Horatia Muir-Watt
Institut d'Etudes politiques de Paris

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(Brussels I)
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Completing article 23 : transmission of choice of forum clauses to third parties

1. One issue that has been much discussed (including during previous hearings before this Parliament is that of the protection of the choice of forum agreement when it is threatened by opportunistic behaviour by one of the parties[1]. However, a no less important point is to ensure that such protection is not detrimental to the interests of third parties. Indeed, it might seem obvious, under ordinary principles of privity of contract, that upholding the agreement in the interests of predictability and procedural economy as between the parties to that agreement, does not mean that it should bind unconditionally other economic actors who are strangers to it[2]. However, the two issues are not always clearly distinguished[3]. Moreover, with the remarkable exception of the new UNICITRAL « Rotterdam rules »[4], the effect of the agreement in respect of third parties is largely overlooked by the international instruments on jurisdiction or choice of forum agreements – both by the Brussels Regulation (article 23) or the 2005 Hague Convention on choice of forum agreements, as if it sufficed to deal with the validity and enforceability of the choice of forum

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[1] This may involve overturning the ECJ's ruling in *Gasser*.

[2] See Adam Samuel, op cit : « Separability has its origins in the different functions of the arbitration clause and much of the main contract. It is a device for ensuring both the sustainability of arbitration clause, where this does no harm to the parties' agreement, what is sensible for them and public policy. This explains why separability has nothing to say about the effect of a contract assignment on the arbitration clause ».

[3] Thus, for instance, the French Cour de cassation has appeared in the recent past to consider that separability, which upholds the clause in the relationship between the parties to the agreement, implies that it should also by the same token bind third parties, who are thereby precluded from challenging the applicability of the clause : Cass civ 1re, 28 mai 2002, Cimat, *Rev crit DIP* 2002.758, note Coipel-Cordonnier.

[4] On which, see below.

clause as between the parties to overcome all the difficulties raised by the clause, including its effects in respect of third parties.

2. While the question of these effects is of general import, in the sense that it affects any forum agreement covering all sorts of claims that might be assigned, or otherwise transferred to, or exercised by, a third party, it is particularly acute in practice in the field of the international carriage of goods by sea, where bills of lading passing from hand to hand frequently contain a choice of forum – court or arbitrator – clause, negotiated by the parties to the initial contract of carriage. This is no doubt why discussion on this point was so prominent during the drafting of the Rotterdam Rules and why these Rules actually contain provisions regulating the effects of forum agreements in respect of suits brought by third party holders against the carrier. Indeeed, if the holder, often the final recipient of the goods, brings an action against the carrier for cargo loss or damage, the issue will arise as to the extent to which the holder is bound by the forum agreement contained in the bill of lading. The challenge here is to ensure the holder adequate protection against the unforeseeble or otherwise unfair effects of a choice of forum dictated by a balance of interests in which he had no part, but here again without undermining the otherwise salutary function of the agreement itself, as initially negotiated. In practice, such a balance between the interests of legal security provided by the clause and fairness towards third parties, is clearly very difficult to find.

3. Furthermore, it must also be borne in mind that in the sea liner trade, where such issues are of very considerable pratical importance, bargaining power may be distributed unequally among the various categories of economic actors. While the strongest interests may well be those of the big shippers, it is generally feared that carriers will impose unfair contract provisions on small shippers ; the Rotterdam Rules reflect this preoccupation – but attract criticism from pro-carrier lobbies for this very reason[5]. On the specific question of choice of forum agreements whether in

[5] See Chester D. Hooper, « Forum Selection and Arbitration in teh Draft Convnetion on Contrats for the International Carraige of Goods Wholly or Partly by Sea, or the Defintion of Fora Conveniens Set Forth in the Rotterdam Rules », 44 *Tex Int'l L J* 417 (2009). On the safeguards against abuse contained

relation to contracting or third parties, it is generally recognised that the practical effect of such clauses may be to reduce carriers's liability through the choice of a forum which will award a low level of damages[6]. This is why, as studies seem to show, cargo interests tend to accept low settlements rather than commence suit in the chosen forum[7]. In addition, public or state interests, and arbitration interests, may interfere either because the extension of forum agreements brings additional adjudication or dispute resolution to the chosen forum, adding to the weight of a given « place » in the global market for judicial services[8], or conversely, because considerations of social justice, which may or may not hide protectionist concerns in crossborder trade, mandate the protection of small traders in their relationship with the carriers.

4. A survey of the case-law of various countries involved in maritime trade reveals an array of diverse solutions, translating very different economic balances. Thus, before rallying in 2009 to the ruling of the European Court of justice in *Coreck* discussed below, the Commercial Chamber of the French Cour de Cassation required that the third party, holder of the bill of lading, had « specially consented» to the agreement[9]. This position was designed to protect the recipients of bills of lading who risked having to bring action against the carrier in a faraway forum. As such, the policy objective was entirely respectable, at least insofar that the recipient is considered if not as as an intrinsically weaker party[10], at least as being at a structural disadvantage. However, this solution also meant that having declared the clause unopposable to a local recipient, the French courts then exercised jurisdiction against

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in the Rotterdam rules, see Michael Sturley, « Modernizing and Reforming US Maritime Law :The Impact of the Rotterdam Rules in the United States », 44 *Tex Int'l L J* 427 (2009).

[6] Hence a spate of issues in the Unites States relating to the conformity of choice of forum to the Carriage of Goods by Sea Act, which is undoubtedly an internationally mandatory provision or « loi de police ».

[7] See Chester Hooper, *op cit.*

[8] See Damman & Hansmann, *op cit.*

[9] For choice of court : Com 26 mai 1992, *Rev crit DIP* 1992.703, note Gaudemet-Tallon, and confirmed since, for ex, Com. 8 déc 1998, Cie helvétia, Rev crit DIP 1999.536, 1re esp. note Pataut. For arbitration ; Com 29 nov 1994, DMF 1995.218, note Tassel. Consent is required at the latest at the time of delivery of the goods.

[10] Jurisdictional protection is afforded to consumers and other protected categories under the Brussels I Regulation, for whom the geographical location of the forum is decisive of effective court access.

the carrier despite the clause. Professional carriers and insurers perceived French courts as safeguarding national commercial interests at the expense of legal certainty[11].

17. Clearly, while the policy objective was respectable, its implementation came at the price of destabilising equally respectable arrangements protecting the interests of carriers against unpredictable fora. That such an interest is equally deserving of protection is confirmed by the case-law of the European court, which is particularly attentive to the « legal protection of persons » notably defendants, against unpredictable fora. Interestingly, American Courts have on occasion pursued radically different policy objectives, or at least implemented solutions which are very generally protective of the carriers, on the same basis of the same legal argument of consent. However, the idea there is rather to consider that any party acting upon the bill of lading has consented to the clause it contains[12].

18. A radically different approach was adopted by the Civil Chamber of the same French Cour de cassation, in the field of arbitration clauses, in the name of the interests of international trade – which appeared here to play out in favour of the carriers. Thus, when – as would seem to be the case in field of the carriage of goods by sea - under international trade usage, the choice of forum agreement is part of the « economy of the contract », the third party was bound insofar as it participated in the economy of the operation[13]. Thus, partipating in a global trade game, there was no need to look for special consent to render the agreement binding on third parties. This position made the third party holder vulnerable in its relations with the carrier and sat uneasily with the privity of contract. Of course, in this respect, it is always –

[11] Cecile Legros, observations in Journal du droit international, 2006, p.632.

[12] See for instance, *A. P. Moller-Maersk A/S v. Ocean Express Miami*, 550 F. Supp. 2d 454, 2008 AMC 1236 (S.D.N.Y. 2008). The court held that the cargo owner accepted the carrier's bill of lading, including the forum selection clause, by suing on it.

[13] Dès lors que la clause - attributive (Cass civ 1re, 12 juill 2001, DMF 2001, n°621, p994 note Delebecque) – ou d'arbitrage (Cass civ 1re, 22 nov 2005, JDI 2006.622, note Legros) « fait partie, selon les usages du commerce maritime international, de l'économie du contrat, elle s'impose à ce titre au destinataire et à l'assureur subrogé sans qu'il y ait lieu d'exiger une acceptation spéciale ».

at least, unless the final recipient is perceived to be in a contractual relationship with the defendant carrier[14] - possible to object that the recipient or final holder always has the alternative of bringing action against the intermediary, who is the direct contractual partner[15]. It might then be argued that specific protection is justified only in cases where the recipient's action against the intermediary is not available, or indeed, as an middle ground solution, that the plaintiff holder could be allowed to show that the chosen forum is unreasonably inconvenient.

19. A third solution was however set out by the Court of justice[16]. Under its ruling in *Coreck*[17], regard must be had to the content of the law governing the contract containing the agreement, to see if third parties can succeed to the rights and duties to the parties to the contract. Thus, « in so far as the jurisdiction clause incorporated in a bill of lading is valid under Article 17 of the Convention as between the shipper and the carrier, it can be pleaded against the third party holding the bill of lading so long as, under the relevant national law, the holder of the bill of lading succeeds to the shipper's rights and obligations »[18]. The reference to the law governing the question of « succession to rights and obligations » under the shipping contract, is not intended to undermine separability[19], but to ensure that the choice of forum agreement is not opposed to the recipient if under the applicable law, the primary obligations contained in the contract cannot be.

20. The desire to avoid a « floating » clause detached from the content of the contract it serves is undeniably coherent. *However, on second thoughts, it may be wondered whether this sort of legal logic is really relevant here. Separability itself is a (useful) legal*

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[14] As is the case in French law, in chains of sales of goods.

[15] Indeed, this is precisely the argument that works to deprive the final recipient who benefits from a protective jurisdictional regime such as the consumer under the Brussels I to invoke such protection in a relationship with the initial manufacturer or supplier, with whom there is no contractual relationship.

[16] On which both Chambers of the French Cour de cassation recently aligned their positions : Cass. Civ. 1re et Com, 16 déc. 2008, D2009, Panorama, p.1565.

[17] Case C-387/98See too *Tilly Russ* case 71/83, *Castelletti* case C-159/97

[18] Comp. *Tilly Russ*, paragraph 24, and *Castelletti*, paragraph 41.

[19] That is, the choice of forum agreement is not being made subject to the law governing the main contract.

fiction, which responds to policy considerations rather than to a coherent legal construction. Indeed, arbitration, a contractual mechanism which has acceded in many respects to a quasi-judicial status, tends to feed on legal fictions. The same can be said of all « direct actions », which mean extending the benefit of the first contract to the last participant in the operation[20]*. The interest served here is esthetic, valuing internal coherence of the law, over workable results*[21]*. And looking at the practical impact of this solution, which requires determining the applicable law and its content before solving the jurisdictional issue, it is more than burdensome.*

20. *Moreover, it is also very difficult to know what « succession » means in the terms of the various legal mechanisms which might be considered as allowing a non privy party – assignee, subrogror, agent, consignee, endorsee - to step into the shoes of one of the contracting parties. Perhaps most importantly, appealing to the governing law does not answer the complex « who decides on jurisdiction ? » question, encountered albeit in a simpler form, above*[22]*. If the choice of forum agreement is invoked by the defendant before a non-chosen court, is it this court which decides not only on the validity of the agreement between the initial parties under article 23 of the Regulation, but also on the « succession » issue, governed by the law of the main contract ? Or should it stay the proceedings before it until the chosen courts itself decides on these matters ? And indeed, is it not somewhat bizarre to require the third party challenging the jurisdiction of the chosen court to show that under a foreign law governing a contract to which he is not privy, in the choice of which he had no say, he does not succeed to the rights and obligations of the shipper ?*

21. In the United States, the courts appear largely to uphold the carriers' interests[23]. Thus, a cargo owner "accepts" a bill of lading to which it is not a signatory by bringing suit on it and is therefore subject to the jurisdiction of the court designated in the bill of lading[24].

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[20] Jochen Bauerreis, « Le role de l'action directe contractuelle dans les chaînes internationales de contrats », *Rev crit DIP* 2000.331.

[21] This is a reccurrent objection to the case-law of the Court of justice, paticularly by common lawyers. See R. Fentiman, XXX.

[22] See above n° XXX

[23] See the references cited in FN XX above.

[24] A.P. Moller-Maersk A/S v. Ocean Express Miami, cited above.

22. At first sight, the new Rotterdam rules[25] contain the most balanced solution, and are notably less liberal on the question of party autonomy than their predecessors, the Hamburg rules[26]. Thus, under the new article 67 – 2 : « A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:(a) The court is in one of the places designated in article 66, subparagraph (a) ». These places are :

(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.

In the absence of a forum agreement, article 66 (a) opens a wide choice of fora for the claimant and is largely favorable to the convenience of the cargo owner ; nevertheless, it protects the defendant carrier by the fact that all the possible fora are predictable in that they are reasonably linked to the carriage. Now, if the contract of carriage contains a choice of forum agreement, the balance would normally swing back in favour of the carrier, who might thus paralyse the claimant's choice and put it at considerable disadvantage by designating an inconvenient forum[27]. It is this risk

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[25] The Hague Rules were adopted by UNCITRAL in 1924 to standardize the law governing the carriage of goods by sea. They were followed in 1968 by the Visby Amendments (Hague-Visby Rules). Some interests, mainly in developing countries, then, in 1978 by the Hamburg Rules, negotiated at the initiaitive of developing countries in order to give more room to the cargo intersts and largely ignored by the great sea-faring powers, who remained supportive of shippers' interests.The new Rotterdam Rules were approved by UNCITRAL in July 2008 and adopted by the U.N. General Assembly on December 11, 2008. The formal signing ceremony in Rotterdam is scheduled for September 2009. The jurisdiction provisions in these Rules will however be « opt-in « provisions.

[26] Hamburg Rules : 21 -5. « …an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective ». And in the field of arbitration : Article 22 3. « The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places: … (*b*) any place designated for that purpose in the arbitration clause or agreement ».

[27] It has been suggested that 'if a purchaser of cargo does not want the carrier to choose the Article 66 place to litigate or the Article 75 place to arbitrate, the purchaser should specify in a contract of sale or letter of credit that such clauses in the transport document or electronic record are not acceptable'. Chester Hopper, *op cit*, p. 417. One may wonder, however, what the value of such a disclaimer might be. The author observes, on the subject of the rotterdam Rules, that « These provisions improve the

that article 67 seeks to counteract, by making the choice of forum opposable to the third party cargo owner only if the chosen court is one of the ones which would normally have had jurisdiction if it had been able to choose [28]. Thus the Rotterdam Rules will allow cargo interests to litigate claims at a place convenient for cargo interests ; the same goes for arbitration[29].

23. However, article 67 (d) raises new difficulties. Under this provision, a condition for the clause to bind third parties is that : « The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement ». For the court of a Member State, this raises various difficult issues. The « law of the court seized » must be Community law when the agreement falls within the scope of article 23 by virtue of the domicile of one of the parties being within a Member State. In such a case, therefore, the court is directed back to the *Coreck* ruling and must consult the law governing the initial contract of carriage to see whether the holder succeeds or not to the rights and obligations arising under that contract. Presumably, article 23 and, by the same token, the *Coreck* ruling, is applicable only when the initial agreement on choice of forum, or the contract which contains it, is an international

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

[28]The other conditions are that:
(b) That agreement is contained in the transport document or electronic transport record;
(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 ». Acccording to one account (Chester Hooper, op cit), « the drafters realized that the purchaser of cargo often does not receive the transport document or electronic record until after it pays for the cargo. Thus, the cargo buyer may not learn of the choice of forum or arbitration provision until after it has paid for the cargo, but either the cargo seller or buyer will probably be a party to the volume contract and will know of the clause ». On (d) see below.

[29] Article 75 -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 subparagraph 2 (b) of this article;
(b) The agreement is contained in the transport document or electronic transport record;
(c) The person to be bound is given timely and adequate notice of the place of arbitration; and
(d) Applicable law permits that person to be bound by the arbitration agreement. »

agreement, so that when, in an international carriage of goods, the cross-border element is the domicile or establishment of the recipient of the cargo, the ordinary « non-Community » rules of the forum, including its private international law, apply to the issue of whether a third party is bound by the agreement. Clearly, it would be desirable that in any given forum the same principles be made applicable, independantly of the connection of the initial contract to the territory of a Member State. This appears to be the position taken by the French Cour de cassation, whose recent alinement on the substance of the *Coreck* ruling does not distinguish between intra- and extra- Community situations[30]. Thus, in a case where there is no Community connection, the court will nevertheless look to the law governing the (possibly domestic) contract of carriage, to see if it provides that the third party holder may (as claimant), or indeed must (as defendant), step into the shoes of a party to the initial agreeement.

24. However, beyond the intrinsic defects of the *Coreck* solution, it is certainly regrettable that it was reintroduced through paragraph (d) into the excellent balance otherwise struck in the preceding paragraphs of article 67. It would have sufficed that, as long as the agreement contained in the bill of lading was sufficiently conspicuous and as such drawn to the attention of the holder, the chosen forum be one of the fora considered to be appropriate in the absence of such a clause. The defendant carrier's interests would have been amply satisfied through the possibility of choice between several fora, and the claimant holder would have been protected from the unpredictability of such choice. Although this solution would not have prevented the strategic use of choice of court agreements to restrict carrier liability for cargo loss or damage, given that the carrier does indeed dispose of a certain margin of choice and is in a position to manipulate, to a certain extent, those connecting factors which depend on the contract[31], it certainly calibrates the conflicting interests involved more fairly than any other.

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[30] See Cass Civ 1re et Cass Comm, 16 déc. 2008, cited above.

[31] See article 66 (a) (ii) The place of receipt agreed in the contract of carriage; (iii) The place of delivery agreed in the contract of carriage.