2) in relation to volume contracts, if that State gives notice that it intends to do so.<sup>292</sup> This course of action will not affect a court in Article 69(a) from having jurisdiction.<sup>293</sup> A court may also take jurisdiction as a result of an arrested vessel because the Draft Convention does not impinge upon the Arrest Convention<sup>294</sup> or, where there is no exclusive jurisdiction clause, by way of consolidating actions.<sup>295</sup> Parties may agree to proceed in a court in a Contracting State after the dispute has arisen, and this court will then have jurisdiction.<sup>296</sup> The Chapter also contains provisions for recognition and enforcement of judgments in Contracting States,<sup>297</sup> and ability for States to opt out of the entire Chapter if they choose.<sup>298</sup> These provisions are the only bases of jurisdiction for judicial proceedings under the Draft Convention.<sup>299</sup>

The only form of exclusive court clauses allowed under the Draft Convention are those contained in volume contracts.<sup>300</sup> All other agreements are rendered non-exclusive by providing the plaintiff a choice at Article 69(a) and (b). The effect of Article 69 is alarmingly similar to that of Article 21 of the Hamburg Rules. Despite its balanced appearance, the Draft Convention's effect will be skewed in favour of the cargo claimant who is the only party allowed the choice of jurisdiction; notwithstanding the fact that several of these choices involve the carrier's domicile. This prevents the situation under the Hamburg Rules, where the carrier can manipulate the chosen forum by instituting proceedings for a declaration of non-liability. I believe that the general position on jurisdiction clauses in the Draft Convention does little to recommend itself beyond the solution provided by the Hamburg Rules, and pays scant regard for party autonomy.

In contrast, the Draft Convention takes a different approach to volume contracts. This was because the drafters considered that the parties involved in volume contracts would be more "sophisticated" and have "equal bargaining power" in order to understand the implications of the agreement.<sup>301</sup> The distinction is not justifiable. There are many shippers active in the carriage market who are sophisticated and experienced in their transactions, but do not always send their goods under volume contracts.<sup>302</sup> This treatment creates disunity in the Convention, and lessens its ease of application. The provisions that apply to exclusive jurisdiction clauses are themselves a very viable option to apply to all types of exclusive jurisdiction clauses and, indeed, such a suggestion has been made.<sup>303</sup> In order for this to be effective, it would be advisable to remove the requirement that the court chosen in the exclusive jurisdiction agreement be in one of the locations named in Article 69(a), and simply stipulate that the chosen court be in a Convention State thus ensuring the provisions of the Draft Convention will be applied.

### 7.3.2 The arbitration chapter

The Draft Convention's provisions on arbitration clauses in contracts for sea carriage of goods encounters the same issues as the provisions on jurisdiction agreements. Article 78 states:

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<sup>292</sup> Article 70(3) of the Draft Convention.

<sup>293</sup> Article 70(4)(a).

<sup>294</sup> Article 73 of the Draft Convention; Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships 1952.

<sup>295</sup> Article 74 of the Draft Convention.

<sup>296</sup> Article 75 of the Draft Convention.

<sup>297</sup> Article 76 of the Draft Convention.

<sup>298</sup> Article 77 of the Draft Convention.

<sup>299</sup> Article 72 of the Draft Convention.

<sup>300</sup> Article 70(4)(b) of the Draft Convention.

<sup>301</sup> Working Group III *Report of Working Group III (Transport Law) on the work of its sixteenth session* A/CN.9/591 Vienna 28 November-9 December, 9.

<sup>302</sup> For example, other types of service contracts agreed to between shippers and carriers.

<sup>303</sup> *Report of Working Group III (Transport Law) on the work of its sixteenth session*, above n 301, 9.

#### Article 78 Arbitration Agreements

- (1) Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.
- (2) The arbitration proceedings shall, at the *option of the person asserting a claim against the carrier*, take place at:
  - (a) Any place designated for that purpose in the arbitration agreement; or
  - (b) Any other place situated in a State where any of the places specified in article 69, subparagraph (a), (b) or (c), is located.
- (3) The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if it is contained in a *volume contract* that clearly states the name and addresses of the parties and either
  - (a) Is individually negotiated; or
  - (b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.
- (4) When an arbitration agreement has been concluded in accordance with paragraph (3) of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:
  - (a) The place of arbitration designated in the agreement is situated in one of the places referred to in article 69, subparagraph (a), (b) or (c);
  - [(b) The agreement is contained in the contract particulars of a transport document or electronic transport record that evidences the contract of carriage for the goods in respect of which the claim arises;]
  - (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.
- (5) The provisions of paragraphs 1, 2, 3, and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

The Chapter goes on to stipulate at Article 79 that the Draft Convention does not affect arbitration agreements in non-liner transportation. “Non-liner transportation” is defined in relation to “liner transportation”, a transportation service offered to the public, and includes ships operating on a regular schedule between specified ports. Non-liner trade is not liner transportation.<sup>304</sup> The section also provides, at Article 80, that agreements to arbitrate formed after the dispute has arisen will be upheld. Contracting States again have the option to opt out of this Chapter.<sup>305</sup>

Once again, as in the Hamburg Rules, agreements to arbitrate are at the option of the claimant. The Draft Convention skews this even more in favour of the cargo claimant by wording the section to allow only for claims against the carrier. This defeats the effect of an exclusive jurisdiction clause, unless it is in a volume contract, or in a transaction for non-liner transportation. Volume contracts are presumably a special case for the reasons set out above in relation to jurisdiction clauses. Non-liner transportation<sup>306</sup> was excluded because arbitration clauses are frequently used, and it was believed that the industry would not accept any regulation.<sup>307</sup> The same arguments made in relation to jurisdiction agreements for treating volume contracts the same as all other types of carriage contracts also apply to the Chapter concerning arbitration agreements. Likewise, non-liner transportation should not be exempt from the general provisions on arbitration solely because the industry would not tolerate regulation. It can be safely assumed that the carriage industry, in whatever guise, would be adverse to regulation. Uniformity should be the norm, rather than allowing special exceptions.

<sup>304</sup> Article 1(3) and (4) of the Draft Convention.

<sup>305</sup> Article 81 of the Draft Convention.

<sup>306</sup> To which the Draft Convention applies by virtue of Article 6(2).

<sup>307</sup> Working Group III *Report of Working Group III (Transport Law) on the work of its fourteenth session* A/CN.9/572 Vienna, 19 November-10 December 2004, 39.

As with the Draft Convention's provisions on jurisdiction, the Chapter on arbitration is very similar to the optional system in the Hamburg Rules and, for this reason, is unlikely to add any appeal for states to accede to the Convention.<sup>308</sup> It was pointed out, and rightly so, that arbitration clauses should be given a similar effect to that of jurisdiction clauses in order to prevent circumvention of the jurisdiction provisions by stipulating for arbitration.<sup>309</sup> However, instead of blindly following the Hamburg Rules, the Draft Convention would do better to apply rules similar to those existing for jurisdiction agreements in volume contracts to arbitration agreements, as suggested above. This would accord greater respect to party autonomy, while at the same time providing a level of protection for the shipper. It would also allow for unity of provisions in the Draft Convention.

## 7.4 The Likelihood of Success?

The contents of the Draft Convention's chapters on jurisdiction and arbitration represent an attempt at compromise between the carriers' and shippers' interest groups. It is a compromise which appears to satisfy neither group. There is no guarantee that every single exclusive jurisdiction or arbitration clause will be enforced. Nor is it guaranteed that States will not lodge a reservation from these chapters thus preventing shippers from having the options provided in Articles 69 and 78.<sup>310</sup> When compared with the offerings provided in the Hamburg Rules, both the chapter on jurisdiction and the chapter on arbitration in the Draft Convention are fiddly and complicated. This will not lend itself to ease of application.

Despite this, Professor Sturley asserts that, even if no party is entirely happy, there is still no better alternative and that the Draft Convention is preferable to national laws on the matter.<sup>311</sup> However, the Draft Convention simply will not be adopted unless the provisions of the Convention are advantageous enough to recommend it to the political lobby groups in each Contracting State. The lack of advantages and satisfactory compromise in the Draft Convention's jurisdiction and arbitration chapters has already been discussed above. It appears that success and appeal in adopting these two areas are slim. The burden then falls to the remaining provisions in the jurisdiction and arbitration chapters, and the rest of the Draft Convention's Articles, to see if there are other reasons for adopting the Convention in its entirety.

### 7.4.1 Highlights

The Draft Convention contains useful chapters defining the obligations of the carrier and the shipper,<sup>312</sup> as well as flexible provisions<sup>313</sup> governing electronic transport documents, the rights of the party and the transfer of these rights under transport documents.<sup>314</sup> These provisions are useful, as they set out international relationship requirements and harmonize aspects of the transaction. The liability of the carrier set out in Chapter 6 is very similar to the successful Hague-Visby Rules, and the Chapter's association to this will benefit its adoption and interpretation. Chapter 15, which contains the provisions on jurisdiction, also has a useful article allowing for actions against a person, other than the carrier, undertaking to perform part of the marine carrier's obligations in two specified jurisdictions.<sup>315</sup> This will allow for ease of suit against persons, such as stevedores, who have been found liable for mishandling the goods.

<sup>308</sup> Tetley, above n 80, 744.

<sup>309</sup> Working Group III *Report of Working Group III (Transport Law) on the work of its fifteenth session* A/CN.9/576 New York 18-28 April 2005, 46; Herber, above n 280, 413.

<sup>310</sup> Sturley, above n 281, 19.

<sup>311</sup> Ibid 21.

<sup>312</sup> Chapters 5 and 8.

<sup>313</sup> The Draft Convention's wide recognition of the different types of transport documents has been described as "progressive"; Glass, D, 'Meddling in the multimodal muddle? — a network of conflict in the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by sea]' [2006] *Lloyd's Maritime & Commercial Law Quarterly*, 307, 311.

<sup>314</sup> Chapters 3, 11 and 12.

<sup>315</sup> Article 71 and Article 1(7) of the Draft Convention.

## 7.4.2 A solution to national problems raised in New Zealand, Australia and Canada

### 7.4.2.1 New Zealand — effect on third parties

The impact of foreign jurisdiction and arbitration clauses on third parties would be softened by the ability of parties to have the option of where to sue or arbitrate under the Draft Convention. A preferable position would be for exclusive jurisdiction or arbitration clauses to be enforceable, as discussed above, in relation to jurisdiction clauses in volume contracts and their enforceability against third parties. This would allow for respect of the parties' agreement in enforcing clauses in bills of lading,<sup>316</sup> as well as protecting third parties by scrutinising the reasonableness of the binding clauses.

### 7.4.2.2 Australia — too strict and too wide

The Draft Convention would provide an international approach simply by virtue of its nature as an international document, and would allow for suit or arbitration in places other than in Australia when such carriage contracts fall under Australian law. The Draft Convention specifically excludes charterparties, or contracts for use of space upon ships, which would avoid the issues of the *Blooming Orchard*<sup>317</sup> decision and the broad language adopted in the Australian *Carriage of Goods by Sea Act 1991*. Of course, all this is subject to Australia amending domestic legislation to conform to its obligations under the Draft Convention.

### 7.4.2.3 Canada — discretion and arbitration

Canada already has legislation based on the Hamburg Rules, which is similar to that of the Draft Convention. Neither the Canadian court, nor any other court for that matter, would be able to use its discretion to stay proceedings even if it were given initial jurisdiction under the Draft Convention, as the Convention provides that it is to be the only basis of jurisdiction.<sup>318</sup> While the Canadian approach is laudable for its flexibility, this removal of discretion is necessary for uniformity in applying the Draft Convention. However, the issues in relation to arbitration still remain in regards to the Draft Convention and this will be discussed below.<sup>319</sup>

## 7.4.3 Over-extension

The Draft Convention ambitiously tackles carriage contracts beyond the marine environment. The definition of a contract of carriage under the Convention includes other transportation means than simply sea carriage.<sup>320</sup> This lofty goal may ultimately be the Draft Convention's downfall. While it has been argued that the seamless approach proposed by the Draft Convention is desirable, and provides a solution to the mess of rules existing in the realm of multimodal transport,<sup>321</sup> recent experience has shown that an incremental approach to international harmonisation of law tends to be more viable.<sup>322</sup>

The extension of door-to-door coverage seems redundant, in light of Article 26, which would allow all international or national legal instruments to prevail over the Draft Convention where it can be proven that the damage was caused during the non-sea leg of the contract. In New Zealand, this would mean the application of the *Carriage of Goods Act 1979*. However, the Draft Convention will ease actions where the

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<sup>316</sup> Glass, above n 313.

<sup>317</sup> Above n 169.

<sup>318</sup> Article 72 of the Draft Convention.

<sup>319</sup> See 7.4.2.5.

<sup>320</sup> Article 1(1) of the Draft Convention.

<sup>321</sup> Glass, above n 313, 308-309.

<sup>322</sup> For example, the current Hague Convention on Choice of Court Clauses, opened for signature 30 June 2005, (not yet in force, which has been scaled back. The Convention originally aimed to recognise wider grounds upon which a contracting state could take jurisdiction but this was reduced to only choice of court clauses due to the diverse rules concerning jurisdiction between the states; Dogauchi, M, and Hartley, T, Preliminary Draft Convention on Exclusive Choice of Court Agreements (Preliminary Document Number 26, Hague Conference on Private International Law, 2004) 6-7.

shipper cannot prove in which actual leg of the journey the damage occurred, allowing for land as well as sea carriers to be sued. In light of this, there are both advantages and disadvantages to extending the Draft Convention beyond maritime transport to include the entire act of carriage. However, this approach adds a layer of complexity that is not present in the Hague-Visby Rules or the alternative Hamburg Rules, and raises issues that may be better dealt with in another international convention.<sup>323</sup> More importantly to the goal of international uniformity, this complexity may damage the Draft Convention's appeal to potential Contracting States.

#### 7.4.4 Alternatives do not equal uniformity

The remaining provisions of the Draft Convention in Chapters 15 and 16 concerning jurisdiction and arbitration in the Draft Convention do little to promote its adoption. It is a mistake to include Articles that allow for certain types of contracts containing jurisdiction clauses to be treated differently or, even worse, allow Contracting States to opt out of the jurisdiction and arbitration chapters in their entirety.<sup>324</sup> To treat some types of carriage contracts differently from others will cause arguments over the type of contract containing the clause, along with a general lack of harmony in the laws governing the area. Allowing Contracting States to opt out of these sections indicates the drafters' doubts about the viability of these provisions, and will not promote the desired effect of uniformity in the area of foreign jurisdiction and arbitration clauses in sea carriage contracts. The Draft Convention then simply becomes another version of the Hague-Visby Rules, albeit slightly broadened and modified.

#### 7.4.5 Cutting across international arbitration conventions

The provisions in the Draft Convention will impinge upon the treatment of exclusive foreign arbitration clauses in sea carriage contracts in the New York Convention. Contracting States to the Draft Convention will be found to be in breach of their obligations if they are also signatories to the New York Convention. There may be a simple solution to this by inserting a provision in the Draft Convention, stating that the Draft Convention's arbitration provisions will override the Articles in the New York Convention. Alternatively, a provision could be inserted to amend the New York Convention stating that it does not apply to contracts for the carriage of goods which fall under the scope of the Draft Convention. The more difficult and time-consuming task will be the resulting requirement for Contracting States to change their domestic laws enacting the New York Convention and the UNCITRAL Model Law. Until such changes are made, Contracting States to the Draft Convention<sup>325</sup> will be in breach of their international obligations to uphold foreign arbitration clauses.

### 7.5 International Success on the Distant Horizon?

I have concluded that the Draft Convention's provisions on foreign jurisdiction and arbitration clauses do not provide the required solution for these clauses contained in bills of lading. While an internationally uniform solution is to be preferred, this is still a long way off in the future. Perhaps a more viable present option would be to insert a jurisdiction and arbitration provision into the Hague-Visby Rules<sup>326</sup> along with another "sweetener" provision such as a reassessment of the rate of special drawing rights. The provisions on jurisdiction and arbitration should be similar to those discussed above in relation to the Draft Convention's treatment of exclusive jurisdiction clauses in voyage contracts. This is unlikely to be successful, as major trading nations, such as the United States, are not overly predisposed to the Hague-Visby Rules. It is clear that the international arena does not, at present, provide a justification or alternative for section 210 of the New Zealand *Maritime Transport Act 1994*.

<sup>323</sup> Arguments supporting a separate convention dealing with non-maritime transport are contained in Nikaki, T 'The UNCITRAL Draft Instrument on the Carriage of goods [wholly or partly] [by sea]: Multimodal at Last or Still All at Sea' [2005] JBL, 647.

<sup>324</sup> Articles 77 and 81 of the Draft Convention.

<sup>325</sup> Who do not opt out of the jurisdiction or arbitration chapters.

<sup>326</sup> Derrington, S, 'The UNCITRAL Draft Instrument on Transport Law — Does Australia Need It?', (2005) 33 *Australian Business Law Review*, 70.



However, if I am wrong, and an international instrument similar to the current UNCITRAL Draft Convention becomes a reality, to which New Zealand's major trading partners become signatories, I would strongly recommend that New Zealand follows suit. While the provisions on jurisdiction and arbitration clauses are far from perfect, it would be advisable for New Zealand to foster its trade relations by ensuring smooth carriage transactions. International ratification of the Draft Convention would be its only commendable aspect. The actual content of the Draft Convention, as discussed above, leaves much to be desired. This leads me to believe that such international acceptance will not be forth-coming.

Nevertheless, I reiterate, such a situation seems somewhat improbable. Nor is it practical to hope for a legislative change which effectively balances shipper and carrier interests. I would recommend, for example, an approach that examines the formal elements of the agreement. Continuance of section 210 of the Act is the most likely situation in the foreseeable future.

## 8 CONCLUSION

I have attempted to explore the historical reasons for legislation regulating foreign jurisdiction and arbitration clauses in the New Zealand maritime context. This has involved an examination of similar Australian and Canadian legislation, in order to aid this assessment and determine whether such legislation remains justifiable in the modern New Zealand sea carriage environment.

It is clear that the historical reasons for a section regulating jurisdiction and arbitration agreements no longer support the current section 210 of the Act. The main reason for the enactment of sections retaining jurisdiction over matters arising in a sea carriage contract was to ensure the application of accompanying legislation preventing carriers from limiting or completely excluding their liability. This is no longer an issue in the New Zealand maritime context. The vast majority of New Zealand's trading partners are now contracting states to an international convention, or the state has provided national laws preventing complete exclusion of liability. The fact that most of New Zealand's trading partners are members to these conventions, or apply similar national laws, remedies any gaps left in the mandatory application of these instruments. When coupled with the removal of the mandatory application of New Zealand law in the enactment of section 210(1) of the Act, this removes the utility of, and the justification for, retaining New Zealand jurisdiction.

Governments and courts now take a more international approach. Retention of jurisdiction can no longer be justified on the grounds that the foreign court may be inept. Likewise, internationalism requires respect for the parties' agreement, including the parties' choice of a foreign jurisdiction and foreign governing law. There is no longer the issue of a single foreign state dominating the sea trade industry. Shipping is now a commercial enterprise run by global companies with a reputation to protect. Legislation retaining New Zealand jurisdiction cannot be justified as protecting New Zealand traders from foreign powers. Another aspect of internationalism is the development in the twenty-first century of a truly global market. The cost of travel is still a factor to consider when New Zealand shippers are called to litigate or arbitrate overseas due to the presence of a foreign forum clause, but it is nowhere near as significant as it used to be. Legal services are more geared to this global market, as are court processes. There are accompanying benefits of experience or specialisation that may be present in the foreign forum. There may also be higher costs involved where it is not straight-forward to apply the foreign law in the New Zealand court. It is not an absolute issue of access to justice. Justice is always available — it may simply cost more. Commercial parties are aware of, or should be aware of, these implications. Protection in this circumstance cannot be justified as it is for a weaker party in a consumer transaction.

The strongest argument in favour of enforcing jurisdiction and arbitration clauses, from the point of view of both parties, relates to the economic reasons for such clauses. These reasons arise from the reality of New Zealand's geographical isolation. The carrier will be concerned to prevent the expense of litigating and arbitrating claims in relation to one incident in different courts around the globe. The agreed risk that the carrier takes on will be reflected in the contract price. To require the carrier to litigate the action in multiple forums will result in an increase in the price of the carriage contract. If the carrier is not to bear this risk, that cost will often be imposed upon the shipper under the guise of insurance cover. Insurance premiums will increase if the insurance provider is required to litigate or arbitrate overseas in order to

recoup upon the claim. However, there are relatively few litigated or arbitrated disputes in the sea carriage of goods. They either do not arise, or they reach settlement before litigation or arbitration is instituted. Economically, it is therefore financially favourable for both parties to enforce the jurisdiction clause. The historical reasons for protecting New Zealand traders because of the country's geographical isolation no longer exist, due to the growing trend towards globalisation, and the economic incentives for both carrier and shipper in enforcing foreign jurisdiction clauses.

However, there are technical reasons for providing minimum regulation of foreign jurisdiction and arbitration clauses. This is due to the unique nature of the bill of lading containing these terms. The bill of lading has the ability to add terms to the carriage contract or, in the hands of a third party, become conclusive evidence of the contract. Endorseees and consignees require notice of these terms in order for it to be reasonable that they be bound to an agreement as to jurisdiction or arbitration. Moreover, these terms need to be sufficiently clear to prevent consignees from being caught by the limitation period preventing an action being brought. An important consideration, alongside the reasons for providing regulation, is the threat of multiple actions. Enforcement of foreign jurisdiction and arbitration clauses will lessen and prevent numerous actions in different courts around the world. In this regard, it is essential to respect and enforce the parties' choice of foreign jurisdiction and arbitration terms in the carriage contract. Although some regulation is thus desirable, this should be instituted in sympathy with party autonomy.

Arbitration agreements continue to be enforced due to section 210(2). This is a requirement of New Zealand's international obligations. It is not necessarily a desirable, or coherent position, as the section allows for arbitration agreements to undermine the regulation of jurisdiction agreements. I believe that it is necessary to re-examine the treatment of arbitration clauses at an international level. It has been some years since the creation of the New York Convention and the UNCITRAL Model Law. The time has come to review whether they have a beneficial effect upon arbitration clauses in bills of lading. Until this reassessment occurs, there will continue to be disunity between the treatment of foreign jurisdiction and arbitration clauses in the New Zealand maritime context.

An examination of the international arena does not disclose a solution for New Zealand in the near future. The Hamburg Rules concerning jurisdiction and arbitration agreements do not adequately balance shipper and carrier interests. The Rules give too much choice to cargo interests and there is no corresponding benefit provided for the carrier. As a result, the rules have been unpopular and have not been subscribed to by many of New Zealand's major trading partners. The proposed Draft Convention is also unlikely to become a major success. The provisions governing jurisdiction and arbitration agreements are ridiculously complicated. While the Draft Convention does equalise the situation between foreign jurisdiction and arbitration agreements, the resulting provisions are too similar to the unsuccessful Hamburg Rules. The jurisdiction and arbitration chapters are greatly undermined by the ability of contracting States to opt out of the provisions. Furthermore, jurisdiction and arbitration agreements are treated differently depending on the type of contract in which they are contained. This would create further disunity in the field of international carriage contracts. However, should the preponderance of New Zealand's trading partners adopt the Draft Convention's sections on jurisdiction and arbitration, then New Zealand would be well-advised to also subscribe. This is more for the sake of uniformity than for the actual utility of the Draft Convention's provisions.

In reality, international accession to the Draft Convention in its current form will be unlikely. It appears that the status quo will be retained. National legislation will continue to govern jurisdiction and arbitration clauses. New Zealand's section 210 of the Act is a prime example of this legislative chauvinism. While this is far from the ideal solution, it is realistically the only option until a viable solution is developed at the international level for the worldwide maritime community.