

10-1-1995

# Forum Selection and Choice of Law Clauses in International Contracts: A United States Viewpoint with Particular Reference to Maritime Contracts and Bills of Lading

Philip A. Buhler

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [International Trade Commons](#)

---

## Recommended Citation

Philip A. Buhler, *Forum Selection and Choice of Law Clauses in International Contracts: A United States Viewpoint with Particular Reference to Maritime Contracts and Bills of Lading*, 27 U. Miami Inter-Am. L. Rev. 1 (1995)

Available at: <http://repository.law.miami.edu/umialr/vol27/iss1/2>

## ARTICLES

# FORUM SELECTION AND CHOICE OF LAW CLAUSES IN INTERNATIONAL CONTRACTS: A UNITED STATES VIEW- POINT WITH PARTICULAR REFERENCE TO MARITIME CONTRACTS AND BILLS OF LADING

PHILLIP A. BUHLER\*

I. INTRODUCTION .....	2
II. CHOICE OF LAW AND CHOICE OF FORUM IN INTERNATIONAL COMMERCIAL TRANSACTIONS — THE UNITED STATES OVERVIEW .....	4
III. CHOICE OF LAW AND CHOICE OF FORUM IN MARITIME CONTRACTS .....	14
A. <i>Introduction</i> .....	14

---

\* The author is an attorney with the firm Taylor, Moseley & Joyner, of Jacksonville, Florida, and specializes in the areas of Admiralty and Maritime Law. He received a B.A. from the College of William and Mary in Virginia (1984), a Juris Doctorate from the University of Miami School of Law (1987), and an LLM in Admiralty from the Tulane University School of Law (1988). He is the author of *THE ODER-NEISSE LINE: A REAPPRAISAL UNDER INTERNATIONAL LAW* (1990). Certain portions of this Article were given in an oral presentation at the Inter-American Bar Association Conference in Quito, Ecuador (November, 1995).

B.	<i>Historical Development and Resistance to Choice of Forum Provisions in Bills of Lading</i> .....	14
C.	<i>The United States Accepts Choice of Law / Choice of Forum Provisions in Maritime Contracts</i> .....	18
D.	<i>1995 — The United States Gives Full Recognition to Forum Selection Clauses in Bills of Lading</i> .....	25
E.	<i>Visby and Hamburg Rules</i> .....	30
IV.	ARBITRATION CLAUSES UNDER UNITED STATES LAW AND INTERNATIONAL CONVENTIONS .....	32
A.	<i>Introduction</i> .....	32
B.	<i>Development of United States Approach to Arbitration Clauses</i> .....	33
C.	<i>Application of International Conventions to Arbitration Clauses — The Effect on United States and Latin American Transactions</i> .....	38
V.	SUMMARY: RECOMMENDATIONS AND CONCLUSIONS .....	42

## I. INTRODUCTION

One of the most important developments in private international and maritime law, benefitting international commerce, was the recent recognition of commercial contracting parties' right to choose which legal forum will hear their disputes and what laws will be used to decide them. For those involved in international trade with the United States, the law has traditionally been either vague or restrictive.

Within the last twenty years, however, courts in the United States (U.S.) have acknowledged the importance of allowing parties to an international transaction to control where and how their commercial disputes will be resolved. U.S. courts have also reaffirmed the validity, well-nigh the necessity, of allowing many international contractual disputes to be settled by arbi-

tration.

In conjunction with the courts' recognition of contractual forum selection, the United States and her key trading partners in Europe and Latin America have entered into several multilateral treaties in order to further guide and support international commercial transactions and dispute resolution. These conventions demonstrate a desire for a uniform approach to international contracts that is crucial to promoting regional trade.

The gradual acceptance of forum selection provisions has had an important impact on international maritime contracts, particularly bills of lading. Trade between the U.S. and Latin America is, for obvious reasons, carried primarily by water. A significant percentage of Latin American exports are carried "in bulk." For example, cargos carried exclusively by water include oil from Venezuela, Colombia, Ecuador and Peru; palletized bagged coffee from Colombia, Guatemala and Peru; phosphates from Chile; citrus concentrate from Brazil; and refrigerated agricultural products from Argentina. While precise statistics are not available, products carried over water account for a substantial portion of the international contracts between companies in the U.S. and Latin America.

This Article approaches the topic of forum selection from a U.S. perspective. It is reasonable to expect, however, particularly with regard to bills of lading and maritime trade, that the approach of other nations toward international contracts is, or soon will be, very similar. For the sake of simplicity, "choice of law" and "choice of forum" will be addressed together, and referred to as either "choice of forum" or "forum selection." Many contracts only specify a particular forum, while others specify only the application of a particular law. U.S. courts and international conventions have generally taken the same approach to both and, therefore, from the standpoint of legal recognition, they are virtually indistinguishable.<sup>1</sup>

This Article will outline the current state of the law governing choice of law, choice of forum, and dispute resolution with respect to international contracts involving United States entities. Part II provides a brief overview of the general state of United States law with regard to forum selection provisions in

---

1. As will be discussed *infra*, when a U.S. court takes jurisdiction of a dispute, it still reserves the right to determine what law applies to the dispute.

international contracts. Part III focuses on contracts of maritime trade and the broad recognition currently accorded such contracts. It also includes a brief history of the developing recognition of forum selection clauses in bills of lading. Arbitration clauses have traditionally received different treatment from U.S. courts and therefore will be addressed separately in Part IV. In 1995, however, the distinction between forum selection and arbitration clauses was virtually eliminated by the Supreme Court when it recognized the full freedom of contracting parties to choose particular forms of dispute resolution.<sup>2</sup>

## II. CHOICE OF LAW AND CHOICE OF FORUM IN INTERNATIONAL COMMERCIAL TRANSACTIONS — THE UNITED STATES OVERVIEW

Historically, contractual choice of forum clauses did not receive the affirmation and protection they now enjoy under U.S. law.<sup>3</sup> Today, federal courts in the United States recognize that “choice of law and choice of forum provisions in international commercial contracts are ‘an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction,’ and should be enforced absent strong reasons to set them aside.”<sup>4</sup> Federal courts interpreting international contracts have held that forum selection clauses are *prima facie* or presumptively valid.<sup>5</sup>

U.S. courts have, however, delineated various reasons for invalidating forum selection clauses. Generally, the clause is considered valid unless the court finds it either unreasonable and unjust or invalid due to fraud, overreaching, or in contra-

---

2. *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 115 S. Ct. 2322 (1995).

3. *See infra* part III.

4. *Northrop Corp. v. Triad Int'l Mktg.*, 811 F.2d 1265, 1270 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-20 (1974)).

5. *See, e.g.*, *Avant Petroleum, Inc. v. Banque Paribas*, 652 F. Supp. 542, 545 (S.D.N.Y. 1987), *aff'd*, 853 F.2d 140 (2nd Cir. 1987); *Ronar, Inc. v. Wallace*, 649 F. Supp. 310, 313 (S.D.N.Y. 1986); *Karlberg European Tanspa, Inc. v. JK-Josef Kratz Vertriebsgesellschaft MBH*, 618 F. Supp. 344 (N.D. Ill. 1985).

One court interpreted a contract between an American and a German company and found a strong policy in favor of forum selection clauses freely negotiated in international contracts. The court held that a party attempting to invalidate such a clause bears the heavy burden of proving its invalidity. *Karlberg European Tanspa*, 618 F. Supp. at 347. Another court found that there must be “impinging circumstances” or some other valid reason to avoid enforcement of forum selection clauses in the United States. *Ronar*, 649 F. Supp. at 313.

vention of a strong public policy.<sup>6</sup> The clause will generally be enforced if the contractual parties are both practiced business entities with reasonably equal bargaining positions.<sup>7</sup> However, where one party has excessive bargaining power or acts in bad faith, a court may invalidate a forum selection clause.<sup>8</sup>

United States courts tend to take a narrow view of when parties may be in unequal bargaining positions and generally will not interfere in a dispute on this basis. Moreover, so long as there is some evidence that both parties understood the provisions of the contract they do not have to be entities of equal sophistication to be considered of equal bargaining power. For example, a federal court that reviewed an employment contract between an American oil company and a former employee refused to invalidate a clause designating Saudi Arabia as the forum for any contractual disputes.<sup>9</sup> The employee unsuccessfully argued that the Saudi forum would incur a great hardship on him because if he returned there he faced arrest in an unrelated criminal matter.<sup>10</sup>

Another consideration in evaluating forum selection clauses is whether the law of the chosen forum will provide an adequate remedy to the aggrieved party. Again, U.S. courts take a narrow view of this defense. For example, the Second Circuit upheld a forum selection clause in favor of Lloyd's Underwriters against aggrieved investors of Lloyd's.<sup>11</sup> The court found that the difference between the chosen law of England and the law of the United States was an insufficient ground to void the choice of law provision, even though the laws provided different remedies.<sup>12</sup>

---

6. *Avant Petroleum*, 652 F. Supp. at 545 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

7. *Samson Plastic Conduit & Pipe Corp. v. Battenfeld Extrusionstechnik GMBH*, 718 F. Supp. 886 (M.D. Ala. 1989).

8. *Weidner Communications, Inc. v. H.R.H. Prince Bandar Al Faisal*, 859 F.2d 1302, 1310 (7th Cir. 1988).

9. *Tisdale v. Shell Oil Co.*, 723 F. Supp. 653 (M.D. Ala. 1987).

10. *Id.* at 656-57.

11. *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993).

12. *Id.* at 1360-61. The case involved complex issues of an underwriter's liability to investors. U.S. law provided more extensive remedies for the aggrieved investors but because English law provided some remedies, albeit not as extensive as those available under U.S. law, the court found that the choice of law provision withstood judicial scrutiny. *Id.*

The Sixth Circuit similarly decided a commercial dispute between a U.S. corporation and a Brazilian company involving a forum selection clause which exclusively elected the courts of São Paulo, Brazil.<sup>13</sup> The American company, wanting to avoid the clause, brought an action on the contract in the United States. It argued that not only would it be denied a jury trial in Brazil, but that the Brazilian judicial process was very slow and required the deposit of a large sum as security. The court held that the choice of forum was enforceable even though the nature of proceedings and remedies were different.<sup>14</sup> The court concluded that Brazilian courts were fully competent to hear the dispute and, in any event, the plaintiff had been given a full opportunity to consider the ramifications of the forum selection clause before it freely entered into the contract.<sup>15</sup>

*Tisdale v. Shell Oil Co.*<sup>16</sup> presents an even clearer example of a U.S. court's enforcement of a forum selection clause despite the chosen forum's vastly disparate legal system. In this case, the court simply noted that an employee had not presented any evidence that the law of Saudi Arabia was inadequate to address his claim<sup>17</sup> and the court made no comparisons between the extent or adequacy of the remedies provided by either United States or Saudi Arabian laws.<sup>18</sup>

Perhaps the oldest and most well-established scenario in which a forum selection clause is invalidated is where the cho-

---

13. *Interamerican Trade Corp. v. Companhia Fabricadora De Pecas*, 973 F.2d 487 (6th Cir. 1992).

14. *Id.* at 489-90.

15. *Id.* In *Warner & Swasey Co. v. Salvagnini Transferica*, 633 F. Supp. 1209 (W.D.N.Y. 1986), *aff'd*, 806 F.2d 1045 (2d Cir. 1986), a federal district court addressed a rather unusual forum selection clause in a contract between a U.S. company and an Italian company. The choice of forum provisions provided that any suit brought by the Italian party must be brought in Ohio and any suit brought by the U.S. party must be brought in Italy. *Id.* There was, however, no separate choice of law provision and the dispute involved complex issues of United States patent law. The suit was brought by the American party in the United States and, under the contract, it should have been brought in Italy. The American company argued that the choice of forum clause should not be enforced because the Italian court would have great difficulty applying U.S. patent law. Nevertheless, the court upheld the forum selection clause and required the American company to file its action in Italy because Italy was a sophisticated forum that could reasonably interpret U.S. law. *Id.* at 1214.

16. 723 F. Supp. 653 (M.D. Ala. 1987). See *supra* text accompanying notes 9-10.

17. *Id.* at 654.

18. *Id.* at 658.

sen forum or law is clearly inconvenient or unrelated to the contract. The Ninth Circuit summarized the approach of most federal courts to this issue:

[A court] will apply the substantive law designated by the contract unless the transaction falls into either of two exceptions:

- (1) the chosen state has no substantial relationship to the parties or the transaction, or
- (2) application of the law of the chosen state would be contrary to a fundamental policy of the state.<sup>19</sup>

This approach simply applies the doctrine of *forum non conveniens* to enforcement of forum selection (or in this case choice of law) clauses. The doctrine of *forum non conveniens*, as applied in the United States and explained by the U.S. Supreme Court in several long-standing opinions, sets forth that in determining whether a court will exercise jurisdiction over a matter, a number of factors affecting the litigation must be considered. These include the relative ease of access to sources of proof, the availability of compulsory attendance process for unwilling witnesses, the cost of obtaining the attendance of willing witnesses, the need for and the possibility of viewing the premises or property, as well as any obstacle to the enforceability of a judgment if one is obtained, and other advantages or obstacles to a fair trial.<sup>20</sup>

The policy behind the application of *forum non conveniens* stems from the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>21</sup> The Supreme Court has ruled that courts should refuse to exercise jurisdiction over a matter

---

19. S.A. Empresa de Viacao Aerea Rio Grandense v. Boeing Company, 641 F.2d 746, 749 (9th Cir. 1981).

20. Hellenic Lines v. Rhoditis, 398 U.S. 306 (1970); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959); Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1946). Even if a U.S. court takes jurisdiction of a matter involving foreign elements, it will still evaluate which law to apply.

21. The Due Process Clause of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.



(or to enforce a forum selection clause) unless the parties have a "substantial relationship" with the forum and have been given fair notice that they might be subject to suit in the forum state.<sup>22</sup>

Surprisingly, there are not a great number of decisions from U.S. courts invalidating forum selection clauses on *forum non conveniens* grounds. This is no doubt due to the general policy considerations associated with freedom of contract and the idea that the parties to a freely negotiated contract had adequate notice that they could be called into the chosen forum to resolve any disputes. In any consideration of *forum non conveniens*, however, especially where the parties are sophisticated business entities, a party's financial status will not be considered by the courts. Therefore, so long as the contract was freely negotiated and the designated forum bears some relationship to the parties, it is irrelevant to the question of enforcement that one party may incur financial difficulties by pursuing an action in the forum.<sup>23</sup>

The issue of "substantial relationship" with a forum is another matter. U.S. courts will invalidate a forum selection clause where the parties have no clear relationship with the chosen forum. For example, in *Copperweld Steel Co. v. Demag-Mannesmann-Bohler*,<sup>24</sup> the Third Circuit refused to enforce a clause designating German courts as the forum for any dispute resolution. The subject of the contract dispute was a facility located in the United States. The facility was fabricated in the United States, all records concerning the contract were in the United States, the purchaser's personnel were in the United States, some of the seller's personnel were in the United States and the majority of the activities concerning the contract took place in the United States, in English.<sup>25</sup> The court found that enforcement of the forum selection clause was clearly "unreasonable."<sup>26</sup>

---

22. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

23. *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1057 (1994).

24. 578 F.2d 953 (3d Cir. 1978).

25. *Id.* at 964-65.

26. *Id.* at 966.

In contrast, in two cases involving contracts between American and English companies where products were bought in England and shipped to the U.S., New York courts found a "reasonable relation" between the transactions and England, just as there was a "reasonable relation" between the transactions and the United States.<sup>27</sup> Therefore, the courts found the choice of forum clauses in the contracts designating the application of English law in an English forum to be valid.<sup>28</sup>

In a related form of analysis, courts may also "balance the interests" of competing forums. Where a foreign country has an interest in the correct application of its laws and a greater interest in the outcome of a particular dispute than does the United States, selection of that country as the forum will unquestionably be enforced.<sup>29</sup>

Two additional aspects regarding the enforcement of forum selection clauses in the United States must be addressed. First, courts may draw a distinction between "permissive" versus "mandatory" forum selection clauses. Parties to an international contract must carefully review and consider this crucial drafting issue. For example, in a contract dispute between a Florida company and a Brazilian company, the contract's forum selection clause merely stated that the "place of jurisdiction is São Paulo, Brazil."<sup>30</sup> The Eleventh Circuit reviewed the dispute brought by the Florida corporation in Florida despite the forum selection clause. The court found the language of the clause ambiguous as to whether it was to be exclusive or merely permissive. Therefore, the court held that the Florida corporation could bring suit against the Brazilian company in the United States because the clause's ambiguous nature rendered it non-binding.<sup>31</sup>

---

27. *L. Orlik, Ltd. v. Helme Products, Inc.*, 427 F. Supp. 771, 774 (S.D.N.Y. 1977); *Fleischmann Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221, 229 (S.D.N.Y. 1975).

28. *L. Orlik, Ltd.*, 427 F. Supp. at 774; *Fleischmann Distilling*, 395 F. Supp. at 229.

29. *See, e.g., Ernst v. Ernst*, 722 F. Supp. 61 (S.D.N.Y. 1989) (upholding agreement to settle a dispute over a decedent's assets in a French forum where decedent's will was drafted in France and the heirs were U.S. citizens).

30. *Citro Florida, Inc. v. Citrovale*, 760 F.2d 1231 (11th Cir. 1985).

31. *Id.* at 1232. Interestingly, this clause was contained in a confirming contract telexed between the parties and not objected to by the receiving party. As a result, the court found the clause valid but permissive.

In *Granados Quinones v. Swiss Bank Corp.*, 509 So. 2d 273 (Fla. 1987), the Florida Supreme Court addressed a dispute wherein a Panamanian banking institu-

The case of *Gordonsville Indus., Inc. v. American Artos Corp.*<sup>32</sup> illustrates what is considered a mandatory forum selection clause. In this case, the court reviewed a contract between an American company and a German company which contained a clause that read in part, "(i)n case of suit, it is agreed that the place for litigation shall be the Amtsgericht (Civil Court) in Bochum, Germany."<sup>33</sup> The court found this language to be "mandatory and not open to interpretation."<sup>34</sup> The lesson to be learned is that to avoid having a forum selection clause interpreted as merely permissive, the language must be clear, precise, definite, and unambiguous and include words such as "shall" rather than "may."

A second and closely related issue is whether the forum selection provision is merely too vague. Sometimes the ramifications of a vague forum selection clause may not be as severe because a U.S. court will apply the most logical interpretation. In a recent case, the Southern District of New York examined a clause which merely specified a "court located in New York."<sup>35</sup> The court interpreted the clause to allow for suit to be brought in either federal or state court,<sup>36</sup> and permitted removal from state to federal court under the federal court's diversity jurisdiction.<sup>37</sup> On the other hand, where a form charter party agreement contained a choice of law clause specifying English law and identifying the forum as the "High Court in London," and the language was changed to read "New York law" and the "high court in New York," the provisions were found too vague to be enforced because there is no "high court" in New York.<sup>38</sup> This

---

tion brought an action against Guatemalan citizens who resided in Florida under a contract containing a forum selection clause setting venue for any disputes in either Guatemala or Panama. The clause specified that the banking institution creditor "may choose to take a legal proceeding" either to the courts of Guatemala or Panama. *Id.* at 274 (emphasis added). The Florida Supreme Court, relying on *Citro Florida*, found that this clause made the forum selection merely permissive and held that "permissive clauses constitute nothing more than a consent to jurisdiction and venue in the named forum and do not exclude jurisdiction or venue in any other forum." *Id.* at 274-75 (citing *Citro Florida, Inc. v. Citrovale*, 760 F.2d at 1232 (11th Cir. 1985) and *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955, 956-57 (5th Cir. 1974)).

32. 549 F. Supp. 200 (W.D. Va. 1982).

33. *Id.* at 204.

34. *Id.* at 206.

35. *Lee v. Regal Cruises*, 1995 AMC 782 (S.D.N.Y. 1995).

36. *Id.*

37. *Id.*

38. *BP Marine Americas v. Geostar Shipping Co.*, 1995 AMC 1352 (E.D. La.

court's decision to invalidate the vague forum selection clause was influenced by the fact that the party seeking enforcement was the party that had made the change over to the non-existent forum.<sup>39</sup>

Finally, where a contract is drafted in multiple languages, the cases addressing this point universally warn the parties to carefully review the draft contract. For example, in *Falcoal, Inc. v. Turkiye Komur Isletmeleri Kurumu*,<sup>40</sup> a federal district court reviewed a contract between an American company and a Turkish company that was drafted in both English and Turkish. Due to an apparent translation error, the forum selection clause in the English language version provided for dispute resolution in U.S. courts when brought by the American company, and in Turkish courts when brought by the Turkish company. The Turkish language version of the contract directly contradicted the English version.<sup>41</sup> The solicitation, negotiation and execution of the contract had all taken place in Turkey.

The U.S. court weighed these factors and held the Turkish version was valid. The court mandated that resolution of the dispute be handled by the Turkish courts even though it was brought by the U.S. company.<sup>42</sup> The U.S. court found that the most significant contract relationships were with Turkey and that the American company was a sophisticated company represented by an agent fully conversant in the Turkish language.<sup>43</sup> Therefore, the court concluded that there was no reason for the American company to contest the provisions of the Turkish language version of the contract because it had ample opportunity to correct any contradictions or ambiguities at the time the contract was negotiated.<sup>44</sup>

One additional drafting consideration was addressed in a case involving complex petroleum exploration agreements. In *Norsul Oil & Mining Co. v. Texaco, Inc.*,<sup>45</sup> a Canadian mining company brought an action against several American petroleum

---

1995).

39. *Id.*

40. 660 F. Supp. 1536 (S.D. Tex. 1987).

41. *Id.* at 1538.

42. *Id.* at 1542.

43. *Id.*

44. *Id.*

45. 641 F. Supp. 1502 (S.D. Fla. 1986).

companies and their Ecuadorian subsidiaries regarding complicated disputes over development agreements and deeds for petroleum exploration in Ecuador. In 1965, the parties entered into a private agreement concerning concession rights over certain leases. There was no forum selection clause in the agreement. The next year, the parties entered into a deed of transfer which contained a clause providing that "all differences which may arise between the parties shall be discussed at a summary proceeding hearing before any of the Provincial Judges of Pichincha."<sup>46</sup> While the deed of transfer referenced the private agreement of 1965, its terms concerning aspects of exploration rights and compensation were different.<sup>47</sup>

The plaintiff brought an action in a U.S. district court in Florida. The defendants attempted to enforce the choice of forum provision nominating Ecuadorian courts but the district court refused to dismiss. The court noted that the subject matter of the litigation, alleged breach of contract and unjust enrichment, fell outside of the subject matter specified by the deed's choice of forum provision.<sup>48</sup> The defendants argued that the choice of forum provision in the deed also applied to disputes arising under the prior agreement because it had referenced the deed. However, the court held that it would only recognize choice of forum for the specific conflicts enumerated by the deed.<sup>49</sup>

This case is informative in that it contains a lengthy description of the court's choice of law analysis. The court stated:

Determination of the *scope* of a choice of forum clause is one to be made according to the applicable local law of the forum, although I believe it is not improper to consider the interpretation that another interested forum would give to the clause. Such information is not, however, binding but rather only instructive on this issue of scope. The law governing interpretation of choice of forum clauses binding on this Court . . . requires *specific* enforcement and suggests strict interpretation of choice of forum clauses so that a federal court otherwise having jurisdiction to hear a dispute is not ousted of its jurisdiction. The evidence in the record of this case simply

---

46. *Id.* at 1504.

47. *Id.* at 1504, 1508.

48. *Id.* at 1508.

49. *Id.* at 1507-08.

does not support a finding that the parties intended that disputes arising under provisions found only in the 1965 Private Agreement necessarily be adjudicated in Ecuador.<sup>50</sup>

The court further found that, under applicable choice of law rules, Ecuadorian law should apply to the substantive issues governing the deeds and agreements because those deeds and agreements were contracts to be performed within Ecuador.<sup>51</sup> Therefore, regardless of whether there was a choice of law (as opposed to a choice of forum) provision in the contracts, the court might have applied the chosen law of Ecuador by its own analysis. This outcome certainly warns parties to specify whether choice of forum provisions are to apply to all contractual agreements in a transaction or only to specific issues.

Apart from international conventions relating to arbitration,<sup>52</sup> the United States has signed only one multi-lateral treaty potentially applicable to choice of forum provisions in international contracts. In 1986, the United States ratified the United Nations Convention on Contracts for the International Sale of Goods.<sup>53</sup> The Convention's broad language in Article IX, Section 1 reads, "[t]he parties are bound by any usage to which they have agreed and by any practices which they have established between themselves."<sup>54</sup> The Convention indicates the international community's preference for allowing parties to freely include provisions in their contracts, and indicates the signatories' intention to strictly enforce agreements freely entered into by contracting parties. There is, however, no provision in the Convention specifically dealing with choice of forum clauses.

---

50. *Id.* at 1510 (emphasis added).

51. *Id.* at 1508. The court reaffirmed the application of Ecuadorian law to the issues of this case because Florida choice of law rules mandated that Ecuadorian law apply to breach of a contract to be performed in Ecuador. *Id.* at 1520.

52. See discussion *infra* part IV.C.

53. U.N. Convention On Contracts For The International Sale Of Goods, art. 9, U.N. Doc. A/Conf. 97/18, U.N. Sales No. E.82.V5 (1980), reprinted in 52 Fed. Reg. 6262-6280 (1987). Additional signatories in the Western Hemisphere include Argentina, Chile, Mexico and Venezuela.

54. *Id.*

### III. CHOICE OF LAW AND CHOICE OF FORUM IN MARITIME CONTRACTS

#### A. *Introduction*

There are several types of maritime contracts regularly encountered in international trade in the Americas. The first, and most important, is the bill of lading for the carriage of cargo. Form carriage contracts on passenger vessel tickets make up the second category. A third type is a contract for international towage and salvage. Unlike bills of lading and passenger carriage contracts, towage contracts are not governed by federal statutes and thus have not been heavily litigated. Another type of maritime contract which involves questions of international law is the charter party. This type of contract, however, is traditionally submitted to arbitration as the primary means of dispute resolution and will be addressed separately in Part IV.<sup>55</sup>

In the United States, the issue of forum selection clauses in bills of lading has been complicated by the interplay of two federal statutes which pertain to maritime carriage of goods: the Harter Act<sup>56</sup> and later the Carriage of Goods by Sea Act.<sup>57</sup> This Part provides a brief history of the traditional judicial resistance and then gradual acceptance of forum selection clauses in maritime contracts. Next, it will analyze the recent developments in the law applicable to bills of lading.

#### B. *Historical Development and Resistance to Choice of Forum Provisions in Bills of Lading*

As in all international contracts, forum selection clauses contained in bills of lading were not traditionally looked upon with favor in the United States. In 1900, the Supreme Court, in *Knott v. Botany Mills*,<sup>58</sup> reviewed a matter involving the carriage of a cargo of wool aboard a British vessel from Buenos

---

55. Even before arbitration was accepted in other fields it was regularly used to resolve disputes involving charter party contracts.

56. 46 U.S.C. §§ 190-196 (1958).

57. 46 U.S.C. §§ 1300-1313 (1975).

58. 179 U.S. 69 (1900).

Aires to New York. The bill of lading stipulated that British law would apply to any disputes arising from the carriage.<sup>59</sup> Despite this express stipulation, the Court held that the Harter Act<sup>60</sup> overrode and nullified the provision.<sup>61</sup>

The Harter Act was enacted by Congress in 1893 to unify the law for the carriage of goods arriving at or originating from any port of the United States.<sup>62</sup> It applied to the carriage of any cargo under a bill of lading. The Act provided specific liabilities and defenses to shippers and carriers and, from its enactment, all cargos transported aboard common carriers by water were governed by these provisions regardless of the express intentions of the parties.<sup>63</sup> Courts strictly applied the Act, mandating that any disputes arising under a bill of lading covered by it would be heard in a U.S. court.<sup>64</sup>

In 1924, the major maritime nations came together to draft and adopt the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, commonly known as the "Hague Rules."<sup>65</sup> The Hague Rules have been adopted by most major maritime trading nations.<sup>66</sup> Perhaps the

---

59. *Id.* at 70-71.

60. 46 U.S.C. § 190 (1958).

61. 179 U.S. at 77.

62. *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 29 F.3d 727, 728 (1st Cir. 1994).

63. 46 U.S.C. §§ 190-193 (1958).

64. In *Gough v. Hamburg Amerikanische Packetfahrt Aktiengesellschaft*, 158 F. 174 (S.D.N.Y. 1907), the federal district court for the Southern District of New York heard a dispute between an American shipper and a German carrier. The bill of lading specified that disputes arising from the carriage would be governed by German law and would be heard in the courts of Hamburg, Germany. The court held, however, that any dispute arising under the bill of lading must be determined under the Harter Act and therefore brought before a United States court. *Id.* at 175-76. In 1918, this court reviewed a dispute between an American shipper and a French carrier and held that a provision in a bill of lading making French law and French courts the exclusive jurisdiction for resolving disputes was void even though the cargo was carried aboard the French line. *Kuhnhold v. Compagnie Generale Transatlantique*, 251 F. 387 (S.D.N.Y. 1918). Again, the court held that the dispute must be heard in U.S. courts under U.S. law even though the parties had specifically agreed to another forum and the application of its law and the selected forum had a reasonable relationship with the dispute. *Id.* at 388.

65. International Convention For the Unification Of Certain Rules of Law Relating To Bills Of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155.

66. *Id.* In Latin America, these nations include Argentina, Bolivia, Ecuador, Guyana, Paraguay and Peru. Several Caribbean nations are also parties to the Hague Rules. However, Colombia, Venezuela, Brazil and Chile are notably absent (Chile has signed but not ratified) despite each country's very significant maritime



most remarkable aspect of the Hague Rules was that they were ratified by the United States and enacted, with only minor modifications, in 1936 as the Carriage of Goods By Sea Act (COGSA).<sup>67</sup> The duties and liabilities set forth in COGSA reflect the same policies as the Harter Act and COGSA superseded most of the Harter Act's applications.<sup>68</sup>

Notably, the Hague Rules and COGSA lack any provisions covering choice of forum or choice of law clauses in bills of lading. One clause frequently utilized in the United States to challenge choice of forum clauses is Article 3, Section 8 of the Hague Rules. It provides:

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.<sup>69</sup>

So long as there is no stipulation in a bill of lading reducing the duties or liabilities of a carrier below the minimum requirements set forth in Article 3, no provision prohibits either choice of law or forum. Article 3, Section 8 is contained in nearly identical form in COGSA.<sup>70</sup>

The logical conclusion resulting from the adoption of the Hague Rules by many maritime powers is that forum selection and choice of law clauses are valid so long as the forum selected applies the Hague Rules. Even if the forum and law chosen were not those of a signatory to the Hague Rules, there is no provision in the Hague Rules that prohibits such a selection *provided*

---

trade.

67. 46 U.S.C. §§ 1300-1313.

68. For a comparison of the two Acts, see GRANT GILMORE & CHARLES L. BLACK, *THE LAW OF ADMIRALTY* § 3.25 (1975); THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* (2d. Ed.) § 10.15 (1994).

69. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, *supra* note 65.

70. 46 U.S.C. § 1303(8). This provision is commonly referenced as § 3(8) of COGSA. These two designations, § 1303(8) and § 3(8), are used interchangeably throughout this Article.

that the law applied to the dispute did not relieve the carrier of any liabilities or obligations mandated under the Hague Rules.

The Second Circuit addressed this issue in *Wm. H. Muller & Co. v. Swedish American Line*.<sup>71</sup> The matter concerned a bill of lading for the carriage of a cargo of cocoa beans between Sweden and the United States. The contract contained a clause which provided that any claim against the carrier arising under the bill of lading should be heard in Swedish Courts and decided according to Swedish law.<sup>72</sup> Sweden was a party to the Hague Rules. The Second Circuit affirmed the district court and found the clause enforceable because it was not unreasonable under the circumstances and did not contravene any public policy of the United States.<sup>73</sup> The court specifically addressed the language of Section 1303, Clause 8 and noted that limitations and defenses under Swedish law would not be substantially different from those available under American law.<sup>74</sup> The court also noted that the Swedish courts applied the same measure of damages as American courts.<sup>75</sup> The court stated that "the Carriage of Goods By Sea Act contains no express grant of jurisdiction to any particular courts nor any broad provisions of venue."<sup>76</sup>

The *Swedish American Line* case would seem to portend the final acceptance of forum selection clauses in bills of lading. Unfortunately, in 1967, the Second Circuit took a step back and reversed its decision in *Swedish American Line*. In *Indussa Corp. v. S.S. Ranborg*,<sup>77</sup> the court openly questioned the soundness of its decision in the *Swedish American Line* case and held that a clause in a bill of lading declaring the courts of Norway the exclusive forum for dispute resolution was invalid as a violation of COGSA.<sup>78</sup> The court held that Clause 1303, Clause 8 of

---

71. 224 F.2d 806 (2d Cir. 1955), *cert. denied*, 350 U.S. 903 (1955).

72. *Id.* at 807.

73. *Id.* at 807-08. The court decided considerations of public policy and fairness would not be offended because much of the evidence and the witnesses were located in Sweden and, therefore, the litigation would be easier before the Swedish courts.  
*Id.*

74. *Id.* at 808.

75. *Id.*

76. *Id.* at 807.

77. 377 F.2d 200 (2d Cir. 1967). This dispute between an American cargo owner and a Norwegian carrier involved a shipment of nails and barbed wire from Belgium to the United States aboard a Norwegian vessel.

78. *Id.* at 200-01.

COGSA, forbidding "any clause, covenant or agreement in a contract of carriage lessening the carrier's liability for negligence, fault or dereliction of statutory duties," barred foreign choice of forum clauses.<sup>79</sup> The court felt that if it permitted choice of law and forum clauses nominating foreign courts and laws, it would have to evaluate each individual forum and its laws to determine whether the carrier's liabilities would be as extensive as if COGSA were applied.<sup>80</sup> The court was concerned with the inherent difficulty of a case by case approach and cited to contradictory results reached by other United States courts.<sup>81</sup> *Indussa* endured as a cloud over the free negotiation of maritime contracts until 1995, when the Supreme Court finally cleared the air.<sup>82</sup>

### *C. The United States Accepts Choice of Law/Choice of Forum Provisions in Maritime Contracts*

Scarcely five years after the nadir of forum selection clauses in maritime contracts under *Indussa*,<sup>83</sup> the U.S. Supreme Court began to recognize the importance of upholding the validity of these clauses. The Supreme Court issued a lengthy opinion in *M/S Bremen v. Zapata Off-Shore Company*,<sup>84</sup> where it found that the forum selection clause in a towage contract was prima facie valid and enforceable.<sup>85</sup> The case involved a contract between a German towage company and an American offshore

---

79. *Id.* at 204.

80. *Id.* at 202.

81. *Id.* at 202-03. Following *Indussa*, a district court likewise gave a restrictive interpretation to a choice of law provision in a passenger contract. In *McQuillan v. "Italia" Societa Per Azione Di Navigazione*, 386 F. Supp. 462 (S.D.N.Y. 1974), the court reviewed an action brought by an American passenger injured aboard an Italian passenger vessel. While the passenger's ticket contained the provisions of his contract of passage, specifying that all controversies arising out of the passage were to be determined by Italian law in Italian courts, the U.S. court held that U.S. general maritime law would govern and that the dispute must be heard in a U.S. court. The Court invalidated the Italian choice of law and forum provisions in the passenger ticket in the same way that the *Indussa* court invalidated the choice of law and forum provisions in a bill of lading. The court relied upon 46 U.S.C. § 183c which restricts the reduction of liability by passenger carriers in a manner similar to the COGSA provisions for cargo carriers. *Id.*

82. See *infra* part III.D.

83. See *supra* notes 77-81 and accompanying text.

84. 407 U.S. 1 (1972).

85. *Id.* at 10.

drilling company for towage of an offshore drilling rig from Louisiana to the Adriatic Sea. The contract contained a provision specifying that "any dispute arising must be treated before the London Court of Justice."<sup>86</sup> During towage in the Gulf of Mexico, the rig was damaged and brought to Florida. The rig owner filed suit against the German towage company in federal court in Florida. The German company challenged the jurisdiction of the U.S. court. The district court held that the contract's forum selection clause was unenforceable<sup>87</sup> and the Fifth Circuit affirmed.<sup>88</sup>

The Supreme Court reversed the lower courts and held that forum selection clauses in maritime contracts should be enforced absent a strong showing of some reason for setting them aside. The only grounds given by the Supreme Court for setting aside forum selection clauses would be where the party challenging the clause could clearly show that enforcement would be "unreasonable and unjust," or that the clause would be "invalid for such reasons as fraud or overreaching."<sup>89</sup> According to the Court, only where a contractual choice of forum clause "would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision," would the clause be invalidated.<sup>90</sup> This opinion is the basis for current U.S. law addressing forum selection clauses in maritime contracts.

The Supreme Court also addressed the application of the doctrine of *forum non conveniens* when deciding the validity of a forum selection clause.<sup>91</sup> The Court stated that even where the remoteness of the chosen forum suggests that the clause is part of an adhesion contract, the challenging party bears a heavy burden of proof to invalidate it.<sup>92</sup> The Court stated:

[It is] incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be gravely difficult and inconvenient, that he will for all practical pur-

---

86. *Id.* at 2.

87. 296 F. Supp. 733 (M.D. Fla. 1969).

88. 428 F.2d 888 (5th Cir. 1970), *aff'd en banc*, 446 F.2d 907 (5th Cir. 1971).

89. 407 U.S. at 15.

90. *Id.*

91. *Id.* at 17.

92. *Id.*

poses be deprived of his day in court. Absent that there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.<sup>93</sup>

The Court stated the policy behind its decision very succinctly:

Selection of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced and capable in the resolution of admiralty litigation. Whatever 'inconvenience' Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting.<sup>94</sup>

The Supreme Court also addressed and quickly disposed of a challenge to the specific language of the forum selection clause as being permissive rather than mandatory. The Court found that the clause's brief language was clearly mandatory and all-encompassing, even including *in rem* actions against the tug.<sup>95</sup>

This recognition by the Supreme Court quickly spread to the lower federal courts. For example, in 1976, the Ninth Circuit upheld a forum selection clause which specified that any dispute between a Chinese vessel owner and a German towage company would be "referred to the Supreme Court of Justice in London."<sup>96</sup> The clause was identical to the clause that was the subject of the Supreme Court's *Bremen* decision. The Chinese vessel owner had brought an action against the German towage company and *in rem* against their tug in Guam after the vessel sank there in a typhoon. The Ninth Circuit's opinion, affirming the district court's dismissal in favor of the forum selection clause, was written by then Circuit Judge Anthony M. Kennedy.<sup>97</sup> The court determined that even though the parties were not residents of England and that neither the vessel nor the tug touched England during the course of the towage, the English forum

---

93. *Id.* at 18.

94. *Id.* at 17-18.

95. *Id.* at 20.

96. *Tai Kien Industry Co. v. M/V Hamburg*, 528 F.2d 836 (9th Cir. 1976).

97. *Id.* Two decades later, Justice Kennedy authored the Supreme Court's opinion in *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 115 S. Ct. 2322 (1995), where the Court finally accepted forum selection clauses unequivocally. See *infra* text accompanying notes 125-152.

selected by the parties would unquestionably be enforced.<sup>98</sup> As Judge Kennedy noted, “[i]t was wholly fortuitous that the voyage from New York to Taiwan ended with litigation in Guam. The forum selection clause was designed to protect the parties from the risk of having to defend litigation in courts selected by chance.”<sup>99</sup>

In the wake of *Bremen*, courts have also upheld forum selection clauses in charter party contracts.<sup>100</sup> Those drafting forum selection clauses in charter parties, however, must be exceptionally careful because most charter party agreements are standard form agreements containing “boiler plate” language. U.S. courts balance any dispute against the party that created the form. In one case, parties to a charter had stipulated to a United States forum during three previous charters.<sup>101</sup> When the charter was renewed, the drafting party inserted a new clause specifying England as the choice of forum. Because the other party did not have the ability to object to this change, the new choice of forum clause was held unenforceable.<sup>102</sup> The district court found that the new clause was obtained through “fraud or overreaching” and, therefore, a “compelling reason” existed for its invalidation.<sup>103</sup>

Forum selection clauses in shipbuilding and repair contracts have also been recognized and upheld by the courts. In *Trojan Yacht Co. v. Productos Pesqueros Mexicanos*,<sup>104</sup> a federal district court declined jurisdiction over a dispute involving an American company that entered into a contract to purchase fishing vessels from a Mexican shipyard. The Mexican shipbuilding contract contained the following clause:

---

98. *Tai Kien Industry*, 528 F.2d at 836.

99. *Id.*

100. For example, a district court, relying upon *Bremen*, affirmed the validity of a forum selection clause in a time charter party. *Sanko Steamship Co. v. Newfoundland Refining Co.*, 1976 AMC 417 (S.D.N.Y. 1976), *aff'd*, Case No. 76-7060 (2d Cir. 1976). The contract specified that the time charter was to be governed by English law and that all disputes would be litigated or arbitrated in England. *Id.* at 419.

101. *Pearcy Marine, Inc. v. Seacor Marine, Inc.*, 847 F. Supp. 57 (S.D. Tex. 1993).

102. *Id.* at 57-58.

103. *Id.*

104. 1978 AMC 1539 (E.D. Va. 1978), *aff'd*, 588 F.2d 1352 (4th Cir. 1978).

This contract shall submit to and be construed under the Laws, Regulations and other provisions of the United Mexican States, and the parties hereby submit to the jurisdiction of the competent Federal Courts of the City of Mexico, Federal District, and consequently waive any jurisdiction which would correspond to them by virtue of their domicile present or future.<sup>105</sup>

The district court found this language to be enforceable and to provide for exclusive jurisdiction. It granted the Mexican shipyard's motion to dismiss the action in the United States. The court noted that the plaintiff, the American company, could not provide proof that there was any other interpretation to this clear and unambiguous language.<sup>106</sup>

Another district court addressed a ship repair contract with a forum selection clause in *Chantier Naval Voisin v. M/Y Daybreak*.<sup>107</sup> This action was brought by a French repair contractor against a Panamanian vessel, *in rem*, after the vessel was placed under arrest in Florida to enforce a lien. The Panamanian vessel attempted to dismiss by citing the repair contract's forum selection clause. However, this argument was not made until after trial commenced, and the court declined to be divested of the action.<sup>108</sup> The language of the opinion implies that if the defendant had asserted the forum selection clause defense in a timely manner, then the court might have deferred to the parties' selection. If nothing else, this case teaches that forum selection clauses, being jurisdictional, must be asserted as defenses in the United States *in the first stage* of the action.

Forum selection clauses, especially arbitration clauses, have generally been accepted in most types of maritime contracts, including some not often litigated.<sup>109</sup> Forum clauses have also

---

105. *Id.* at 1540.

106. *Id.* at 1542-43.

107. 677 F. Supp. 1563 (S.D. Fla. 1988).

108. *Id.* at 1571.

109. For example, the Seventh Circuit enforced an arbitration provision in a standard form salvage agreement between an American and a German company. *AMOCO Transport Co. v. Bugsier and Bergungs, A.G.*, 659 F.2d 789 (7th Cir. 1981). The court noted that a "special deference" was owed to forum selection clauses in such contracts. *Id.* at 795. Likewise, an arbitration clause in a protection and indemnity contract between an American vessel owner and a Bermuda underwriter was

been upheld in seamen's employment contracts<sup>110</sup> and extended to contracts for the carriage of passengers.<sup>111</sup>

A passenger contract action allowed the U.S. Supreme Court to reinforce its acceptance of forum selection clauses in maritime contracts. In *Carnival Cruise Lines, Inc. v. Shute*,<sup>112</sup> the Court found a forum selection clause in passage contract tickets, designating Florida as the exclusive venue for any dispute litigation, to be valid and enforceable. The plaintiff passengers were residents of the state of Washington and had purchased tickets for a cruise aboard a Panamanian passenger vessel bound for Mexican waters. One of the plaintiffs was injured in international waters off the coast of Mexico while aboard the vessel.<sup>113</sup> The Court found that the plaintiffs had not satisfied their heavy burden of proof because they could not show that Florida was an inconvenient or remote forum, that the accident's location in international waters made the dispute a local dispute in plaintiffs' own state, or that they lacked notice of the forum

---

enforced by the District Court for the Southern District of Texas. *Triton Lines, Inc. v. Steamship Mut. Underwriting Ass'n.*, 707 F. Supp. 277 (S.D. Tex. 1989).

110. In *Willard v. Fishing Company of Alaska, Inc.*, 1995 AMC 1358 (D. Alaska 1995), the court held that The Jones Act, 46 U.S.C. § 688 (1988), which provides a specific remedy to seamen, did not prevent enforcement of a forum selection clause so long as no "unfairness" was shown. *Id.* at 1360. The court determined fairness by looking at the factors articulated by the Supreme Court in another forum selection clause case, *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991). It should further be noted that any forum selection clause in a seaman's contract of employment will be narrowly construed and apply only to claims arising directly out of the employment contract. *Hodge v. Ocean Quest Int'l.*, 1992 AMC 2920 (E.D. La. 1992).

111. In *Hollander v. K-Lines Hellenic Cruises*, 670 F. Supp. 563 (S.D.N.Y. 1987), two American cruise ship passengers brought an action against a Greek cruise line due to an alleged illness they suffered aboard a vessel while cruising in the Aegean Sea. The passage contract was obtained by the plaintiffs in New York and contained a forum selection clause specifying that any action brought against the Greek cruise line must be brought in Greece. *Id.* at 564. The court upheld the clause and granted the cruise line's motion to dismiss. *Id.* at 565.

The court found two factors favored enforcement of the forum selection clause even though the clause was part of a form passage contract. First, the court determined that the passage contract gave adequate notice of its terms and conditions, including the forum selection clause. *Id.* at 565. Second, the court found that Greece was a reasonable forum under the circumstances because the injury occurred in Greece, the cruise ship was Greek-owned and operated in Greece, and the majority of persons involved in the events in question were located in Greece. *Id.*

112. 499 U.S. 585 (1991). The Court was now joined by Justice Kennedy who had written the Ninth Circuit's opinion in *Tai Kien Industry Co. v. M/V Hamburg*, 528 F.2d 836 (9th Cir. 1976). See *supra* text accompanying notes 96-99.

113. 499 U.S. at 587-88.



clause.<sup>114</sup> In dicta, the Supreme Court noted that forum selection clauses contained in form passenger contracts are subject to judicial scrutiny for "fundamental fairness" while a more rigid standard would be applied to contracts entered into by sophisticated business entities.<sup>115</sup>

Another crucial subject addressed by the Supreme Court in *Shute* was the application of 46 U.S. Code, Section 183c to passenger contracts.<sup>116</sup> This statute prohibits passenger vessel owners from inserting in carriage contracts any provisions that will "lessen, weaken, or avoid" a claimant's right to trial "by a court of competent jurisdiction."<sup>117</sup> This language is similar to that of COGSA.<sup>118</sup> The Court found that the clause in *Shute*, for the reasons set forth above, did not appear to "lessen, weaken, or avoid" the plaintiffs' right to trial, even though the forum might be some distance from plaintiffs' domicile.<sup>119</sup> The defeat of the plaintiffs' attempt to invalidate the clause because of an alleged conflict with a specific U.S. law presaged the Supreme's Court's most important forum selection clause opinion.<sup>120</sup>

---

114. *Id.* at 594-95.

115. *Id.* at 595. The Court did not find any indication that the cruise line had set Florida as the forum in order to discourage legitimate claims nor was there any evidence that the contract had been obtained from plaintiffs through fraud or overreaching. *Id.* In fact, the plaintiffs conceded actual notice of the forum selection clause. *Id.* Presumably, rejection of the contract prior to sailing was an option.

116. 46 U.S.C. § 183c provides:

§ 183c. Stipulations limiting liability for negligence invalid

It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect.

*Id.*

117. *Id.*

118. 46 U.S.C. §§ 1300-1313.

119. *Shute*, 499 U.S. at 596.

120. A number of decisions concerning forum selection clauses in passenger tickets have been issued since *Shute*. These decisions have generally upheld, under most circumstances, forum selection clauses contained in passenger tickets and have also held that the passenger has the heavy burden of showing that compliance with the

D. 1995 — *The United States Gives Full Recognition to Forum Selection Clauses in Bills of Lading*

Despite *Bremen* and the general acceptance of forum clauses in most maritime contracts, U.S. courts continued to refuse to enforce forum selection clauses in bills of lading. For example, in *Union Ins. Soc. of Canton v. S.S. Elikon*,<sup>121</sup> the Fourth Circuit refused to enforce a forum selection clause in a bill of lading between a German carrier and an American shipper. The court held that the clause, nominating a German court for dispute resolution, failed because COGSA<sup>122</sup> applied to the carriage and, therefore, the German forum was inappropriate.<sup>123</sup> Similarly, the Fifth Circuit refused to enforce a choice of forum clause, favoring instead application of COGSA and a U.S. jurisdiction.<sup>124</sup> The court specifically noted that the decision of the

---

clause is so gravely difficult that the passenger will effectively be deprived of his or her day in court. *See, e.g., Hicks v. Carnival Cruise Lines*, 1995 AMC 281 (E.D. Pa. 1994); *Compagno v. Commodore Cruise Line*, 1995 AMC 276 (E.D. La. 1994); *Moraites v. Royal Caribbean Cruises*, 1995 AMC 348 (N.D. Ill. 1994). However, several courts have held that passengers must have "reasonable notice" of the existence of forum selection clauses in their contracts of passage. *Natale v. Regency Maritime Corp.*, 1995 WL 117611 (S.D.N.Y. 1995); *Corna v. American Hawaii Cruises, Inc.*, 794 F. Supp. 1005 (D. Haw. 1992); *Miller v. Regency Maritime Corp.*, 824 F. Supp. 200 (N.D. Fla. 1992). Passengers must prove that they were not given sufficient notice of a forum selection clause in order to allow them time to cancel the passage if they objected to the clause. *Corna*, 794 F. Supp. at 1005; *Miller*, 824 F. Supp. at 203-04.

121. 642 F.2d 721 (4th Cir. 1981).

122. 46 U.S.C. §§ 1300-1313.

123. 642 F.2d at 724. The court recognized that neither the specific language of COGSA nor court interpretations such as *Indussa* specifically prohibited forum selection clauses. However, the "paramountcy" of COGSA was emphasized in the court's opinion. *Id.* at 723-24. The Court also noted that the terms of the bill of lading were not agreed to through hard bargaining and instead represented form clauses of an "adhesion contract." *Id.*

124. *Conklin & Garrett v. M/V Finnrose*, 826 F.2d 1441 (5th Cir. 1987). In *Conklin*, an English shipper brought an action in Texas against a Bahamian flag Finnish vessel. The cargo in question was shipped from Great Britain to the United States, and therefore the Carriage of Goods by Sea Act, by its own terms (to any carriage to or from a U.S. port), applied to the dispute. The bill of lading contained a choice of forum clause specifying that any dispute arising under the bill of lading must be decided in Finland under Finnish law. *Id.* at 1441. The court held that in a situation where COGSA applied by its own terms, any forum selection clause in the bill of lading must yield to the application of COGSA. In reaching this decision, the Court felt that any obligation imposed upon a shipper to bring an action in a foreign forum would of necessity "lessen the liability of the carrier," which is prohibited under the specific terms of COGSA. *Id.* at 1443-44.

Supreme Court in *Bremen*, validating forum selection clauses, was inapposite to bills of lading where the specific statutory language of COGSA was applicable by the terms of the statute itself.<sup>125</sup>

While refusing to enforce foreign forum selection clauses in bills of lading, the courts did concede one point. Where cargo is carried between two foreign ports and is not shipped to or from a U.S. port, COGSA, by its own terms, will not apply. Many carriers do, however, make COGSA's provisions applicable to the carriage by stipulating to it in the bill of lading.<sup>126</sup>

In June 1995, however, the U.S. Supreme Court finally settled the issue of forum selection clauses in bills of lading. *Vimar Seguros y Reaseguros v. M/V Sky Reefer*<sup>127</sup> may be the most significant sea change in the law concerning international carriage of goods. This case is pivotal because it holds that forum selection clauses in bills of lading covered by COGSA are valid.<sup>128</sup> In addition, the case addresses two crucial issues for drafting forum clauses: first, whether an *arbitration clause* — not merely the choice of a foreign court — is permissible, and second, whether the Federal Arbitration Act (FAA)<sup>129</sup> will override the perceived prohibition on choice of arbitration under COGSA. The current status of arbitration clauses is addressed in Part IV of this Article.

---

125. *Id.* at 1443-44. Interestingly, this court did not foreclose from consideration of a dismissal of the action on grounds of *forum non conveniens*. The court cited as support *Union Ins. Soc. of Canton v. S.S. Elikon*, 642 F.2d 721 (4th Cir. 1981). *Id.*

126. Incorporation of COGSA by contract has specifically been approved by the courts. See, e.g., *Tessler Bros. v. Italpacific Line*, 494 F.2d 438 (9th Cir. 1979).

In *North River Ins. Co. v. Fed Sea/Fed Pac Line*, 647 F.2d 985 (9th Cir. 1981), a carriage of cargo between Hong Kong and Canada was sent under a bill of lading which contractually incorporated the terms of COGSA. The bill of lading also contained a forum selection clause which designated the "Exchequer Court of Canada, Quebec Admiralty District, Montreal Registry" as the exclusive forum for hearing disputes under the contract. *Id.* at 986. The Ninth Circuit held that where COGSA was incorporated into the foreign contract of carriage by agreement and did not apply of its own force, the parties were free to apply some or all of its terms, and to incorporate other different or contrary terms in the bill of lading. *Id.* at 988-89. See also *Fabrica De Tejidos La Bellota S.A. v. M/V Mar*, 799 F. Supp. 546 (D. V.I. 1992).

127. 115 S. Ct. 2322 (1995).

128. *Id.* at 2330.

129. 9 U.S.C. § 1 (1988).

*Sky Reefer* involved the carriage of a cargo of fruit from Morocco to the United States. The shipper was a New York fruit distributor that purchased the fruit from a Moroccan grower and chartered a vessel to transport it to the United States. The vessel was owned by a Panamanian company and was time-chartered to a Japanese carrier. The Japanese carrier received the cargo in Morocco and issued to the Moroccan supplier a form bill of lading containing the contract terms on its back. A clause specified that the contract of carriage would be governed by Japanese law and any dispute would be referred to the Tokyo Maritime Arbitration Commission for arbitration in Tokyo, Japan.<sup>130</sup> During transit, the vessel encountered heavy weather and much of the cargo was damaged or destroyed. The American fruit distributor and its insurer brought an action against the vessel and its owner in federal district court in Massachusetts. The vessel and its owner moved to stay the action and to compel arbitration in Tokyo under the terms of the bill of lading and the provisions of the FAA.<sup>131</sup>

The district court granted the carrier's motion to stay the action and compel arbitration.<sup>132</sup> It then certified for interlocutory appeal the question of whether the provisions of Section 3, Clause 8 of COSGA<sup>133</sup> would nullify a forum clause contained in a bill of lading. The First Circuit affirmed the district court decision staying the action and compelling arbitration, but held that the arbitration clause in the bill of lading would normally be invalid under COGSA.<sup>134</sup> However, because the Federal Arbitration Act applied to this situation, the conflict between the mandate of the FAA and the prohibition of COGSA was resolved in favor of the FAA.<sup>135</sup> The U.S. Supreme Court affirmed.<sup>136</sup> The opinion, joined by seven justices and authored by Justice Kennedy, finally determined that COGSA does not prohibit foreign choice of forum clauses in bills of lading on carriage to

---

130. 115 S. Ct. at 2325.

131. *Id.* at 2330.

132. *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 1993 WL 137483 (D. Mass. 1993).

133. 46 U.S.C. §§ 1303(8).

134. 29 F.3d 727 (1st Cir. 1994).

135. *Id.* at 731-32.

136. *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 115 S. Ct. 2322, 2330 (1995).

and from the United States.<sup>137</sup>

The shipper made a two-fold argument against enforcement of the arbitration clause. The first attacked the forum clause as unenforceable because it was part of an adhesion contract.<sup>138</sup> The second assertion was that the forum clause violated COGSA Section 3, Clause 8, which prohibits any language in a bill of lading that would "lessen the liability" of the carrier. The shipper argued that since the clause provided for arbitration in Tokyo and application of Japanese law, the cost of proceeding in that distant forum was not only prohibitive but would also effectively lessen or eliminate the liability of the carrier.<sup>139</sup> The shipper implied that such forum selection clauses, particularly choice of law clauses, could potentially limit liability because there is no guarantee that a foreign forum would apply COGSA or its equivalent.<sup>140</sup>

The Supreme Court disposed of the adhesion argument, almost without opinion, by merely affirming the lower court's determination that bills of lading were not adhesion contracts per se because the Federal Arbitration Act specifically includes bills of lading in its definition of enforceable arbitration agreements.<sup>141</sup> With regard to the COGSA prohibition on forum selection clauses, the Supreme Court invalidated the rule set forth in *Indussa Corp. v. S.S. Ranborg*.<sup>142</sup> The Court held that Section 3, Clause 8 of COGSA had been misinterpreted all these years. According to the Court, the provision was designed to prevent clauses in bills of lading that would lessen the specific duties and liabilities COGSA placed on a carrier.<sup>143</sup> Section 1303 of COGSA requires a carrier to "exercise due diligence to . . . make the ship seaworthy and properly man, equip, and supply the ship before and at the beginning of the voyage . . . and to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."<sup>144</sup> The Supreme

---

137. 115 S. Ct. 2322.

138. *Id.* at 2325.

139. *Id.* at 2326.

140. *Id.* at 2329.

141. *Id.* at 2326.

142. 377 F.2d 200 (2d Cir. 1967). See *supra* notes 77-81 and accompanying text.

143. *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 115 S. Ct. 2322, 2327 (1995).

144. *Id.*

Court found that forum selection clauses in bills of lading would not reduce these liabilities per se. The Court cited its previous ruling in *Shute*<sup>145</sup> and held that the forum selection clause at issue did “not purport to limit petitioner’s liability for negligence.”<sup>146</sup>

The Court further held that even where there is a question of whether the foreign forum will apply a law equivalent to COGSA,<sup>147</sup> a forum selection clause would not be invalidated unless it was determined that an “inferior law” was applied and actually reduced the carrier’s liability.<sup>148</sup> The Court stated that it would view the imposition of an inferior law as “repugnant to the public policy of the United States” and would decline enforcement on that ground.<sup>149</sup>

145. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). See *supra* text accompanying notes 112-120.

146. 115 S. Ct. at 2327 (citing *Shute*, 499 U.S. at 596-97). The Court noted that sixty-six nations, including the United States and Japan, were already parties to the Hague Rules, on which COGSA was modeled. *Id.* at 2328. Therefore, any forum applying the Hague Rules would be imposing substantially the same liabilities on the carrier as if COGSA were being applied. *Id.* See 2 (U.N.) Register of Texts, ch. 2, reprinted in STURLEY, BENEDICT ON ADMIRALTY (7th Ed.) Vol. 6, Doc. 1-2 (1993).

The Court did concede that there might be cases where a forum selection clause would be held unenforceable because “the foreign court chosen as the exclusive forum would apply a domestic substantive law which would result in limiting the carrier’s liability to a sum lower than that to which he would be entitled if [English COGSA] applied.” 115 S. Ct. at 2330 (citing *The Hollandia*, [1983] A.C. 565, 574-575 (H.L. 1982)). However, the Court found such a question to be premature and stated that “mere speculation that the foreign arbitrators might apply Japanese law which, depending on the proper construction of COGSA, might reduce respondents’ legal obligations, does not in and of itself lessen liability under COGSA Section 3(8).” *Id.*

147. 46 U.S.C. §§ 1300-1313.

148. 115 S. Ct. at 2330.

149. *Id.* In its discussion the Court cites the Restatement (Third) Foreign Relations Law of the United States § 482(2)(d) (1986). The full text of this Section reads: § 482. Grounds for Nonrecognition of Foreign Judgments

(1) A court in the United States may not recognize a judgment of the court of a foreign state if:

(a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or

(b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421.

(2) A court in the United States need not recognize a judgment of the court of a foreign state if:

(a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;

The Court clearly set forth the policies behind its decision, stating that it was required to recognize "contemporary principles of comity and commercial practice" and that "the historical judicial resistance to foreign forum selection clauses 'has little place in an era when . . . businesses once essentially local now operate in world markets.'"<sup>150</sup> The Court went on to state that "the expansion of American business and industry will hardly be encouraged . . . if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."<sup>151</sup> To drive home its resolve that a new era in international trade by sea had arrived, the Court concluded its policy discussion with the following statement:

If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements. That concern counsels against construing COGSA to nullify foreign arbitration clauses because of inconvenience to the plaintiff or insular distrust of the ability of foreign arbitrators to apply the law.<sup>152</sup>

### *E. Visby and Hamburg Rules*

During the years when U.S. courts continued to refuse enforcement of foreign forum selection clauses, the international

- (b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;
- (c) the judgment was obtained by fraud;
- (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;
- (e) the judgment conflicts with another final judgment that is entitled to recognition; or
- (f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

*Id.*

150. *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 115 S. Ct. 2322, 2328 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)). For a discussion of the Court's opinion in *Bremen*, see *supra* text accompanying notes 82-93.

151. *Id.* at 2328 (citing *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)).

152. *Id.* at 2329.

maritime community moved ahead. In 1968, many of the major maritime trading nations signed the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, the "Visby Amendments" to the Hague Rules.<sup>153</sup> Neither the United States nor many of her Latin American trading partners have ever ratified or acceded to the Visby Amendments to the Hague Rules.<sup>154</sup> However, it is noteworthy that the Visby Amendments, as is true of the original Hague Rules, do not place any restrictions on forum selection clauses in bills of lading.

Even more telling, in 1978 many of the parties to the Hague/Visby Rules, and also the United States, Brazil, Chile, Ecuador, Mexico, Panama and Venezuela, signed the United Nations Convention on the Carriage of Goods by Sea, or the "Hamburg Rules."<sup>155</sup> Taking a more affirmative step than the Hague/Visby Rules ever dared, the Hamburg Rules contain a specific provision regarding forum selection clauses. Article 21(1) provides as follows:

In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

- (a) the principle place of business or, in the absence thereof, the habitual residence of the defendant; or
- (b) the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or
- (c) the port of loading or the port of discharge; or
- (d) *any additional place designated for that purpose in the contract of carriage by sea.*<sup>156</sup>

While the Hague/Visby Rules never prohibited forum selection clauses, and no contracting state other than the United

---

153. 2 U.N. Register of Texts. ch. 2, reprinted in STURLEY, BENEDICT ON ADMIRALTY (7th ed.) Vol. 6, Doc. 1-2 (1993).

154. Original Latin American signatories include Argentina, Paraguay and Uruguay. Visby was later ratified by Ecuador.

155. 17 I.L.M. 608 (1978).

156. *Id.* art. 21(1) (emphasis added).



States has ever interpreted application of the Hague/Visby Rules to exclude them, the Hamburg Rules affirmatively permit forum selection clauses provided only that the chosen forum have the jurisdictional competency to hear the dispute.

The Hamburg Rules have not been ratified by the United States, and ratification is not anticipated in the very near future. However, in the Western Hemisphere the Hamburg Rules have been ratified by Chile and Barbados, and it is anticipated that other Latin American or Caribbean trading partners may follow suit. For these two pioneer nations, the Hamburg Rules entered into force on November 1, 1992. Inasmuch as Chile appears on track to become the next member of the NAFTA group, it is uncertain what impact the Hamburg Rules may have in succeeding years.

Serious discussions are underway in the United States, both among maritime lawyers and in Congress, concerning amendment to the Carriage of Goods by Sea Act in order to bring U.S. law into greater conformity with the laws of most other major maritime powers. Such amendment would probably mean the effective adoption of the Visby and Hamburg Rules discussed here. There is strong support for this action, as many maritime law practitioners recognize the need for uniformity of laws to assist in the maritime trades. United States courts have begun to recognize the need for such uniformity, as evidenced by the *Sky Reefer* opinion discussed *infra*. It is expected that within the next several years legislation will be introduced in Congress to bring COGSA up-to-date with Visby and Hamburg, and thus the language of these Conventions may become part of U.S. law in the foreseeable future.

#### IV. ARBITRATION CLAUSES UNDER UNITED STATES LAW AND INTERNATIONAL CONVENTIONS

##### A. Introduction

Arbitration selection clauses have traditionally been handled differently than forum clauses by U.S. courts. The Court's *Sky Reefer*<sup>157</sup> decision has probably blurred or eliminated any

---

157. See *supra* text accompanying notes 125-152.

real distinction between the treatment of forum selection clauses and arbitration clauses under U.S. law. There are, however, extensive international conventions governing the recognition and enforcement of arbitration clauses in international and maritime contracts. These international conventions are particularly applicable to trade between the United States and Latin America.

*B. Development of the United States Approach to Arbitration Clauses*

Unlike standard forum selection clauses, arbitration clauses were given early recognition in the United States. The Federal Arbitration Act (FAA),<sup>158</sup> enacted in 1947, was derived from an earlier statute enacted in 1925.<sup>159</sup> The Federal Arbitration Act provides in pertinent part:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>160</sup>

The broad coverage of the FAA is set forth in its definitional provision, which provides that "maritime transactions" include charter parties, bills of lading, wharfage agreements, vessel supply and repair contracts, and "any other matters in foreign commerce which . . . would be embraced within admiralty jurisdiction."<sup>161</sup> The FAA defines a transaction involving commerce as "commerce among the several states or with foreign nations . . ."<sup>162</sup> If a maritime or international commercial contract contains an arbitration clause, any suit brought in a U.S. court is automatically stayed as long as the arbitration decision is pending and the issue is arbitrable pursuant to the agreement's terms.<sup>163</sup> The statute also contains a provision

---

158. 9 U.S.C. §§ 1-14 (1988).

159. Act of February 12, 1925, ch. 213, § 1, 43 Stat. 883.

160. 9 U.S.C. § 2.

161. *Id.* § 1.

162. *Id.*

163. *Id.* § 3.

specifying that an arbitration award may be vacated by a United States district court if the award was procured by either corruption, fraud, or undue influence; where there was evidence of partiality or corruption of the arbitrators; where the arbitrators were guilty of misconduct; or where the arbitrators exceeded their powers.<sup>164</sup> Further, the FAA provides that if a party refuses to abide by an arbitration clause, the other party can seek a court order compelling arbitration.<sup>165</sup> The overall language of the FAA clearly shows no ambivalence in its framers' desire to uphold arbitration clauses freely entered into.

Early decisions interpreting the FAA and its predecessor confirm that arbitration clauses in maritime contracts were enforceable in the United States.<sup>166</sup> In 1953, however, the Supreme Court opened up a broad defense to the enforceability of arbitration clauses in maritime contracts. In *Wilko v. Swan*<sup>167</sup> the Court reviewed an arbitration clause in a contract to sell securities. The securities contract was also covered by the Securities Act of 1933,<sup>168</sup> which contains specific provisions for the resolution of contract disputes.<sup>169</sup> Section 14 of the Securities Act of 1933, cited by the Court, specifically voids any "condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision" of the Act.<sup>170</sup> Therefore, the Court held that the parties could not be bound to arbitrate the dispute pursuant to the FAA because the Securities Act of 1933 prevails over the FAA's mandate to enforce arbitration clauses.<sup>171</sup> This decision seemed to portend doom for arbitration clauses in bills of lading governed by COGSA<sup>172</sup> because COGSA would override the FAA.

Despite this early setback for arbitration clauses in commercial contracts, the Supreme Court later determined that the United States would not be hostile to binding arbitration agree-

---

164. *Id.* § 10.

165. *Id.* § 4.

166. *See, e.g., O'Ryan Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama*, 284 F.2d 419 (2d Cir. 1960) (involving a contract of affreightment); *The Aakre*, 21 F. Supp. 540 (D.C.N.Y. 1938) (involving a charter party contract).

167. 346 U.S. 427 (1953).

168. 15 U.S.C. § 1 (1988).

169. *Id.* § 14.

170. 346 U.S. at 430 n.6.

171. *Id.* at 438.

172. 46 U.S.C. §§ 1300-1313.

ments in commercial contracts where there was not a direct conflict with another U.S. statute. In *Scherk v. Alberto-Culver Co.*,<sup>173</sup> the Court found that an arbitration clause in a contract between an American buyer and a German seller regarding the purchase of three interrelated German and Liechtenstein companies was covered by the FAA because it involved international commerce.<sup>174</sup> The contract was signed in Austria and contained an arbitration clause referring any claim or controversy to the International Chamber of Commerce in Paris.<sup>175</sup> The plaintiff, the American purchaser, argued that the contract fell under the Securities Exchange Act of 1934.<sup>176</sup> However, the Supreme Court found that there was neither sufficient evidence nor argument for this proposition in the record, and thus there was no clear statutory exception to enforcement of the FAA.<sup>177</sup> Accordingly, the Court gave a green light to the enforcement of arbitration clauses so long as a contradictory federal statute did not exist. Where two statutes apply to a contract, they must both be enforced absent clear contradiction.

Since *Scherk v. Alberto-Culver*, U.S. courts have enforced most arbitration clauses in non-maritime international commercial contracts.<sup>178</sup> In 1984, the Supreme Court even issued an opinion finding an individual state law purporting to invalidate arbitration agreements in contracts covered by the FAA to be unconstitutional.<sup>179</sup> The next year, the Court issued its seminal opinion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>180</sup> where it stated that "the preeminent concern of Congress in passing the [Federal Arbitration Act] was to enforce private agreements into which parties had entered, a concern

---

173. 417 U.S. 506 (1974).

174. *Id.* at 519-20.

175. *Id.* at 508.

176. *Id.* at 510.

177. *Id.* at 514-16 (distinguishing *Wilko v. Swan*).

178. *See, e.g., Al-Salamah Arabian Agencies Co. v. Reece*, 673 F. Supp. 748 (M.D.N.C. 1987) (enforcing a sales contract between an American individual and Saudi Arabian company which specified arbitration in Saudi Arabia despite the American's argument that he would have difficulty entering Saudi Arabia or remaining long enough to arbitrate); *Pioneer Properties, Inc. v. Martin*, 557 F. Supp. 1354 (D. Kan. 1983) (enforcing arbitration between U.S. and Canadian real estate development corporations because the transaction was found to involve commerce).

179. *Southland Corp. v. Keating*, 465 U.S. 1 (1984). *See also Allied-Bruce Terminix Companies, Inc. v. Dobson*, 115 S. Ct. 834 (1995) (holding that the FAA preempts contrary state laws).

180. 473 U.S. 614 (1985).

which requires that we rigorously enforce agreements to arbitrate."<sup>181</sup> Once again, the Court affirmed its full backing for arbitration clauses in international commercial contracts.<sup>182</sup>

As previously noted, the general hostility of U.S. courts to forum selection and arbitration clauses has not always extended to arbitration clauses in maritime contracts.<sup>183</sup> One court opined that support of arbitration clauses in maritime contracts, and enforcement of the Federal Arbitration Act where applicable, was beneficial to "relieve the congestion in the court system and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation."<sup>184</sup> However, COGSA remained a hindrance to such clauses in bills of lading.

While some courts held that COGSA would not invalidate an arbitration clause in a bill of lading,<sup>185</sup> as late as 1988 some federal courts were hesitant to enforce arbitration clauses in bills of lading governed by COGSA which designated foreign jurisdictions for arbitration. For example, in *State Establishment for Agric. Prod. Trading v. M/V Wesermunde*<sup>186</sup> the bill of lading incorporated COGSA by reference rather than applying it by its own provisions. The bill of lading contained an arbitration clause specifying arbitration in England even though the goods were carried from the United States to Jordan. The Eleventh

---

181. *Id.* at 625-26.

182. The Court supported enforcement of an arbitration agreement in a sales and distribution contract between an American corporation and Swiss and Japanese corporations. The contract's arbitration clause specified that the resolution of any disputes or controversies was to be made exclusively through the Japan Commercial Arbitration Association. *Id.* at 625-26. Although the dispute arising over the contract also fell under the Sherman Antitrust Act, 15 U.S.C. § 1 (1988), the Court held that the arbitration clause was valid. The Court recognized the "liberal federal policy favoring arbitration agreements." 473 U.S. at 625 (citing *Moses H. Cohen Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)). The Court further decided that "concerns of international comity, respect for the capacities of foreign and transactional tribunals and sensitivity to the needs of the international commercial system for predictability in the resolution of disputes required" enforcement of arbitration clauses, despite the possible application of domestic statutes to the contrary. *Id.* at 629.

183. *See supra* part III. *See also Bunge Corp. v. M/V Furnace Bridge*, 390 F. Supp. 603 (E.D. La. 1974).

184. *Ultracashmere House v. Meyer*, 664 F.2d 1176 (11th Cir. 1981).

185. *Keystone Chem. Inc. v. Bow-Sun*, 1989 AMC 2976 (S.D.N.Y. 1990); *Amstar Corp. v. S.S. Union Austraua*, 445 F. Supp. 940 (S.D.N.Y. 1978).

186. 838 F.2d 1576 (11th Cir. 1988).

Circuit found that the arbitration provision violated the general purpose of COGSA and invalidated because the chosen forum had no relation to the carriage.<sup>187</sup> On the other hand, one district court boldly held that agreements to arbitrate must be heavily favored and vigorously enforced and that COGSA would not preclude enforcement of a foreign arbitration clause in a bill of lading.<sup>188</sup> The court held that "any doubts concerning the scope of a contract's arbitrable issues must be resolved in favor of arbitration particularly where agreements, such as bills of lading, effect interstate and foreign commerce."<sup>189</sup> This district court's opinion, even in 1994, was very unusual.

Once again, a discussion of the Supreme Court's decision in *Vimar Seguros y Reaseguros v. M/V Sky Reefer*<sup>190</sup> is warranted. It is probably safe to say that the *Sky Reefer* opinion has extinguished any distinction between forum selection clauses and arbitration clauses in bills of lading by specifically allowing them where policy considerations are satisfied. A central issue in the case was the apparent conflict between the provisions of the FAA, which requires enforcement of arbitration agreements in maritime transactions, and the provisions of COGSA, which purportedly prohibits enforcement of arbitration agreements where they might reduce carrier liability. The Court saw no direct conflict between the statutes because it found that foreign forums or laws would not necessarily reduce a carrier's liability, and the selection of a foreign forum, per se, would not be considered a reduction in liability.<sup>191</sup> Therefore, the Court specifically refused to resolve the question of whether, if there were a conflict, the provisions of the FAA would override contrary provisions of COGSA.<sup>192</sup> Moreover, because of the Court's interpretation of COGSA and the adoption by most maritime nations of the Hague Rules — which are equivalent to COGSA — the Court may never again address the issue of any conflict between the FAA and COGSA. For now, arbitration clauses in bills of lading and other types of maritime contracts are as firmly grounded as other types of forum selection clauses.

---

187. *Id.* at 1580-1581.

188. *Japan Sun Oil Co. v. M/V Maasdijk*, 864 F. Supp. 561 (E.D. La. 1994).

189. *Id.* at 563.

190. 515 U.S. 2322 (1995). See *supra* text accompanying notes 125-152.

191. *Id.* at 2326.

192. 46 U.S.C. §§ 1300-1313.

C. *Application of International Conventions to Arbitration Clauses — The Effect on United States and Latin American Transactions*

Two multi-lateral conventions provide further support for the enforcement of arbitration clauses in contracts involving U.S. and Latin American parties. In 1958, the United States and a number of Latin American and Caribbean nations joined the vast majority of sovereign states in signing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>193</sup> The United States ratified the Convention and it went into effect in 1970. In ratifying the New York Convention, the United States entered the reservation that it would enforce it only on the basis of reciprocity for arbitral awards made in the territories of other contracting states and only for arbitration for disputes arising out of "commercial transactions, as understood under the laws of the United States."<sup>194</sup>

Article II, Section 1 of the New York Convention provides as follows:

Each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.<sup>195</sup>

Section 2 of Article II further provides that "[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."<sup>196</sup>

---

193. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2815, 330 U.N.T.S. 330 [hereinafter New York Convention]. Western hemisphere nations currently parties to this Convention include Argentina, Barbados, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, Guatemala, Haiti, Mexico, Panama, Peru, Trinidad and Tobago, the United States and Uruguay.

194. 9 U.S.C.A. § 201 (West 1973 & Supp. 1995).

195. New York Convention, *supra* note 193.

196. *Id.*, 21 U.S.T. at 2519.

Article II, Section 3, then goes on to provide that a court of a contracting state, when seized of an action in a matter involving an agreement to arbitrate, shall refer the parties to arbitration unless it finds that the arbitration is null and void, inoperative, or incapable of being performed.<sup>197</sup> The Convention does not, however, specify how these determinations are to be made.

The United States adopted the New York Convention verbatim and it became companion legislation to the FAA under Title 9 of the United States Code.<sup>198</sup> Despite the New York Convention's broad language, it appears to have had little independent effect on the limitations placed upon enforcement of arbitration clauses by U.S. courts. The New York Convention does not mention non-enforcement of arbitration agreements where contrary national legislation exists — for example, COGSA. Apparently, U.S. courts did not find that the Convention, or its enacting legislation, superseded the prior restrictive legislation to the contrary.

On the other hand, courts interpreting the applicability of the Convention will not readily invalidate forum selection clauses. Courts have specifically held that the traditional "public policy limitation" on enforcement of forum selection clauses must be construed narrowly. Invalidation will occur "only where enforcement would violate the forum state's most basic notions of morality and justice."<sup>199</sup>

In one of the few cases addressing the application of the New York Convention to a maritime matter, the Fifth Circuit held that an arbitration clause in a charter party was subject to the Convention, even though one of the parties to the charter contract was from a non-signatory nation, because the arbitration was to occur in a country which was a Convention signatory.<sup>200</sup> Unfortunately, no U.S. court has addressed the di-

---

197. *Id.*, 21 U.S.T. at 2519.

198. 9 U.S.C. § 201 (1988).

199. *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975). *See also Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974).

200. *E.A.S.T., Inc. of Stamford v. M/V Alaia*, 876 F.2d 1168 (5th Cir. 1989). This case is also interesting because the court held that the Convention does not prohibit the arrest of a vessel as security for a future arbitration award. *Id.* at 1173.

An earlier case also enforced foreign arbitration under a charter party agreement pursuant to the Convention. *Atlas Chartering Servs., Inc. v. World Trade*



rect application of the Convention to an arbitration clause in a bill of lading despite the fact that it has been law in the United States since 1970.

It should be noted that U.S. courts sometimes treat the provisions of the New York Convention in the same manner as the FAA provisions dealing with enforcement of arbitration clauses. Therefore, it is possible that U.S. courts may refuse to enforce an arbitration clause under the Convention when the clause specifies a forum having absolutely no connection with the parties or the transaction.<sup>201</sup>

In 1975, the United States joined a number of Latin American nations in drafting and ratifying the Inter-American Convention on International Commercial Arbitration (Panama Convention).<sup>202</sup> The Panama Convention was adopted verbatim by the United States in 1990.<sup>203</sup> Again, as with the New York Convention, the United States entered a reservation that it would only apply the provisions of the Panama Convention on the basis of reciprocity and only to arbitration awards made in the territories of other contracting states.<sup>204</sup> The United States also noted that if the majority of the parties to a contract were citizens of Panama Convention signatories, the Convention would be applied to any dispute. Otherwise, the United States would apply the New York Convention.<sup>205</sup>

The Panama Convention gives broad recognition to arbitration clauses in international contracts. It declares such agreements to be valid and without limitations or exceptions.<sup>206</sup> The Convention allows the parties the freedom to choose the manner

---

Group, Inc., 453 F. Supp. 861 (S.D.N.Y. 1978). The Third Circuit enforced an award of a foreign arbitration panel under the Convention even though some technical violations occurred in the proceedings. *Rhone Mediterranee Compagnia v. Lauro*, 712 F.2d 50 (3d Cir. 1983).

201. See, e.g., *Jones v. Sea Tow Servs.*, 30 F.3d 360 (2nd Cir. 1994).

202. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336, OAS Treaty Ser. No. 42 [hereinafter Panama Convention]. The other contracting parties to the Panama Convention include Chile, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Uruguay and Venezuela.

203. 9 U.S.C. § 301 (1988).

204. *Id.* § 304.

205. *Id.* § 305.

206. Panama Convention, *supra* note 202, art. I.

in which arbitrators are appointed.<sup>207</sup>

Unlike the New York Convention, the Panama Convention specifies in greater detail when courts may refuse to recognize and execute an arbitral decision of a member nation.<sup>208</sup> Article V states that arbitral decisions may be refused recognition and enforcement if the parties to the agreement were subject to some incapacity, one of the parties was not given adequate notification of the decision, the arbitration is of a dispute not envisaged in the agreement between the parties, the arbitral tribunal or procedures were not carried out in accordance with the terms of the agreement, or the arbitral decision has been nullified by a competent authority of the state in which the arbitration was conducted.<sup>209</sup> More importantly, Article V contains language that supports the position previously taken by U.S. courts. The provision concerns the non-enforcement of arbitration clauses where arbitration would be contrary to the law of the state. Article V, clause 2 provides:

The recognition and execution of an arbitral decision may also be refused if the competent authority of the state in which the recognition and execution is requested finds:

- (a) That the subject of the dispute cannot be settled by arbitration under the law of that state; or
- (b) That the recognition or execution of the decision would be contrary to the public policy "order public" of that state.<sup>210</sup>

Because this language was adopted verbatim by the United States in 1990, it appeared that after 1990 there would be no conflict between U.S. court decisions and the federal statute.

The Panama Convention has not been part of U.S. law long enough to acquire many significant judicial interpretations. However, in 1994, the Second Circuit directly addressed the Panama Convention in *Productos Mercantiles e Industriales v. Faberge USA, Inc.*<sup>211</sup> In that case, a Guatemalan company

---

207. *Id.* art. II.

208. *Id.* art. V.

209. *Id.*

210. *Id.*

211. 23 F.3d 41 (2d Cir. 1994).

sought enforcement of an arbitration award against an American company. Notably, the arbitration had taken place before the American Arbitration Association in New York. The Second Circuit affirmed the district court's enforcement of the arbitration award. In its opinion, the court held that arbitration awards rendered in the United States could be enforced in the same way as foreign arbitration awards.<sup>212</sup> The court further held that, irrespective of whether the arbitration award was domestic or foreign, the district court had the authority to modify the award so long as the modification action was brought by a party to the arbitration.<sup>213</sup>

Unfortunately, there have not been any U.S. cases addressing the enforcement of foreign arbitration awards, nor have there been any challenges to arbitration clauses specifically falling under the Panama Convention. However, based upon the language of the Convention and the recent *Faberge* opinion, it would appear that the Panama Convention allows for exceptions to its blanket enforcement of arbitration clauses if a court believes that the public policy of the United States is being violated. Therefore, the acceptance and limitations placed on arbitration clauses by the Supreme Court in *Sky Reefer* comport in full with the provisions of the conventions currently in force between the United States and most of Latin America.

## V. SUMMARY: RECOMMENDATIONS AND CONCLUSIONS

Given the vagaries of court-made law in a common law system, it is somewhat bold to assert that forum selection clauses have been unreservedly accepted in the United States. However, considering the Supreme Court's most recent decisions and the ratification by the United States of several extensive multilateral conventions, there is little chance that U.S. courts will again be restrictive in their interpretation and enforcement of foreign forum selection clauses.

Despite the general acceptance of forum selection and arbitration clauses, there are still valid defenses to their enforcement available in certain circumstances. The defenses are, for

---

212. *Id.* at 46.

213. *Id.* at 45-46.

the most part, old principles that have come through the courts' initial blanket rejection; they now represent the only exceptions to blanket acceptance. In a nutshell, forum selection and arbitration clauses will not be enforced where the chosen forum is completely unrelated to the parties or transaction or the location was chosen with hindrance in mind so that a court will apply the doctrine of *forum non conveniens*. In addition, a chosen law will not be utilized where it is not connected with the parties or transactions or if it clearly reduces the duties and liabilities of a defendant in the case of carriage contracts. These defenses, for the most part, constitute parts of the general defense that such clauses are "contrary to the policies of the United States." No summary of other general policy defenses can be made as they will arise on a case-by-case basis.

It is imperative that forum selection clauses be drafted with specificity to avoid being found overly vague or interpreted as merely "permissive." Technical specificity is also important where the parties desire that a dispute be heard by a particular court in a particular state. This is very important where the parties might accidentally designate a court that lacks jurisdiction over the subject matter. If this occurs, the entire forum clause could be held invalid or the decision rendered by the court might be unenforceable elsewhere.

The parties should also specify what portions of a contract, or what particular disputes under a contract, are intended to be submitted to a particular forum. If any and all disputes arising out of a contract are intended to be submitted to the same forum, then drafting is easy. However, the parties should carefully consider whether certain aspects of a contract are better submitted to arbitration or to a court of competent jurisdiction. Likewise, the parties must decide whether certain laws will apply to only certain portions of a contract. Therefore, even though this Article addresses choice of forum and choice of law provisions simultaneously, it is extremely important that a contract provide for both a particular forum and the particular laws to be applied.

It is hoped that this Article provides a workable overview of the status of choice of forum provisions in contracts involving trade with the United States. As with any common law jurisdiction, an understanding of the history of these legal principles, along with an extensive review of the cases, is the best way to

fully understand the implications of the current law. It is my hope that this lengthy reading of U.S. case law will assist in the successful drafting of arbitration and forum selection clauses.