

INTERNATIONAL MARITIME ARBITRATION AND THE ROTTERDAM RULES: A NEW PERSPECTIVE ON PARTY AUTONOMY

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Rotterdam Rules - A set of rules dreamed up by the United Nations to govern the international carriage of goods, with a special focus on the rights of landlocked countries. Thirteen years in the making, the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (to give it its full, grey name) takes us back to pre-Hague Rules days and carries on the tradition of producing something for everybody which meets the needs of nobody. – Chris Hewer, December 2012, *The Arbitrator*

1 Introduction

In 2009 the United Nations presented a document, developed by its Working Group III under the United Nations Commission on Trade Law (UNCITRAL), for signatures by member states as the new regime for shipping liability. The document is called the United Nations Convention on the Carriage of Goods Wholly or Partly by Sea, to be known commonly as the Rotterdam Rules. Containing a chapter on arbitration, the Rotterdam Rules followed the precedent set by the Hamburg Rules in regulating forum selection clauses in contracts for the carriage of goods by sea. The chapter was hotly debated so that, along with the chapter on jurisdiction, provisions had to be made that contracting states to the Rotterdam Rules will only be bound by this chapter if the states take a further step by opting in.

The effect of this chapter is, for specific maritime contracts, to limit party autonomy to choose an exclusive arbitral forum in arbitration clauses and enforce a choice of places connected to the dispute. So a clause in a maritime contract affected by Chapter 15 requiring arbitration to take place in location A would not be binding on the claimant. Instead the claimant could bring arbitral proceedings in any of the places listed in Chapter 15. While in an ideal world the place would have no substantive effect on the fairness of any arbitral tribunal, in reality the choice of place is a significant factor as parties seek a convenient and economical forum that is sympathetic to their interests.²²⁹ This drives the controversy as taking away the contractual stipulation of place is considered by some to be a revolutionary break from party autonomy.

When the UNCITRAL Working Group III decided to include a chapter on arbitration, the debate and submissions by interested parties were substantial and opinions were diverse. Some are strongly on the side of party autonomy and abhor this intrusion onto freedom of contract. Others take a permissive approach considering that a chapter on arbitration is necessary for the coherence of the Rotterdam Rules as a whole, especially in relation to the chapter on jurisdiction. The end result is that Chapter 15 on arbitration is a unique and complex compromise between party autonomy and mandatory rules. In the author's humble opinion, this chapter now reasonably accurately, in theory, represents the current reality of party autonomy of maritime arbitration. However, the provisions are also plagued with major problems making them practically unworkable. The aim of this paper will be to discuss how party autonomy in maritime arbitration clauses can be interpreted with a new perspective through the lens of the Rotterdam Rules and also to offer a starting point for the discussion on how more pragmatic rules on maritime arbitration could be considered for adoption by New Zealand.

1.1 A New Perspective on Party Autonomy in Maritime Arbitration through the Rotterdam Rules

The author contends that when approaching maritime arbitration, there are different perceptions of how party autonomy is understood. A compromise between party autonomy and mandatory rules must be seen to be the sensible way to advance congruent worldwide legal regimes. The limited encroachment by the Rotterdam Rules upon party autonomy and freedom of contract in arbitration clauses, in bills of lading and other contracts of carriage of goods by sea, is in many ways appropriate when considering the unique nature of maritime arbitration and the current legal impositions on maritime arbitration agreements. The prevalence of 'copy and

* I am grateful to Associate Professor Paul Myburgh of the University of Auckland Law Faculty for his helpful contributions and comments in writing this paper.

²²⁹ Sabena Hashimi, 'The Rotterdam Rules: A Blessing?' (2012) 10 *Loyola Maritime Law Journal* 227, 256.

paste' arbitration clauses,²³⁰ fitted into the transport document by the carrier, which designate unsuitable and distant locations for arbitral proceedings necessitate that it must be possible, in some cases, for arbitration to be held at a place connected with the dispute.

In this paper, the author will use the mechanics and effects of Chapter 15 of the Rotterdam Rules on arbitration as the context by which party autonomy in maritime arbitration can be seen in a new perspective. Through examining the development of the rules and by comparing the relationship between party autonomy and the Rotterdam Rules in maritime arbitration and other regimes affecting arbitration such as the Hamburg Rules, Canadian law, United States law, Australian law, and the international air carriage liability regimes, the author will show that ultimately the Rotterdam Rules represent no major break from global legal trends. Criticisms of the arbitration chapter will be given due attention and potential directions for expanding on this fresh outlook on maritime arbitration will be postulated.

1.2 The Development of Maritime Arbitration

Maritime arbitration is the result of a marriage between two different fields of law – maritime law and arbitration law. The rise of modern international commercial arbitration is a relatively recent triumph of party autonomy in the last century. Arbitration agreements are contractual arrangements to have disputes solved by an independent arbitrator instead of the courts. Prior to 1958, arbitration clauses were generally frowned on by courts in many jurisdictions as ousting the jurisdiction of the court. However, signed in 1958 and entering into force in 1959, the New York Convention on the Enforcement of Arbitration Agreements (New York Convention)²³¹ unified the law internationally on arbitration agreements by confirming and upholding their enforceability and the freedom of parties to contract into them. The New York Convention was such a success that now in many states the only practical answer to an international commercial dispute is arbitration.²³²

In contrast to arbitration, maritime law is an aged branch of law, developing mainly as a civil law concept.²³³ Developed to accommodate taxes, international customs and statecraft, maritime law is most recognisable for its mandatory rules and international legislative cooperation or at least uneasy compromise to encourage uniform practice. While this may be an overly romantic assessment, none can deny that maritime legal instruments and practices diverge from traditional common law rules, such as the way in which the bill of lading bends the rule of privity of contract.²³⁴ A prominent Australian judge, Justice James Allsop in talking about maritime law stated that due to shipping's ancient nature and its status as a universal and necessary activity to commerce, the field 'has always revealed a striking degree of uniformity' through compulsory rules.²³⁵ Thus, the value placed on party autonomy in arbitration is different to party autonomy in maritime law. The former was a recent worldwide legislative movement to protect and uphold parties' freedom of contract and values party autonomy highly. The latter is a legal tradition where the imposition of mandatory rules has been seen as necessary to balance competing interests and enhance uniformity and sees party autonomy as one of many competing principles.

Maritime arbitration has developed rapidly in spite of its mixed parentage. Now is the 'golden age' of maritime arbitration due to worldwide respect for the arbitration process, judicial cooperation with the arbitration industry and near universal enforcement of arbitral awards.²³⁶ While vulnerable to substandard legislation, in current practice all forms of commercial arbitration remain a legal success.²³⁷ Notable maritime arbitration centres, such as those in London, New York, Singapore and Tokyo, have established reputations in dealing with maritime disputes and most arbitration clauses in maritime contracts are based on one of their model clauses,

²³⁰ It is well known that a great number of shipping cases arise due to contracts which are constituted of terms and clauses copied from standard form bills of lading. These contracts are usually unworkable in the circumstances and lead to needless litigation beneficial only for use as case studies in contract law textbooks.

²³¹ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

²³² James Allsop, 'International Maritime Arbitration: Legal and Policy Issues' (Paper presented to the Australian Maritime and Transport Arbitration Commission, Sydney, December 4 2007) 1.

²³³ Gordon W Paulsen, 'Historical Overview of the Development of Uniformity in International Maritime Law' (1983) 57 *Tulane Law Review* 1065, 1078.

²³⁴ Bradley Giles, 'Caution sounded on 'passion for maritime arbitration' (1999) *Northern Law News* 9, 9.

²³⁵ Allsop, above n 4, 5.

²³⁶ Russell J Cortazzo Jr, 'Development and Trends of the Lex Maritime from International Arbitration Jurisprudence' (2012) 43 *Journal of Maritime Law & Commerce* 255, 256.

²³⁷ *Ibid.*

stipulating their own forum and rules of procedure for the proceeding.²³⁸ The success of these centres is due to the high level of expertise by its arbitrators because professional maritime arbitrators must not only know ‘the law of admiralty but ... the practice of maritime operations’.²³⁹ Unquestionably the maritime arbitration industry is a branch of arbitration which involves different professional expectations and practice.

2 The Unique Field of Maritime Arbitration

Arbitration is a triumph of freedom of contract, whereas maritime law has always been an area needing mandatory laws. Maritime arbitration is a mixture of the two. In this section the author will illustrate how maritime arbitration is a distinct industry. Also, the problems with maritime arbitration will be highlighted. These problems show that in maritime arbitration especially, the place of arbitration should be open to a place connected with the dispute when one of the parties is domestically constrained and yet the other is an international carrier.

2.1 The Nature of Party Autonomy in Maritime Arbitration

Maritime arbitration is unique because in many ways it already has a lesser degree of party autonomy due to the nature of existing maritime laws. In *The Hollandia sub nom The Morviken* (*‘The Hollandia’*)²⁴⁰ a jurisdiction agreement was struck down for an exclusive jurisdiction clause specifying a jurisdiction which would offend the limits in the Hague-Visby Rules. *The Hollandia* indicated in obiter that the Court may not distinguish between jurisdiction and arbitration agreements. So where an arbitration agreement would likely result in a violation of the Hague-Visby Rules’ liability standards, based on *The Hollandia*,²⁴¹ the court may either annul the arbitration agreement or suspend the proceedings pending the arbitration and in that way ensure that liability standards are adhered to. Although the case *Vimar Seguros y Reaseguros, S.A. v Sky Reefer* (*‘Sky Reefer’*) is seen as an example of party autonomy being applied to maritime arbitration, it is actually an instance of Court control in arbitration. In that case the proceedings in the US courts were merely stayed²⁴² to make sure the arbitral tribunal did not breach the standard of liability. According to the minority in *Sky Reefer* the decision was incorrect under US law because the Carriage of Goods Act already limits foreign choice of forum arbitration clauses in maritime contracts if they make it uncertain whether the minimum liability standard will be kept.²⁴³ Germany is another state where it is possible that where a maritime arbitration agreement would result in a violation of the Hague-Visby limits then the foreign arbitration clause could be invalidated.²⁴⁴ In many respects, the minimum standards of liability in existing maritime trade regimes limit party autonomy in foreign maritime arbitration clauses, in an equally large if not quite so obvious way, based on whether or not the liability would be diminished based on the substantive law likely to be applied by the arbitral tribunal; examples of this are the US, the UK and Germany.²⁴⁵ Maritime arbitration is an area of international dispute resolution that is already characterized by a lesser prominence of party autonomy.

2.2 Encouraging Fairness in Maritime Arbitration

Arbitration was encouraged by the New York Convention and is now widely used in international commercial arrangements. However, modern arbitration has taken a downturn; for instance, esteemed international arbitrator David W Rivkin enunciated that arbitration is now plagued with delay and extra cost.²⁴⁶ Part of the cause of this dissatisfaction is the penchant for arbitration agreements to specify places for arbitral proceedings in a place inconvenient for the parties which makes claims risky to pursue. International trade has been agreed to be something needing international frameworks to guide and ensure fairness between competing interests of carrier, shipper and consignee. Maritime arbitration is guaranteed to involve complicated disputes involving

²³⁸ Dewey R Jr Villareal, Thomas E Fotopoulos and Steven D Overly, ‘International Maritime Arbitration’ (1983) 12 *Stetson Law Review* 342, 362.

²³⁹ Cortazzo, above n 8, 266.

²⁴⁰ [1983] 1 AC 565; [1983] 1 Lloyd’s Rep 1.

²⁴¹ Felix Sparka, *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis* (Heidelberg, 2010) 162.

²⁴² *Vimar Seguros y Reaseguros, S.A. v. Sky Reefer*, 515 US 528, 540-551 (1995).

²⁴³ Cherie L LaCour, ‘The Enforceability of Foreign Arbitration Clauses under the Carriage of Goods by Sea Act after *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*’ (1996) 4 *Tulsa Journal of Comparative and International Law* 127, 131.

²⁴⁴ Sparka, above n 13, 163.

²⁴⁵ *Ibid* 164.

²⁴⁶ David W Rivkin, ‘Making International Arbitration Suitable for the 21st Century’ (Speech delivered at the Centre for the Interdisciplinary Study of Conflict and Dispute Resolution, Cleveland, October 2011).

multiple international entities. It is logical to suggest that some international rules like Chapter 15 of the Rotterdam Rules would be helpful in encouraging fairness in arbitration.

Another argument supporting a Rotterdam Rules approach comes from insurance companies and banks. In order to gather ideas, the working group distributed an initial questionnaire on the scope of any draft instrument for a regime of carrier liability. The International Union of Maritime Insurance (IUMI) strongly argued for taking away the ability of the contracting parties to specify a place of arbitration that would bind third parties,²⁴⁷ as it is more convenient for insurance companies to handle the arbitration in a place convenient for them. It is important to realise that the enterprise of carriage of goods by sea is not as simple as between a carrier and a shipper but rather that banks, insurance companies and other interested parties are also intricately involved. Maritime ventures are best arbitrated at a place convenient for all concerned. This argument was presented by insurance companies during the drafting stating that because maritime arbitration should be treated differently in regards to party autonomy.

Maritime arbitration proceedings should take place in a forum connected with the dispute for reasons of cost and convenience. The United States has been a major supportive force for these kinds of changes. The list in Article 75 of Chapter 15 of the Rotterdam Rules is of places bound to be connected with the dispute. Professor William Tetley emphasised that ensuring the claimant has the option of bringing arbitral proceedings in one of the places in Article 75 is a positive thing for maritime arbitration because the designated place by 'copy and paste' arbitration clauses is often not connected and unrelated to the dispute.²⁴⁸ It is particularly desirable in maritime arbitration to be able to hold the proceedings in one of these places when there is a disparity between the parties' capabilities in terms of resources and will to pursue claims through arbitration. Parties like to forum shop and the carrier does it by selecting a standard form bill of lading or transport document whereas the cargo claimant rarely has the opportunity to negotiate such matters. In the US, the case of *Sky Reefer*²⁴⁹ in which party autonomy was upheld, spurred some US attitudes against complete party autonomy in maritime arbitration agreements.²⁵⁰ Due to the threat of having to pursue arbitration in an expensive foreign forum, many cargo claimants have been forced to accept lower awards since the *Sky Reefer* decision²⁵¹. Academic support includes Chester Hooper who calls the Rotterdam Rules' provisions on arbitration a 'significant improvement on the present law in the United States'.²⁵² As seen in the US, the fact that many arbitration agreements are not negotiated can result in unfairness to cargo claimants since they cannot choose a place convenient to them.

3 The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea – Approaching New Viewpoints on Arbitration in Shipping

In this section the author will briefly unravel the historical development and background of the Rotterdam Rules and how the contentions to the chapter created a compromise crafted to be suited to arbitration within the maritime industry. In some ways it is the presence of the chapters on jurisdiction and arbitration that distinguishes the Rotterdam Rules and incidentally the Hamburg Rules from the Hague and Hague-Visby Rules. Whereas the Hague and Hague-Visby Rules were intended to balance shipping interests against the interests of the carrier, the Rotterdam Rules more ambitiously sets out to regulate a greater number of aspects of maritime law.

3.1 Development of the Rotterdam Rules

The Rotterdam Rules were developed to be a modern uniform and complete regime for shipper liability in order to replace and modernize the international carriage of goods framework. In 2000, concerns were expressed at a transport law colloquium held by the United Nations Secretariat and the Comité Maritime International (CMI), that the current patchwork of Hague Rules, Hague-Visby Rules, Hamburg Rules and various national laws in

²⁴⁷ *Addendum to Compilation of Replies to a Questionnaire on Door-to-Door Transport and Additional Comments by States and International Organizations on the Scope of the Draft Instrument*, UN Doc A/CN.9/WG.III/WP.28/Add.1 (18 September 2003), 8.

²⁴⁸ D Rhidian Thomas, *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules* (Lawtext Publishing Limited, 2009) 286.

²⁴⁹ *Sky Reefer*, 515 US 528, 540-551 (1995).

²⁵⁰ Peter Winship, 'Arbitration of Maritime Disputes under the Rotterdam Rules' (18 June 2012) Kluwer Arbitration Blog <<http://kluwerarbitrationblog.com>>.

²⁵¹ Chester D Hooper, 'Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or The Definition of *Forum non Conveniens* Set Forth in the Rotterdam Rules' (2009) 44 *Texas International Law Journal* 417, 425.

²⁵² *Ibid* 426.

place at the time, were inadequately meeting the 21st century needs of international carriage of goods by sea. An agreement was reached that any new convention must deal with developments in shipping such as multimodal transport, electronic commerce and formulating a clearer allocation of liability.²⁵³ Information was sought from governments and notable international commercial organisations concerned with carriage of goods.²⁵⁴ As their purpose is to provide a complete reformed approach to shipping law, this motivated the drafters to include provisions on dispute resolution.²⁵⁵ Although presented for signatures in 2009 and having received support from 24 countries²⁵⁶, currently, as of the time of writing, only Spain, Togo and Guinea-Bissau have ratified the Rotterdam Rules.

3.2 The Contentions behind the Dispute Resolution Chapters

Making the decision to integrate such provisions on jurisdiction and arbitration to limit party autonomy was a bold and contentious move made by the working group.²⁵⁷ Although when the CMI prepared the preliminary draft they did not draft chapters on forum selection, the CMI always anticipated that there would later be such provisions added.²⁵⁸ Because these chapters were a heavily debated part of the convention, it was decided as a compromise to all interests to make these chapters 'opt-in' so that contracting states to the Rotterdam Rules must take a further step to opt in to the chapters on jurisdiction and arbitration. Admittedly, a large influencing factor behind the arbitration chapter was the jurisdiction chapter. It was deemed necessary to regulate both forms of dispute resolution together or none separately – the general fear was that if there was no arbitration chapter, then arbitration would become a back door to escape the provisions on jurisdiction.²⁵⁹ Eventually, the arbitration chapter was written as a significant compromise on the original position due to the debate between champions of party autonomy and those supporting UNCITRAL's inclination to regulate maritime arbitration. In the eleventh session of the working group, the concept of including an arbitration chapter was discussed for the first time.²⁶⁰ The apparent, although not necessarily real, consensus of opinion was that the new convention should contain provisions on jurisdiction and arbitration.²⁶¹ In actual fact, a variety of interested groups were either in opposition to any provisions based on a party autonomy perspective, or in favour of modelling the arbitration (and jurisdiction) chapters on the CMR Regulation of the European Union²⁶² and the Montreal Convention. Those that supported basing the provisions on the Hamburg Rules were the strongest group. Nevertheless, it was decided that the decision to write the draft articles governing arbitration should proceed, and the debate moved to consider what the content of these articles should be.

There were two general positions on the content of the arbitration chapter. The first came from the United States, a great influence on any international activity, who strongly supported²⁶³ rules similar to the Hamburg Rules by listing permissible forums for dispute resolution. Many of the United States' suggestions were integrated into the chapter. Advocating modifying the Hamburg Rules in certain respects, the United States proposed that the provision should be worded as to limit the party qualifying to a selection of forums to only the cargo claimant.²⁶⁴ Furthermore, the United States espoused the list of permissible forums now in the convention.²⁶⁵ A second argument, particularly from the United Kingdom and France, supported either no arbitration provisions or drafting the arbitration chapter so that it would have little substantive effect on freedom

²⁵³ *Report of Working Group III on the Work of its Ninth Session*, UN Doc A/CN.9/510 (7 May 2002), 4.

²⁵⁴ *Ibid.* 5.

²⁵⁵ Erika Lindholm, *The Future of Maritime Arbitration: Analysis of the Rotterdam Rules from a Finnish Perspective* (Bachelor Paper, Maastricht University, 2012) 3.

²⁵⁶ UNCITRAL, *Status: 2008 - United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the "Rotterdam Rules"* (20 March 2013) UNCITRAL <<http://www.uncitral.org>>.

²⁵⁷ *Arbitration: Uniform International Arbitration Practice and the Provisions of the Draft Instrument*, UN Doc A/CN.9/WGIII/WP45(2 March 2005), 6.

²⁵⁸ Michael Sturley, '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, 7.

²⁵⁹ Michael F. Sturley, Tomotaka Fujita, and Gertjan van der Ziel, *The Rotterdam Rules* (Thomson Reuters, 2010) 355.

²⁶⁰ *Report of Working Group III on the Work of its Eleventh Session*, UN Doc A/CN.9/526 (9 May 2003), 44.

²⁶¹ One such opinion is held by the Canadian expert on maritime law William Tetley who emphasised that such provisions were essential for any 'acceptable convention': William Tetley, 'Reform of Carriage of Goods – The UNCITRAL Draft and Senate CGSO '99 Let's Have a Two-Track Approach' (2003) 28 *Tulane Maritime Law Journal* 1.

²⁶² *Regulation (EC) of the Council of the European Union of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2001] OJ L 012, arts 31, 33.

²⁶³ Although rather ironically the United States has not yet adopted the Rotterdam Rules and is instead considering new domestic legislation.

²⁶⁴ *Proposal by the United States of America*, UN Doc A/CN.9/WGIII/WP34 (7 August 2003), 9.

²⁶⁵ *Ibid.*

of contract in arbitration clauses. The United Kingdom cited the New York Convention as already establishing an international precedent for freedom of contract.²⁶⁶

The Working Group III proposed two variations at the twelfth session based on these arguments. One favoured party autonomy and one favoured the Hamburg Rules approach.²⁶⁷ However, a third group which favoured a compromise of distinguishing between different types of contracts was also developed. Eventually, the solution proposed by this group was adopted. Headed by Denmark and the Netherlands, the compromise reached entailed drafting provisions affecting mainly liner transportation arbitration agreements and only in limited instances other²⁶⁸ arbitration agreements.²⁶⁹ Ultimately there were three views influencing the Rotterdam Rules: Those that favoured compromise, those that favoured party autonomy and those that favoured the Hamburg approach. It was the compromise that succeeded²⁷⁰ and made Chapter 15 the successor of the strict regulation from the Hamburg Rules but with a mix of party autonomy and regulation. This compromise was deemed an appropriate approach to maritime arbitration's conditions because of the international maritime industry that defines it.

3.3 The Rotterdam Rules on Jurisdiction Clauses

Because the arbitration chapter was developed to complement the jurisdiction chapter,²⁷¹ the rationale behind the jurisdiction chapter is relevant to determining whether the arbitration chapter reflects the reality of maritime arbitration. Like the arbitration chapter, the jurisdiction chapter opens it up to the claimant to choose from a variety of forums connected with the dispute. The rationale for the jurisdiction chapter was to prevent the situation when exclusive jurisdiction clauses specify a foreign forum that would make the cost of suit for even substantial amounts impractical. This attracted interest from parties such as the European Union.

Although the European Union did not attend the parts of the Convention where such rationales were discussed, the European Union became a leading advocate of making the chapter 'opt in' due to its own Jurisdiction Regulation.²⁷² The contrast between Chapter 14, the jurisdiction chapter, and Chapter 15, the arbitration chapter, is not in its effects but in its underlying rationale. Jurisdiction has no background legal framework of international legal regimes except in the European Union while arbitration has had a massive international law scheme for decades. Thus, the arguments for and against each was different.²⁷³ Due to the European Regulations on Jurisdiction, the jurisdiction chapter was made 'opt in' and by association the arbitration chapter was also made 'opt in'.²⁷⁴

4 How the Arbitration Chapter Affects Maritime Arbitration

In this section the author will investigate the effects of the chapter of arbitration and the mechanics of its application. Chapter 15 provides a new perception of party autonomy in maritime arbitration which is argued to be appropriate in the degree of its infringement of party autonomy. However the articles in Chapter 15 are complicated and unappealing as a workable international maritime arbitration regime. The key feature of the chapter is the restriction on freedom of contract in the form of removing the enforceability of the designation of arbitral place in some cases. Instead, it is up to the claimant's choice where to pursue proceedings in one of the places listed by Chapter 15.

4.1 The Application of the Arbitration Provisions of the Rotterdam Rules

In analysing the arbitration chapter in the Rotterdam Rules, a brief explanation of some key differences between the Rotterdam Rules and previous conventions is required. The first key difference is that the Rotterdam Rules apply to all contracts of carriage that have a sea leg and the contractual place of receipt, discharge, loading or

²⁶⁶ *Report of Working Group III on the Work of its Fourteenth Session*, UN Doc A/CN.9/572 (21 December 2004), 40.

²⁶⁷ *Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]*, UN Doc A/CN.9/WGIII/WP32 (4 September 2003), 67.

²⁶⁸ Volume contracts and Article 7 contracts, see below.

²⁶⁹ *Proposal by the Netherlands on Arbitration*, UN Doc A/CN.9/WGIII/WP54 (13 September 2005), 2.

²⁷⁰ Michael Sturley, 'Jurisdiction and Arbitration under the Rotterdam Rules' (2009) 14 *Uniform Law Review* 945, 952.

²⁷¹ Sturley, Fujita, and van der Ziel, above n 31, 354.

²⁷² Sturley, above n 42, 951.

²⁷³ Sturley, Fujita, and van der Ziel, above n 31, 355.

²⁷⁴ *Ibid.*

delivery is in a contracting state.²⁷⁵ Unlike the Hague Rules and the Hague-Visby Rules which strictly covered only the part of the journey which was by sea, the Rotterdam Rules will pertain to all agreements for carriage that has at least one section being by sea. This would have the effect of overriding any domestic carriage of goods legislation in countries which sign up to the Rotterdam Rules and invading domestic law including in regards to arbitration. This is important to keep in mind when considering arbitration. For example, if New Zealand was a contracting state and there was a domestic carriage containing an arbitration clause to which the Rotterdam Rules applies,²⁷⁶ the place of arbitration would still be open for the claimant to choose the forum within the limits the Rotterdam Rules provide.

4.2 The Imposition on Party Autonomy in Article 75

Article 75 paragraph 2²⁷⁷ stipulates that the person claiming against the carrier has the option to proceed with arbitration at any one of 6 places, which are certain to be places connected with the dispute. These places are (1) the place designated by the arbitration agreement, (2) a location in the state of the domicile of the carrier, (3) a location in the state of the receipt agreed in the contract of carriage, (4) a location in the state where delivery was agreed in the contract of carriage, (5) a location in the state where the goods were initially loaded on a ship or (6) a location in the state where the goods were finally discharged. The working group conceded that the rationale behind intervening in party autonomy in this way was to prevent arbitration being held in a place that is overly expensive, unconnected with the dispute and not worth the cost of dispute resolution.²⁷⁸

4.3 The Exceptions to Article 75(2)

Importantly, there are some key exceptions to Article 75 paragraph 2 which provide that the place stated in the arbitration agreement will be enforced: ²⁷⁹ volume contracts with certain conditions met; ²⁸⁰ third parties to volume contracts with certain conditions met and; Article 7 contracts which meet certain conditions contained in Article 76 paragraph 2. Volume contracts are broadly defined 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’.²⁸¹ Thus, as there is no minimum quantity defined, a carriage of as few as two containers could be considered a volume contract.²⁸² The volume contract must clearly state the names and addresses of the parties and must be either individually negotiated or contain a prominent statement making known the presence of the arbitration agreement. Since the concept of volume contracts are loosely defined, the concept is considered a weakness of the Rotterdam Rules as a whole. For these reasons, it is advisable for parties to err on the side of caution and ensure that arbitration agreements are negotiated.

Article 7 contracts are bills of lading or transport documents under charterparty arrangements where the bill of lading is transferred to a consignee or other third party, even though the bill of lading references the charterparty. While charterparties and other ‘non-liner’ contracts are not affected by the Rotterdam Rules, Article 7 will apply the convention to these contracts and charterparty transport documents as between the carrier and consignee or holder of the negotiable document if they are not an original party to the charterparty. Any arbitration agreements in ‘Article 7’ contracts are not affected by Article 75 paragraph 2 by virtue of Article 76 paragraph 2 if specific requirements are fulfilled. Since the majority of ocean trade is governed by these types of contracts, complying with the terms listed in Article 76 paragraph 2 will ensure the designation of place in arbitration agreements are enforced by the convention.

4.4 Summary of Chapter 15's Application

Essentially Chapter 15 on arbitration in the Rotterdam Rules divides maritime arbitration agreements into two broad categories: those that are subject to paragraph 2 of article 75 on forum selection and those that are not.

²⁷⁵ *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, GA Res 63/122, GAOR, 63rd sess, 67th plen mtg, Agenda Item 74, Supp No 49, UN Doc A/Res/63/122 (2 February 2009), art 5 (‘*Rotterdam Rules*’).

²⁷⁶ For example a domestic carriage of goods governed by a head door-to-door international transport contract which also involves a sub-contract for carriage by sea.

²⁷⁷ See Rotterdam Rules, above n 48.

²⁷⁸ *Arbitration: Uniform International Practice and the Provisions of the Draft Instrument*, above n 29, 5.

²⁷⁹ Regina Asariotis, ‘UNCITRAL Draft Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea: Mandatory Rules and Freedom of Contract’ in Antonios Antapassis et al (eds), *Competition and Regulation in Shipping and Shipping Related Industries* (Martinus Nijhoff Publishers, 2009) 354.

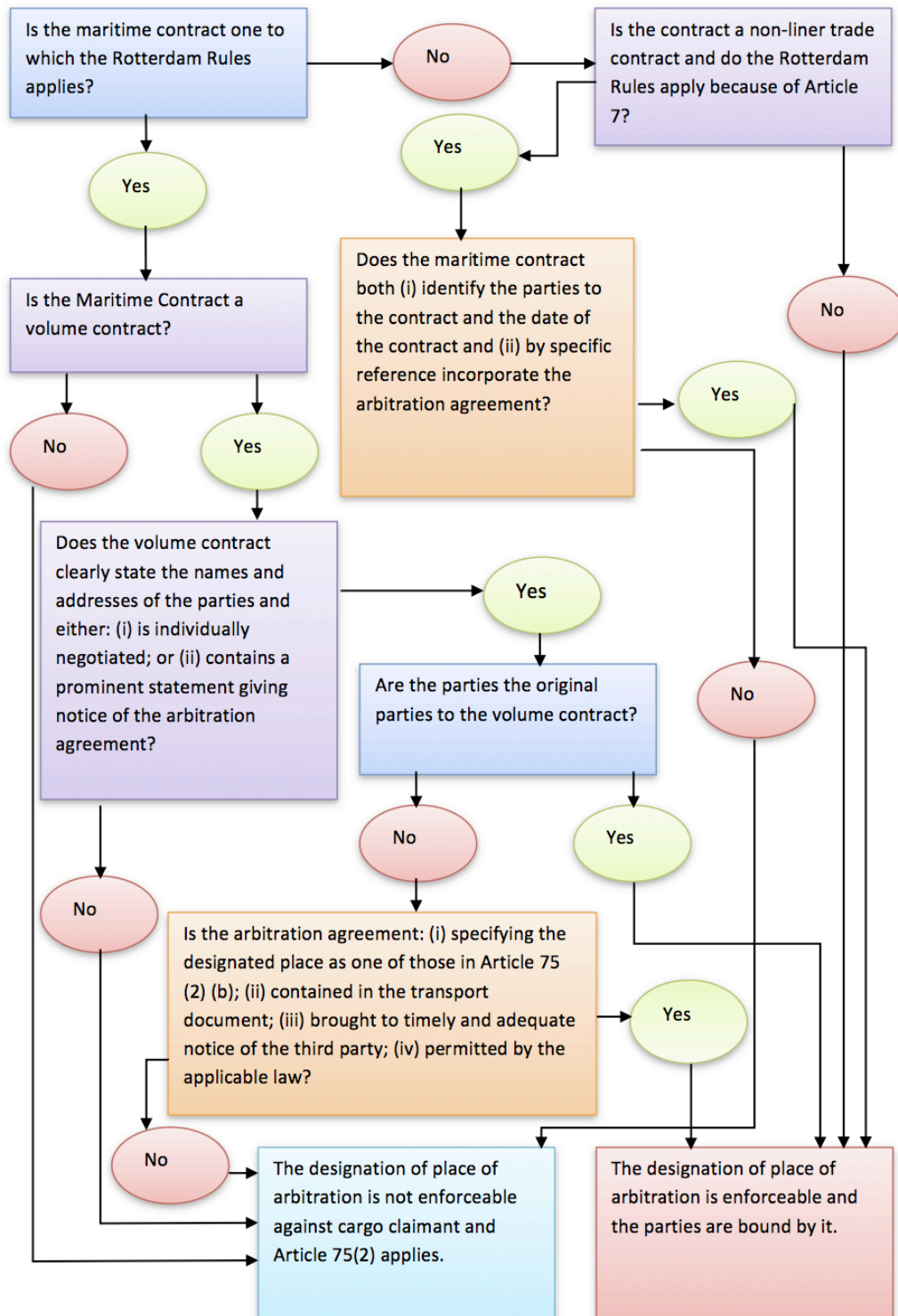
²⁸⁰ See Rotterdam Rules, above n 48, art.75(3) – (4).

²⁸¹ *Ibid* art 1(2). See also Sparka, above n 13, 200.

²⁸² Asariotis, above n 51, 357.

Greater party autonomy is given to non-linear trades and charterparties where arbitration is more standard practice and lesser party autonomy to liner trades where arbitration is the exception.²⁸³ The application and mechanics of the arbitration chapter is designed to surgically restrict party autonomy in some maritime contracts and is necessary for maritime arbitration to fit into the Rotterdam Rules. In an ideal world where all countries opt in to these arbitration provisions, they could be workable, but realistically these rules are made unattractive because of their complexity.

Figure 1: Chapter 15's application.



²⁸³ Sturley, above n 30, 17.

5 Comparing Chapter 15 with Existing Perspectives of Party Autonomy in Maritime Arbitration

The Rotterdam Rules are inventive in many ways but they draw from international trends in regards to arbitration. In this section, the author will show that a prohibitive approach to exclusive forum clauses in arbitration agreements are supported by these international trends. Furthermore these jurisdictional attitudes are evidence that maritime arbitration is unique. While US law and policy has been a proponent of party autonomy, it now has shown dissatisfaction and pushes for more intervention in maritime arbitration. The conventions regulating the carriage of goods by air such as the Warsaw Convention and the Montreal Convention include provisions of arbitration opening the place of arbitration to be at the option of the claimant. Developed by UNCITRAL as a shipping liability regime to be more balanced and replace the Hague-Visby Rules, the Hamburg Rules were the first to regulate jurisdiction and arbitration. Canadian law has taken on a modified Hamburg Rules approach to maritime arbitration. Although not directly based on the Hamburg Rules, Australian law has had a parochial legislative position similar to Canada on foreign maritime arbitration clauses. These examples show that maritime arbitration is recognised as different by some major international legislatures.

5.1 Maritime Arbitration and US Law

The United States of America has been an instigator of international maritime legal change since the Harter Act 1893²⁸⁴ and recent trends have shown that consensus in the US is for a new perspective on party autonomy in maritime arbitration. The scene is originally set by *Indussa Corp v. SS Ranbourg* ('*Indussa*')²⁸⁵ which stated that the *Carriage of Goods by Sea Act* (COGSA) invalidated foreign forum selection clauses in jurisdiction agreements to which COGSA applied. In the case *M/S Bremen v. Zapata Off-Shore Co* ('*Bremen*')²⁸⁶ the general rule was given that foreign forum clauses will be upheld as long as COGSA does not apply to the contract unless the party resisting enforcement could demonstrate unreasonableness or unjustness.²⁸⁷ *State Establishment for Agricultural Product Trading v M/V Wesermunde*²⁸⁸ is another example where the US courts held that a maritime arbitration clause for English arbitration violated COGSA as the only connection was the charterer who was not even named in the action.²⁸⁹ This precedent, although concerning exclusive jurisdiction clauses, reveals the distinct nature of how the courts would treat maritime arbitration as a branch of arbitration in which party autonomy is not the highest value, but the *Indussa* and *Bremen* cases were undermined by the majority in *Sky Reefer*²⁹⁰ which refused to enforce foreign forum selection clauses in maritime contracts and changed case law to state that foreign arbitration clauses will be upheld.²⁹¹

Sky Reefer truly upset many commentators on US law for this issue. A contract for carriage of fruit between a Japanese carrier and American fruit distributor contained an arbitration clause specifying Tokyo as the place of arbitration. When the fruit was damaged in transit it was argued that the cost of the proceedings in Tokyo would offend the COGSA and the arbitration clause should be made void, yet this argument was rejected.²⁹² American legal scholar Cherie L LaCour states that *Sky Reefer* is inconsistent with existing maritime liability regimes because foreign arbitration clauses intrude upon COGSA due to potential uncertainty of the appropriate law for the arbitral tribunal to make awards and the transaction costs of pursuing proceedings overseas.²⁹³ *Sky Reefer* has increased momentum to change the approach to foreign arbitration clauses in maritime contracts and exhorted US support for Chapter 15 in the Rotterdam Rules.

Since *Sky Reefer*, the US has drafted proposed domestic legislation which is currently on hold and will essentially overturn *Sky Reefer*²⁹⁴ and revert it back to its historical position. This seems unnecessary because if

²⁸⁴ *Carriage of Goods by Sea Act*, 46 USC app § 190.

²⁸⁵ 377 F 2d 200 (2d Cir 1967).

²⁸⁶ 407 US 1 (1972).

²⁸⁷ Robert Force and Martin Davies, *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honour of Robert Force* (Kluwer Law International, 2005) 4.

²⁸⁸ 838 F2d 1576 (11th Cir 1988).

²⁸⁹ LaCour, above n 15, 136.

²⁹⁰ 515 US 528 (1995).

²⁹¹ Force and Davies, above n 59, 4-5.

²⁹² Allsop, above n 4, 18.

²⁹³ LaCour, above n 15, 137.

²⁹⁴ Sturley, above n 30, 6.

the US signs up to the arbitration chapter in the Rotterdam Rules, it would undo *Sky Reefer*.²⁹⁵ American courts have not favoured foreign arbitration agreements²⁹⁶ in spite of it being a signatory to two international arbitration treaties both placing the highest value on party autonomy, the New York Convention and the Inter-American Convention.²⁹⁷ The US legislative trend shows that maritime arbitration agreements should be open to being granted a lesser amount of party autonomy.

5.2 The Hamburg Rules on Maritime Arbitration

The predecessor to international regulation of maritime arbitration in the Rotterdam Rules is arbitration provisions in the Hamburg Rules.²⁹⁸ The Hamburg Rules is the common name allotted to the United Nations Convention on the Carriage of Goods by Sea which was adopted in Hamburg in 1978 and came into force in 1992. The Hamburg Rules have not been an outstanding success with few major shipping nations ratifying. Article 22 of the Hamburg Rules mirrors article 21 on jurisdiction by allowing arbitration in a number of places at the option of the claimant. The justification was, like in the Rotterdam Rules, to prevent arbitration from becoming a method to escape the provisions on jurisdiction.²⁹⁹ The main difference from the Rotterdam Rules is that this list of permissible forums is open to every claimant in every maritime arbitration agreement³⁰⁰ so party autonomy is even less.³⁰¹ The Hamburg Rules certainly infringed on party autonomy too much³⁰² because in cases where the shipper has equal bargaining power it makes sense to allow the place of arbitration to be upheld. However, the compromise in the Rotterdam Rules offers a better philosophy than that driving the Hamburg Rules. Nevertheless the Hamburg Rules do show an international tendency to include rules for arbitration in maritime commerce.

5.3 The Canadian Marine Liability Act 2001 and Maritime Arbitration

Canada has enacted the Hamburg Rules in section 45 of its *Marine Liability Act 2001*.³⁰³ Section 46 of the *Marine Liability Act* extends Article 22 of the Hamburg Rules to apply to all maritime contracts concerning the carriage of goods by water whether covered by the Hamburg Rules or not. A cargo claimant will be entitled under the Act to bring arbitral proceedings in Canada if the contract is sufficiently connected to Canada regardless of the designation of forum in the contract itself.³⁰⁴ This can be criticised as having somewhat of a narrow approach, as such acts limits maritime arbitration to only be held in Canada itself. Relating this to the Rotterdam Rules, Canada's perspective is much more limiting of party autonomy but it does support a departure from strict adherence to complete party autonomy in maritime arbitration.

5.4 Australian Law's Approach to Maritime Arbitration

Australia's key shipping legislation is the *Carriage of Goods by Sea Act 1991* (Cth). Similar to the Canadian provisions, section 11 of the Act strikes down clauses in maritime contracts that stipulate arbitration occurring in a foreign place unless the arbitration happens in Australia.³⁰⁵ This is essentially producing the same effect as the Canadian legislation. In the recent case *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd*,³⁰⁶ (*Dampskibsselskabet*) the court refused to enforce a foreign arbitration award due to its legislation which annulled the arbitration clause. The decision indicates an overly regulatory stance taken by the Australia legislature which is in contradiction also with the Rotterdam Rules since under them places outside Australia would be permitted. The Australian position is another example of an extreme protectionist policy against foreign arbitration – the Rotterdam Rules offer a more sensible and balanced view on maritime arbitration.

²⁹⁵ Lindholm, above n 27, 13.

²⁹⁶ *Bremen* 407 US 1, 9-10 (1972).

²⁹⁷ Sparka, above n 13, 31.

²⁹⁸ *Report of Working Group III of its Ninth Session*, above n 25, 21.

²⁹⁹ Sparka, above n 13, 194.

³⁰⁰ See above section 4: The Rotterdam Rules allow for enforcement of the designated place of arbitration in many cases.

³⁰¹ Thomas, above n 20, 263.

³⁰² Sparka, above n 13, 195.

³⁰³ *Marine Liability Act*, SC 2001, c 6.

³⁰⁴ William Tetley, 'Canadian Maritime Arbitration and Decisions 1999 – 2001' (2001) *Lloyd's Maritime and Commercial Law Quarterly* 551, 553.

³⁰⁵ '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': *Carriage of Goods by Sea Act 1992* (Cth) s 11(3).

³⁰⁶ [2012] FCA 696 (29 June 2012).

5.5 The Conventions on the Carriage of Goods by Air

The concept of leaving the choice of forum for arbitration to a list of places at the option of the claimant in the Rotterdam Rules is paralleled by the Warsaw and Montreal Conventions on carriage of goods by air in Article 32 and Article 34 respectively.³⁰⁷ These mandatorily allow for the claimant to bring an arbitration claim in either: the domicile of the carrier; the carrier's principal place of business; where the contract of carriage was made or; the destination. However, practically this is inconsequential since scholars of these conventions have discovered no cases concerning arbitration of air carriage disputes to date.³⁰⁸ The explanation for the disuse of arbitration in air waybills is absent, but in drafting the arbitration chapter in the Rotterdam Rules the working group did consider following the formulation of the Montreal Convention.³⁰⁹ The striking similarity between the air carriage conventions and the Rotterdam Rules is that it restricts party autonomy in arbitration agreements mostly in cases where arbitration is usually not the first choice for parties. The two regulatory systems on the carriage of goods by sea and air concur in their dispute resolution approach. This leads to the conclusion that a unified transport law approach to party autonomy in arbitration consensus is developing.

6 The Current New Zealand Position on Maritime Arbitration

New Zealand currently follows the traditional, party autonomy centric jurisprudence on all forms of arbitration although there has been some who have voiced concerns. Through the *Arbitration Act 1996* (NZ), New Zealand incorporates the New York Convention and rigorously applies it. In New Zealand, maritime law is governed partly by the *Maritime Transport Act 1994* (NZ). Section 210 of that Act states that jurisdiction clauses in maritime contracts designating a forum outside New Zealand will not be enforced but unlike Australia, arbitration agreements are unaffected. While New Zealand has prioritized party autonomy in its legislation on arbitration, it would be appropriate to consider other principles in maritime arbitration such as ensuring disputes can be resolved in places connected to the contract. A New Zealand judge, Bradley Giles, expressed an apprehension to New Zealand's 'passion for arbitration' in maritime contracts and postulated that third parties could be severely disadvantaged by an enforcement of arbitration agreements in all cases.³¹⁰ Due to geography, New Zealand parties forced to arbitrate in places such as London or New York or any distant foreign location, are put at a distinct handicap in terms of cost and convenience.³¹¹

However, in spite of Justice Giles' comments, no litigation has ever come before a New Zealand Court concerning maritime arbitration that would be decided differently under the Rotterdam Rules.³¹² Perhaps the most prominent maritime arbitration case from the 'charterparty arbitration cases' ever before New Zealand Courts was *Mobil Oil New Zealand Ltd v The Ship "Stolt Sincerity"* ('*Mobil Oil*')³¹³ where the defendants to an arbitration proceeding to be instituted in London based on the arbitration agreement in the charterparty sought to use the *New Zealand Carriage of Goods by Sea Act 1940* to conduct arbitration in New Zealand instead. In this case, Justice Jonathan Temm ruled on this case that the *New Zealand Carriage of Goods by Sea Act* cannot invalidate the designation of place in a charterparty arbitration agreement and looking through the lens of the Rotterdam Rules a charterparty is outside the ambit of the convention anyway. Although New Zealand has an upright acknowledgment of party autonomy as shown by the 'charterparty arbitration cases', in regards small shippers which are parties to bills of lading or transport documents, standard form arbitration clauses with distant places should not be upheld.

7 Criticisms of Chapter 15 of the Rotterdam Rules

The chapter on arbitration is one which has stirred up a lot of controversy and has also received many criticisms. While it has been most seriously debated, the argument for party autonomy in maritime arbitration is not

³⁰⁷ *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, opened for signature 12 October 1929, 137 UNTS 11 (entered into force 13 February 1933); *Convention for the Unification of Certain Rules for International Carriage by Air*, opening for signature 28 May 1999, 2242 UNTS 309 (entered into force 28 May 1999).

³⁰⁸ Thomas J Whalen, 'Arbitration of International Cargo Claims' (2009) 34 *Air & Space Law* 417, 419.

³⁰⁹ *Report of Working Group III on the Work of its Eleventh Session*, above n 32, 44.

³¹⁰ Giles, above n 6, 9.

³¹¹ *Ibid.*

³¹² See *Mobil Oil New Zealand Ltd v The Ship "Stolt Sincerity"* (Unreported, High Court of New Zealand, 28 March 1994); *Air New Zealand Ltd v The Ship "Contship America"* [1992] 1 NZLR 425. Both cases concerned an arbitration agreement in a charterparty that would not be affected by Chapter 15 of the Rotterdam Rules and in those cases the Court did in fact enforce the place of arbitration in the agreement in spite of arguments to have arbitration conducted elsewhere.

³¹³ (Unreported, High Court of New Zealand, 28 March 1994).

persuasive enough to reject the new perspective on party autonomy in maritime arbitration in Chapter 15. In addition, there are those who state that the specialised nature of maritime arbitration means that ‘copy and paste’ provisions for inconvenient places should be enforced. The Rotterdam Rules should have been clearer on defining certain terms, especially, ‘applicable law’ as it invites inconsistency between different jurisdictions. Article 7 is a complicated provision incorporating the Rotterdam Rules in other types of maritime contracts and yet it is not clear enough how it would work in arbitration. For this part the author will address some legitimate criticisms of the arbitration chapter of the Rotterdam Rules and whether they affect any proposed outlook on party autonomy in maritime arbitration.

7.1 The Argument for Party Autonomy in Maritime Arbitration

The harshest of criticisms against the Rotterdam Rules come from those who believe party autonomy is the highest principle to be valued in every arbitration agreement. During drafting, some of the largest protests on the arbitration chapter came from countries like the United Kingdom which opposed including provisions on arbitration. Another argument comes from a straight party autonomy angle contending that the principle of freedom of contract is and should be given the highest value in any legal rules and especially in arbitration. Nevertheless, these arguments all make the same fallacious assumptions that assume that either that maritime arbitration cannot accommodate any mandatory rules or that by giving an option for a variety of places to the claimant, this will result in a complete loss of the established efficacy of arbitration.

In their report to the Working Group III, the United Kingdom stated that they are strongly against going with a Hamburg model on arbitration and prefers remaining with the trend of binding agreements.³¹⁴ London is a recognized centre for maritime arbitration³¹⁵ and an estimated half of maritime arbitration agreements specify London and the London Maritime Arbitrators’ Association as the forum.³¹⁶ Dramatically, Yvonne Baatz has complained that under the Rotterdam Rules if the contract for carriage is not involved in England then claimant or carrier could choose to not take advantage of the London Maritime Arbitrators Association.³¹⁷ Stating that the prescriptive nature of the Hamburg rules influenced its non-universal acceptance and will be a factor in the acceptance of the Rotterdam Rules, the United Kingdom adamantly concludes that party autonomy is to be preferred.³¹⁸ The United Kingdom also rejected any notion of a compromise, which selectively applies to liner contracts, asserting that ‘there are also occasions where arbitration could be appropriate to liner carriage, particularly in the context of specialist trades’.³¹⁹ The criticisms like those from the United Kingdom were perhaps the most fervent objections to the arbitration chapter during drafting.

It is contended that in the context of maritime arbitration, that the designation of place should be enforced because commonly the parties desire the choice of a neutral seat. In the case *C v D*³²⁰ the judge described the designation of place in arbitration agreements as a method for people to ensure that arbitration occurs without judicial intervention. Yvonne Baatz again contends that a place may be chosen ‘on the basis that the arbitrators are very specialized and experienced in maritime matters, have a speedy and effective procedure for arbitration and a good reputation for integrity’.³²¹ It has also been said that if other places are optional, then this would involve treating the commercial parties as ‘guinea pigs’ until the same level of expertise is developed in non-traditional maritime arbitration centres, as there is in popular specialised centres.³²²

The final category of this line of argument comes from a freedom of contract standpoint based on two conventions, one international and one regional, which show general support for party autonomy in international arbitration.³²³ A lessening of party autonomy is seen as corresponding with a loss in commercial certainty for commercial arbitration agreements.³²⁴ Legal scholar Felix Sparka has stated that the New York Convention is

³¹⁴ *Comments by the United Kingdom of Great Britain and Northern Ireland Regarding Arbitration*, UN Doc A/CN.9/WGIII/WP59 (18 November 2005), 3.

³¹⁵ Bruce Harris, ‘London Maritime Arbitration’ (2011) 77 *Arbitration* 116, 116.

³¹⁶ Sparka, above n 13, 75.

³¹⁷ Yvonne Baatz et al, *The Rotterdam Rules: A Practical Annotation* (informa, 2009) 239.

³¹⁸ *Comments by the United Kingdom of Great Britain and Northern Ireland Regarding Arbitration*, above n 86, 3.

³¹⁹ *Ibid* 2.

³²⁰ [2007] EWCA Civ 1282; [2008] Lloyd’s Rep 239, 1.

³²¹ Baatz et al, above n 89, 237.

³²² Thomas, above n 20, 282.

³²³ *Arbitration: Uniform International Arbitration Practice and the Provisions of the Draft Instrument*, above n 29, 6.

³²⁴ *Report of Working Group III on the Work of its Sixteenth Session*, UN Doc A/CN.9/591 (4 January 2006), 29.

in a state of friction with the provisions on arbitration in the Hamburg Rules and the Rotterdam Rules.³²⁵ This is not due to any express contradiction between the New York Convention and the Rotterdam Rules, indeed the New York Convention is silent on forum selection, but rather due to the New York Convention being the embodiment of principles of freedom of arbitration and the recognition of arbitration agreements and awards.³²⁶

In the *Bremen*³²⁷ case the judge commented that a freely negotiated instrument should be upheld in principle. In addition to the New York Convention, another international instrument on arbitration to note is the European Convention on International Commercial Arbitration. In Article 4(1) (b), it is stated that the parties are free to choose the place of arbitration. This may be a problem for European countries joining the Rotterdam Rules, but is an indicator of the party autonomy trend across international arbitration.³²⁸

Importantly in addressing these arguments, the author would like to stress that the largely beneficial nature of freedom of contract does not necessitate its unconditional application everywhere. While the working group did acknowledge many of these arguments³²⁹ it did not deal with them specifically as its focus was on the compromise to reconcile all positions. Fundamentally the objection from the United Kingdom was based on the presumption that because the designation of place had always been enforceable in every arbitration agreement that it should remain so in maritime arbitration for the advantage of a prospective change in industry practice regarding liner contracts. This is hardly compelling. Liner contracts do not usually attract arbitration agreements because the value of the claim is usually too low.³³⁰

There is a presumption that cargo claimants will use Chapter 15 to choose irrational and inefficient places of arbitration. However, it is vitally essential is to remember that the claimant still has an interest in choosing an efficient place of arbitration in order that its dispute can be resolved. It is usually the defendant, the carrier and the one who would have drafted the arbitration agreement in the transport document, who would be most interested to delay proceedings. These criticisms fail because they assume that by making the choice open to the cargo claimant it will greatly upset the status quo. The truth is that the changes will be based on what is convenient to the claimant - hardly unreasonable and disadvantageous to the global maritime arbitration industry.

The Working Group defended its position from those claiming that less party autonomy would make arbitration generally impracticable by maintaining that the general enforceability of arbitration agreements are still protected and can still be accommodated by the New York Convention.³³¹ It is difficult to envision a situation under the Rotterdam Rules where a competent centre is not available to the parties and that the cargo claimant will subject themselves to inadequate arbitration. The notion that the place of arbitration in a maritime contract should be enforced does possess some merit from a party autonomy perspective. However this reveals an idealistic assumption that arbitration agreements are always negotiated between the parties. This is not the case. The Rotterdam Rules will generally enforce the place designated only if the agreement is negotiated, such as in volume contracts where arbitration agreements are more common (as said before, arbitration agreements in liner contracts are rare).³³² There are energetic proponents of party autonomy arguing against the choice of arbitral forum being made open to a limited number of forums for the claimant but these are not overwhelmingly convincing.

7.2 Maritime Arbitration – A Unique Species within the Genus of International Arbitration

Maritime arbitration is distinctly unlike general commercial arbitration, even described as ‘sectorial’.³³³ Thus, it can be contended that the designation of an inconvenient place should be upheld as long as it is a recognised centre of maritime arbitration. When the London Maritime Arbitration Association was queried as to whether maritime arbitration was like general commercial arbitration, they somewhat caustically replied that in contrast to other arbitrators, maritime arbitrators are expected to know maritime issues rather than dispute resolution law.

³²⁵ Sparka, above n 13, 191.

³²⁶ *Comments by the United Kingdom of Great Britain and Northern Ireland Regarding Arbitration*, above n 86, 2.

³²⁷ 407 US 1 (1972).

³²⁸ Sparka, above n 13, 191 fn 1208.

³²⁹ *Report of Working Group III on the Work of its Fourteenth Session*, UN Doc A/CN.9/572 (21 December 2014), 40.

³³⁰ Sparka, above n 13, 71.

³³¹ *Report of Working Group III on the Work of its Eighteenth Session*, UN Doc A/CN.9/616 (27 November 2006), 64.

³³² Article 75(3): see above at section 2.5

³³³ Fabrizio Marrella, ‘Unity and Diversity in International Arbitration: The Case of Maritime Arbitration’ (2005) 20 *American University International Law Review* 1055, 1086.

³³⁴ In maritime arbitration, proceedings are often ad hoc and special maritime arbitration rules can be used rather than standard commercial arbitration rules. Experienced maritime arbitrators are highly sought after and centres of maritime arbitration such as the London Maritime Arbitrator's Association in London have developed.³³⁵ Evidence of maritime arbitration's uniqueness is found in the fact that there are many institutions with special practices dedicated to resolving maritime disputes through arbitration.³³⁶ Maritime institutions, such as the aforementioned London Maritime Arbitrators Association, the Society of Maritime Arbitrators and the China Maritime Arbitration Commission are examples of organisations adapting to a maritime industry described as 'a paradox of international cooperation and isolation, intense competition and camaraderie'.³³⁷ However, the uniqueness of maritime transport law leads to an acceptable adjustment of party autonomy but does not justify burdensome provisions to arbitrate in an inconvenient forum simply because it is a specialist centre.

The advantage of the continuing development of the maritime arbitration industry is that centres have been established worldwide. There are now prominent centres in China, Nigeria, Australia, United Arab Emirates and Singapore. It is true that it is a possibility that a claimant who avails themselves by use of Article 76 may not, by choice or by circumstance, initiate arbitration in a competent maritime arbitration centre. However business practice, reputation and hopefully an increased tendency for parties to negotiate the place of arbitration indicates that this will not always be the case. As mentioned, the volume contract and Article 7 stipulations³³⁸ will encourage negotiation of the designation of forum and the hope is that a more agreeable location will be agreed upon. Furthermore the continued development of maritime arbitration should be encouraged. Maritime arbitrators are required to be people knowledgeable about shipping practices rather than legal principles and with the global nature of the shipping industry these people are not hard to find.³³⁹ Russell J Cortazzo notes that the 'maritime industry uses a language that is ... unique from any other trade [and] fluency in the dialect of the sea is required'.³⁴⁰ With provisions like the Rotterdam Rules, maritime arbitration can develop, as it always has, out of the *lex mercatoria*³⁴¹ and the practice of carriage of goods by sea.

7.3 The Vagueness of the Term 'Applicable Law'

Article 75.4(d) states:

... 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:

- (d) Applicable law permits that person to be bound by the arbitration agreement.

This is slightly problematic³⁴² in the confusion it creates as to whether the 'applicable law' is the procedural law of the place of arbitration or the substantive law of the contract. This is a contentious problem the Rotterdam Rules had the opportunity to remedy. The doctrine of severability, established in common law states and prominent civil law states,³⁴³ disconnects the arbitration agreement from the main contract and treats it as an independent contract. This allows for matters of the validity of the contract to be determined by arbitration. This doctrine is well established in the United States³⁴⁴ but not mandatorily applied to every arbitration agreement in UK.³⁴⁵ It is endorsed in Germany³⁴⁶ and is important because the law applicable to the contract may differ from the law applicable to the arbitration agreement³⁴⁷ as implied by the New York convention:³⁴⁸

³³⁴ Ibid.

³³⁵ Sparka, above n 13, 79.

³³⁶ Winship, above n 22.

³³⁷ Cortazzo, above n 8, 255.

³³⁸ See above at section 4.3.

³³⁹ Cortazzo, above n 8, 266.

³⁴⁰ Ibid.

³⁴¹ Georgios I Zekos, *International Commercial and Marine Arbitration* (Routledge-Cavendish, 2008) 10.

³⁴² *Report of Working Group III of its Twentieth Session*, UN Doc A/CN.9/642 (2 November 2007), [210].

³⁴³ Also known as the doctrine of *kompetenz-kompetenz* which enables the arbitral tribunal to rule on its own jurisdiction.

³⁴⁴ Sparka, above n 13, 88.

³⁴⁵ *Arbitration Act 1996* (UK) s 7.

³⁴⁶ Sparka, above n 13, 91.

³⁴⁷ Ibid 95.

³⁴⁸ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) art 5 (1)(a).

[enforcement of arbitral awards may be refused if the agreement is] not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

Yvonne Baatz worries that this:³⁴⁹

could lead to a Contracting State refusing to ... enforce an arbitration award because their law as to whether there was an arbitration clause which bound the parties at all, differed from that State in which the award was made.

The lack of clarity as to whether the substantive law of the contract or the procedural law of the state governs the arbitration agreement in the application of Chapter 15 to third parties in volume contracts is a failing in the drafting of the Rotterdam Rules.

Yvonne Baatz states that the lack of guidance given on the substance and procedure dichotomy by the Rotterdam Rules 'is far worse than the current situation', since third parties are likely to be the most often affected by these provisions.³⁵⁰ In saying that however, this is not such a major issue as Yvonne Baatz contends since private international law trends show that most countries will apply the substantive law of the contract. English law deems the question of the validity of an arbitration clause according to the substantive law of the contract³⁵¹ as shown in the case *C v D* where the Court deemed Indian law applicable to an arbitration agreement because it was the substantive law.³⁵² Also the German judiciary have indicated that the substantive of the contract will be applied.³⁵³ While the US is an example of a major shipping nation with an uncertain approach to this,³⁵⁴ the vague terminology of applicable law is not quite a fatal problem as international legal trends are seemingly favouring the substantive law of the contract approach to the validity of arbitration agreements independent of the Rotterdam Rules.

7.4 What is the Meaning of Incorporating under Article 46(2) (b)?

Another lack of clarity issue affecting bills of lading and other maritime transport documents which are formed out of a charterparty arrangement is found in Article 46(2) (b):³⁵⁵

An arbitration agreement ... to which this Convention applies by reason of the application of article 7 is subject to this chapter unless [the transport document]: (b) *Incorporates* by specific reference the clause in the charter party or other contract that contains the terms of the arbitration agreement.

This concerns application of the Rotterdam Rules by Article 7 which makes Article 45(2) apply only if the transport document incorporates by specific reference the arbitration agreement. The Rotterdam Rules however do not define the mechanics of incorporating by specific reference. The problem lies in the fact that there is a significant disparity between various national laws³⁵⁶ so while in one jurisdiction the clause could be considered 'incorporated', in another the agreement would fail by reason of lack of incorporation.

Conceivably Chapter 15 will often be invoked for these arbitration clauses incorporated in the bill of lading this way, so a lack of definitive wording is a defect. As charterparties are the main habitat for maritime arbitration agreements, what standard is required for a proper incorporation into the bills of lading is a contentious issue. Maritime arbitration agreements that are incorporated into the bill of lading are usually inappropriately worded and nonsensical since they refer to terms specific to the charterparty.³⁵⁷ Potentially an arbitration agreement could be deemed not incorporated if it references the 'charterers' in place of shipowner or shipper. In England this problem has been overcome by established case law allowing the Courts to skew the wording of the arbitration agreement to fit into the context of the bill of lading as long as it coincides with the parties'

³⁴⁹ Baatz et al, above n 89, 239.

³⁵⁰ Ibid 239.

³⁵¹ Sparka, above n 13, 91.

³⁵² [2007] EWCA Civ 1282; [2008] Lloyd's Rep 239.

³⁵³ Sparka, above n 13, 92.

³⁵⁴ Ibid 88.

³⁵⁵ (emphasis added).

³⁵⁶ Sparka, above n 13, 117.

³⁵⁷ Michael Moon, 'New Opportunities for Maritime Arbitration and Arbitrators' (2004) 70(4) *Arbitration* 274, 275.

intention.³⁵⁸ Chapter 15 should have aligned its definition of incorporating to the English model so that there would be no confusion as to when a maritime arbitration agreement is validly incorporated.

8 Why Adopting Chapter 15 is not a Viable Option

While the Rotterdam Rules' approach to party autonomy in maritime arbitration is suitable in theory, a potential disconnect between jurisdictions that will ratify the convention and those that do not is a major problem to the efficacy of Chapter 15. Case law from prominent common law jurisdictions show that parties to maritime arbitration would not be able to enforce their awards if in breach of national legislation. Conclusively, the only way the advantages of Chapter 15 can be expressed is if the Rotterdam Rules achieves Hague Rules-style ratification by major shipping nations for example the US, China or Germany. Another problem facing arbitration under the Rotterdam Rules is the possibility of concurrent arbitral proceedings in other jurisdictions. The Rotterdam Rules should have stipulated anti-suit injunctions to be available to claimants wanting to prevent defendants from initiating arbitration elsewhere so that potential jurisdictional conflicts can be avoided. The author supports a new perspective of party autonomy as shown by Chapter 15 but recognises the pragmatic problems that can arise, if there is no uniformity and comity regarding the convention, as a caveat to adopting Chapter 15.

8.1 The Need for Uniformity to be Effective

The key requirement of successful international law is that it is uniformly applied and implemented and the reluctance by shipping countries to sign up reveals a fundamental weakness in the Rotterdam Rules. It appears that the arbitration chapter suffers from the fear that many nations will not sign up to it, decreasing its universality, power and applicability. International acceptance is, rather obviously, the thing which makes a convention international law. Due to the fact that the arbitration chapter is not a mandatory part of the Rotterdam Rules there is the likelihood that in future there will be difficulties for parties to accommodate trade between states that have signed up to the chapter and those that have not. This unfortunate eventuality is predicted by Rotterdam Rules critic, Yvonne Baatz.³⁵⁹ Article 78 provides that states must sign up to the arbitration chapter to be bound by it. This article was included in order for Chapter 15 to not be an obstacle for acceptance of the Rotterdam Rules.³⁶⁰ Ironically however, the option has now become an obstacle for the acceptance of the chapter. The advantage of any international law is the fact that it is uniform and standard everywhere. The momentum to ratify the Rotterdam Rules needs to be much greater before the convention will reach the status of international law.

Until the Rotterdam Rules gain prominence as an international shipping liability regime, three common law cases show that maritime arbitration could potentially suffer for the global inconsistency: *OT Africa Line Ltd v Magic Sportswear (OT Africa)* from the English Court of Appeal,³⁶¹ *OT Africa Line v Magic Sportswear Corp*³⁶² from the Federal Court of Canada and; *Dampskibsselskabet* from the Federal Court of Australia.³⁶³ In the United Kingdom, *OT Africa* interestingly explored the dynamics of disparity between jurisdictions on party autonomy in maritime exclusive jurisdiction clauses, directly analogous to arbitration, as between Canada with its *Marine Liability Act* and the United Kingdom. In *OT Africa*, the English Court of Appeal upheld an anti-suit injunction to enforce an adjudication agreement that designated England as the place having jurisdiction whereas the *Marine Liability Act* was allowing the claimant the right to be suing in Canada.³⁶⁴ Correspondingly the case of the same name in the Canadian Federal Court concerning the proceedings of *OT Africa*,³⁶⁵ decided that section 46 of the *Marine Liability Act 2001* did not prevent the Court from granting a stay based on *forum non conveniens*.³⁶⁶ In contrast, the decision in *Dampskibsselskabet*³⁶⁷ from the Australian Court annulled a

³⁵⁸ See *The Rena K* [1979] QB 377; *Kallang Shipping SA Panama v Axa Assurances Senegal* [2008] EWHC 2761 (Comm); *Sotrade Denizcilik Sanayi Ve Ticaret SA v Amadou Lo (The Duden)* [2008] EWHC 2762 (Comm) (Senegal); *Daval Aciers d'Usinor et de Salicor v Armara SRL (The Nerarno)* [1996] 1 Lloyd's Reports 1. These cases provide a history of the development of adjusting the terms of a maritime arbitration agreement incorporated from a charterparty in order to make it apply to the parties of a bill of lading.

³⁵⁹ Thomas, above n 20, 287.

³⁶⁰ *Jurisdiction and Arbitration: Information Presented by the Danish Delegation at the Fifteenth Session*, UN Doc A/CN.9/WG.III/WP.49 (22 June 2005), 2.

³⁶¹ [2005] EWCA Civ 710; [2006] 1 All E.R. (Comm) 32.

³⁶² [2006] FCA 284 (9 March 2006); [2007] 1 Lloyd's Rep 85.

³⁶³ [2012] FCA 696 (29 June 2012).

³⁶⁴ Allsop, above n 4, 22.

³⁶⁵ [2007] 1 Lloyd's Rep 85.

³⁶⁶ *Ibid.*

³⁶⁷ [2012] FCA 696.

maritime arbitration award since it did not happen in Australia according to its legislation. The trilogy of cases from England, Canada and Australia have different results and even concern different issues, but they are precedent to disorder when there are different applications of party autonomy in maritime arbitration between countries.

Prima facie these cases show that, without general international adoption, Chapter 15 of the Rotterdam Rules will be at worst unworkable and at best inefficient. There are two scenarios which could result from these authorities in a hypothetical situation involving an arbitration agreement: where the claimant will have the option to sue in one of the places in Article 75, that designates arbitration to take place in country A, where country A has not signed up to the arbitration chapter and a second country, country B, has signed up to the arbitration chapter. The claimant could attempt to pursue arbitral proceedings in country B, while the defendant could begin proceedings in country A in order to get an anti-suit injunction to prevent the arbitration in country B. The situation would then depend on whether the court in country B stays the proceedings as in the corresponding Canadian decision of *OT Africa Line*³⁶⁸ or do what the Court in Australia indicated in *Dampskibsselskabet*³⁶⁹ and ensure that arbitration can happen as the claimant wants.

These cases share a common denominator in that they uphold their respective legal systems acceptance of party autonomy in maritime arbitration against any concept of international comity. There is a case, *The Al Battani*,³⁷⁰ where the judge, Sheen J, noted that English Courts would recognize the comity of nations as an argument for respecting foreign legislation. However that case has nowhere near the precedent value of the other three since it was a decision of a lower court than the *OT Africa* case and has not been so widely accepted in subsequent decisions. In spite of the fact that the *Dampskibsselskabet* and the two *OT Africa* decisions came to different conclusions and dealt with different issues, they all are indications of how Chapter 15 could produce serious difficulties unless collectively ratified.

8.2 Concurrent Proceedings in Other Courts

Anti-suit injunctions in the context of maritime arbitration are orders made by the Court to prevent the parties from starting arbitration proceedings in another jurisdiction when arbitration is already taking place. In the context of non-universal acceptance of the Rotterdam Rules this could be some kind of solution because the claimant could bring the arbitration proceedings in accordance with Article 75 along with obtaining an anti-suit injunction to prevent the carrier from instituting proceedings in contradiction with the Rotterdam Rules. However *OT Africa* casts that solution in doubtful light. Moreover, within the European Union, this could never be any kind of solution because the European Jurisdiction Regulation prevents anti-suit injunctions.³⁷¹ So there is potential for there to concurrently be two proceedings in different jurisdictions leading to a double award. For these reasons, Yvonne Baatz espouses the view that the Rotterdam Rules should have dealt with this in the maritime arbitration context.³⁷² The problem is exemplified in the case *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)*,³⁷³ where the English House of Lords referred to the European Court of Justice (ECJ) the question of whether they could issue an anti-suit injunction to prevent proceedings in other states that were in breach of an arbitration agreement. However, the European Court of Justice declined to allow anti-suit injunctions.³⁷⁴ Thus for Rotterdam Rules countries in Europe like Spain, anti-suit injunctions are not currently a viable solution to protect a claimant's utilisation of the choice in Article 76. Additionally *OT Africa* makes anti-suit injunctions unlikely to be a solution in the common law context. Consequently, only non-European civil law jurisdictions which have adopted Chapter 15 could try to use some form of anti-suit injunction.

8.3 Are the Arbitration Provisions Overly Complex?

The infringement on party autonomy in maritime arbitration is almost surgical in its precision. However, like surgery, using Chapter 15 of the Rotterdam Rules is a complex and esoteric process and the untrained could make a bloody mess. The terms of the provisions are unclear and the various legal gymnastics needed to

³⁶⁸ Ibid.

³⁶⁹ Ibid.

³⁷⁰ [1993] 2 Lloyd's Rep 210.

³⁷¹ An order issued by the Court which prevents instituting proceedings in another court while arbitration proceedings are being pursued.

³⁷² Thomas, above n 20, 282.

³⁷³ [2007] UKHL 4; [2007] 1 All ER (Comm) 794.

³⁷⁴ Jonathan Harris, 'The Brussels Regulation and the Re-Emergence of the English Common Law' (2008) 4 *The European Legal Forum* 181, 186.

determine how a particular arbitration agreement will be treated may result in unnecessary litigation. Admittedly it is the nature of lawmakers and maritime law to be complicated, but a simpler option should be preferred. Regardless, the complicated provisions combined with the latent ambiguity of new conventions in how they are supposed to be applied in practice will result in a rejection of the chapter not because of real party autonomy arguments but based on status quo traditionalism.

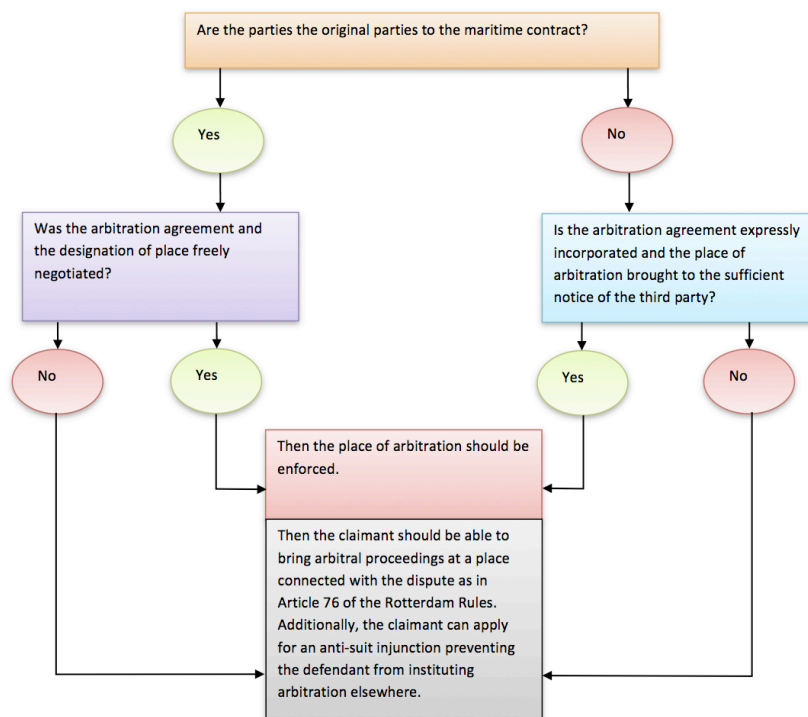
9 The Future of Party Autonomy in Maritime Arbitration

9.1 Room for Improvement

For arbitration agreements involving domestic shippers or international shipping corporations, an approach based on Chapter 15 of the Rotterdam Rules is best, but there are several problems preventing a sound advocacy of adopting them outright. Firstly there is a lack of a clear definition of volume contracts which could lead to increased litigation or worse, disparity between jurisdictions this term should be defined or avoided. Chapter 15 would have benefited by provisions mandating anti-suit injunctions in favour of the claimant’s choice in order to counter the problem of concurrent proceedings in different jurisdictions. Clearer direction with regards to terms such as ‘incorporating’ and ‘applicable law’ would be beneficial. Ultimately instituting such modifications along with a clearer, more streamlined framework for party autonomy in maritime arbitration would make it more alluring for nation parties to accept Chapter 15.

Chapter 15 positively protects small shippers from onerous ‘copy and paste’ arbitration agreements and ensures negotiation and/or notice of the arbitration agreements in volume contracts or charterparty transport documents. However, Chapter 15 has been shown to become an unlikely solution to this problem due to its inherent defects. The arbitration provisions could work better if party autonomy was infringed upon with clear goals in mind: to ensure a fair negotiation of the place of arbitration between the parties; in the case of third parties, sufficient notice and clear incorporation of the arbitration agreement from the charterparty or other contract and its designation of place. This would enable claimants who are small time shippers to take advantage of arbitrating in a convenient place if they do not negotiate the agreement and also maintain party autonomy in volume contracts where the shipper usually negotiates the arbitration agreement with the carrier. Recognising a new perspective on party autonomy, provisions of this kind encourage negotiation of the place of arbitration and are a benefit for small shippers subject to ‘copy and paste’ clauses, but still maintain fairness as between carriers and large shipping companies.

Figure 2: A suggested regime



9.2 Conclusion

Although historically, New Zealand has been supportive of party autonomy in maritime arbitration, the Rotterdam Rules presents itself as a real international starting point for developing a new perspective on this issue. The author is supportive of the idea that New Zealand should base its understanding of party autonomy in maritime arbitration in line with the compromise of Chapter 15 of the Rotterdam Rules. Convenience and economy are the main matters of concern for many instances in maritime dispute resolution where the arbitration agreement may be one which is included as part of a standard form contract. The careful infringement upon party autonomy by the Rotterdam Rules is an appropriate approach considering the context of maritime arbitration agreements in bills of lading and other transport documents for the carriage of goods by sea.

As maritime industry is ‘distinctly isolated from all other commerce’,³⁷⁵ maritime arbitration is also distinctly isolated from other forms of arbitration and should be treated as such. New Zealand recognises the efficacy of treating maritime law separately and should include maritime arbitration as something which welcomes small amounts of regulation to ensure economical proceedings to all parties. New Zealand also needs to be aware that foreign arbitration clauses can effectively limit the carrier’s liability by increasing the costs of litigating a claim.³⁷⁶ Critics of these provisions either overestimate the effect of Chapter 15 on maritime arbitration or underestimate the uniqueness of maritime arbitration compared with normal commercial arbitration. In regards to the United States, legal scholar Peter Winship answers the question of whether that country should sign up to Chapter 15 with a definite yes.³⁷⁷ In New Zealand’s case, the author of this paper tentatively answers that question by saying it would be acceptable in New Zealand’s case to include signing up to the chapter on arbitration only provided, if the Rotterdam Rules is to be ratified, that major shipping nations have already done so. However, a much better option would be to streamline the arbitration provisions in order to guarantee the negotiation of where arbitration would be conducted and, in essence, even the scales for shippers with limited bargaining power. This would benefit small time shippers on the receiving end of ‘copy and paste’ agreements to arbitrate and contribute to a new perspective of party autonomy in maritime arbitration.

³⁷⁵ Cortazzo, above n 8, 264.

³⁷⁶ LaCour, above n 15, 138.

³⁷⁷ Winship, above n 22.