View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Maine, School of Law: Digital Commons

Ocean and Coastal Law Journal

Volume 8 | Number 1 Article 4

January 2002

Dispute Resolution On The High Seas: Aspects Of Maritime Arbitration

Buffy D. Lord

Follow this and additional works at: https://digitalcommons.mainelaw.maine.edu/oclj

Recommended Citation

Buffy D. Lord, *Dispute Resolution On The High Seas: Aspects Of Maritime Arbitration*, 8 Ocean & Coastal L.J. (2002).
Available at: https://digitalcommons.mainelaw.maine.edu/oclj/vol8/iss1/4

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Ocean and Coastal Law Journal by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

DISPUTE RESOLUTION ON THE HIGH SEAS: ASPECTS OF MARITIME ARBITRATION

*Buffy D. Lord**

> The sea lies all about us. The commerce of all lands must cross it. The very winds that move over the lands have been cradled on its broad expanse and seek ever to return to it. The continents themselves dissolve and pass to the sea, in grain after grain of eroded land. So the rains that rose from it return again in rivers. In its mysterious past it encompasses all the dim origins of life and receives in the end, after, it may be, many transmutations, the dead husks of that same life. For all at last returns to the sea—to Oceanus, the ocean river, like the ever-flowing stream of time, the beginning and the end.[1]

Since the dawn of humanity, the sea has been a source of sustenance, providing food and avenues of trade.[2] The earliest civilizations used the sea as an avenue to search for wealth in the form of spices, minerals, and other natural resources.[3] The search for natural resources and wealth resulted in the establishment of the maritime industry that would continue in some form or another until the present.[4] The long history of the the maritime industry is dotted with both success and disputes.

In the maritime industry, arbitration has served as a common tool for the settlement of disputes for several decades.[5] In the past, the large amount of informal personal contact, the limited number of people, and the concentration of the shipping industry in New York led to an atmosphere conducive to the amicable resolution of disputes before "dreaded lawyers"

---

* Pepperdine University School of Law, Class of 2003. The Author will be joining the firm of Preis, Kraft & Roy in Lafayette, Louisiana upon graduation to practice maritime law.

1. RACHEL LOUISE CARSON, THE SEA AROUND US 212 (Oxford Univ. Press 1989) (1951).
2. *See id.* at 199.
3. *Id.* at 200.
4. *See id.* at 199–212.
5. *See* Patrick Martin, *Why is Arbitration Getting Much Too Legalistic? Can the Old Method be Revived?* 8TH INT'L CONG. MAR. ARB. 1 (1987).

could become involved.[6] Presently, the shipping industry is no longer made up of a small number of people or concentrated in one state.[7] This results in a loss of the close personal contact that facilitated arbitration in the past.[8] These changes in the shipping industry led to the immediate consultation of lawyers as a necessity when problems arise, and the continued presence of lawyers through the resolution of those problems.[9]

Despite any changes, maritime arbitration remains a popular way to resolve maritime disputes that arise, in part because of the often lower costs involved and the ability to mold the process to the needs of the parties involved.[10] Maritime arbitration is most often the result of an arbitration clause in a contract, in which case, the clause controls.[11] The clause may contain provisions pertaining to the site of arbitration, the procedures to be followed in arbitration, the makeup of the arbitral tribunal, and the remedies available. [12]

Part I of this Article discusses the availability of interim measures in maritime arbitrations. Part II of this Article examines the treatment of forum selection clauses under the Carriage of Goods by Sea Act. Part III of this Article focuses on the choice of law selection in maritime arbitrations. Part IV discusses damage awards in maritime arbitrations. Part V concludes that while many areas of maritime arbitration have evolved over time to facilitate maritime arbitrations, other areas have not. Punitive damage awards must become a recognized weapon in the arsenal of arbitral panels where applicable and, more importantly, the evaluation of the validity of foreign forum selection clauses must go to the fundamental fairness of the applicable law, not only to the costs involved.

---

6. *Id.* at 3.

7. *Id.* at 6.

8. *Id.*

9. Robert Force & Anthony J. Mavronicolas, *Two Models of Maritime Dispute Resolution: Litigation and Arbitration,* 65 TUL. L. REV. 1461, 1467 (1991). The economic depression of the shipping industry in the late 1980's has further undermined personal relationships in the shipping industry by resulting in a "chang[e] of the 'players' in the shipping game." *Id.* at 1466–67. The loss of personal interaction between those in the shipping industry has undermined "the consensus of what is custom and usage" within the industry. *Id.*

10. *See* Michael Marks Cohen, *A New Yorker Looks at London Maritime Arbitration,* 1986 LLOYD'S MAR. & COM. L.Q. 57. It was estimated that arbitration in maritime disputes is "on average 60 to 70% cheaper than litigating judgments in courts." *Id.* at 57.

11. Force & Mavronicolas, *supra* note 9, at 1475.

12. *Id.*

I. INTERIM MEASURES IN MARITIME ARBITRATIONS

Interim measures serve multiple goals in supporting maritime arbitrations, including the preservation of assets, insuring satisfaction of an award, preventing the removal of property from a jurisdiction, and conservation to ensure the enforceability of an award.[13] In the application of interim measures, the granting body wants to protect the rights of the parties while also addressing urgent matters in an effort to protect the status quo.[14] The traditional requirements for the granting of interim measures consist of a showing of urgency and prejudice to the rights of the party requesting the measures.[15] The need for preserving the status quo and ensuring the award is especially compelling in maritime cases involving vessel arrest and attachment as the property in question is highly mobile.[16]

In maritime arbitrations, the primary interim measure sought is generally attachment of the vessel concerned.[17] When a party to a maritime dispute subject to arbitration wants to attach a vessel, it is not entirely clear to whom that party should look. The arbitration clause itself may provide the answer as it can broaden or narrow the scope of the powers of the tribunal and provide for the provision of interim measures.[18] When the arbitration clause does not speak to the provision of interim measures, "it is likely that there will be a balance struck to achieve a shared power between the court and the arbitral tribunal in order to promote the effectiveness of arbitration."[19] Three general views prevail as to court ordered interim measures when dealing with an arbitration clause: (1) by opting for alternative dispute resolution, the parties have waived all court

---

13. Coleen C. Higgins, *Interim Measures in Transnational Maritime Arbitration*, 65 TUL. L. REV. 1519, 1522 (1991). The key goal of interim measures is to preserve the rights of the parties. *Id.* at 1524–25. There is, however, the danger that the use of interim measures "could become tools for delay" if abused, which would undercut the benefits of arbitration in maritime disputes. *Id.*

14. *Id.* at 1524.

15. *Id.* at 1525. The urgency requirement "derives from the need to preserve peace and prevent violence pending a final resolution on the merits . . . and is associated with maintaining the status quo." *Id.* at 1524.

16. *Id.* at 1545.

17. *See* Charles S. Donovan, Esq., *Arrest and Attachment in Admiralty*, 5 U.S.F. MAR. L.J. 127, 133 (1992).

18. Higgins, *supra* note 13, at 1525.

19. *Id.* Where there are gaps in the arbitration clause governing the agreement and the clause does not specify a set of institutional rules, the gaps will be filled by the "legal systems that support the arbitral process" and the law of the site of arbitration. William Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 656–57 (1989).

use of interim measures; (2) the parties involved should go to the tribunal to request interim measures, but if the tribunal is not yet formed, the court should consider implementing interim measures and should tailor any measures ordered to account for the later formation of the arbitral tribunal; and (3) the court should take any measures necessary to promote effective arbitration and protect the rights of the parties.[20]

A. Interim Measures under the New York Convention and the USAA

The United States adopted the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1970.[21] The underlying policy goal of the New York Convention to support arbitration is clearly evidenced by the requirement of Article II (3) that courts "uphold arbitration agreements and refer the parties to arbitration."[22]

When the United States adopted the New York Convention, they specified that the convention applies only to "commercial" matters.[23] Maritime transactions are recognized as "commercial" matters within the scope of the convention.[24] Because the New York Convention does not expressly address the question of interim measures, where there is a request for interim relief in an arbitration proceeding, the controlling law regarding the availability of interim measures will be the law of the state court in which the measure is being sought.[25] The Federal Arbitration Act (hereinafter "FAA") governs the applicability of the New York Convention under the laws of the United States.[26] Section 8 of the FAA states:

---

20. Professor Jack Coe, Lecture at Pepperdine School of Law on International Commercial Arbitration (Oct. 15, 2001).

21. Higgins, *supra* note 13, at 1526.

22. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 [hereinafter New York Convention]. For this referral requirement to be defeated, the party seeking to avoid arbitration must demonstrate the arbitration agreement is "null and void, inoperative or incapable of being performed. *Id.*

23. New York Convention, art. I(3).

24. Antco Shipping Co. v. Sidemar, S.A., 417 F. Supp. 207, 215 n. 8 (S.D.N.Y. 1976). The United States restricts application of the New York Convention to "legal relationships which are considered as commercial under the national law of the United States." *Id.* A maritime contract of affreightment meets that standard of commercial. *See* Island Territory of Curacao v. Solitron Devices, Inc., 356 F. Supp. 1, 12–13 (S.D.N.Y. 1973) *aff'd on other grounds*, 489 F.2d 1313 (2d Cir. 1973).

25. Higgins, *supra* note 13, at 1527.

26. *Id.*; 9 U.S.C. §§ 1–13 (1988).

> If the basis of jurisdiction be a cause of action otherwise justifiable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course in admiralty proceedings, and the court shall then have jurisdiction . . . to enter its decree upon the award.[27]

This act allows a party to pursue a libel in admiralty to seize a vessel, and then proceed to arbitration.[28] Despite being unsettled in the courts, authorities in the arbitration and maritime fields agree there is no incompatibility between the New York Convention and the preserved right of attachment for maritime transactions contained in the terms of the FAA.[29]

The 1925 United States Arbitration Act (hereinafter "USAA") provides that agreements to arbitrate maritime transactions "are as valid, enforceable and irrevocable as any other contract."[30] However, the USAA does not expressly address whether the presiding court has the power to award preliminary injunctive relief where an arbitration agreement exists.[31] State rules allowing courts to order preliminary injunctive relief do not conflict with federal policy in favor of supporting arbitration absent state rules that unreasonably interfere with the arbitration agreement of the parties.[32] In order to support the federal policy in favor of the enforcement of arbitration agreements and to make arbitration "a fair, just and effective method of dispute resolution, some judicial actions may be necessary."[33]

---

27. 9 U.S.C. § 8 (1988).

28. William A. Durham, *"We Just Want our Ship Back"—Action for Possession in Admiralty*, 15 TUL. MAR. L.J. 47, 56 (1990). Under the Federal Rules of Civil Procedure property may be attached under Rule B or Rule C. *Id.* Rule B applies to quasi in rem actions in which the action is 'in personam' (proceedings against the person) and the defendant cannot be located in the district in which the action has been commenced, permitting the attachment of any property located within that district. *Id.* Rule C applies to 'in rem' proceedings (proceedings against the property where the claim is allowed by statute or to enforce a maritime lien), allowing for the plaintiff to commence an in rem action in court, arrest the vessel, stay the court proceedings until the completion of arbitration, and the claimant can proceed to court with an award for court ordered enforcement. *Id.*; *See also* Supplemental Rules for Certain Admiralty and Maritime Claims, Rule B & C (amended 1991).

29. Higgins, *supra* note 13, at 1531.

30. 9 U.S.C. § 2 (1988).

31. Zhaodong Jiang, *Federal Arbitration Law and State Court Proceedings*, 23 LOY. L.A. L. REV. 473, 518 (1990).

32. *Id.* at 520.

33. *Id.*

The enforcement of interim measures in maritime arbitrations can be effected through the arbitral tribunal where provided for in the arbitration agreement. The courts may also affect interim measures due to the mandate of the New York Convention that courts uphold arbitration agreements and refer parties to arbitration. The provision of interim measures in maritime arbitration is essential to protect the respective rights of the parties, preserve the status quo, and to promote the effectiveness of arbitration as an alternate to litigation.

II. COGSA, FORUM SELECTION & MARITIME ARBITRATIONS

The Carriage of Goods by Sea Act (hereinafter "COGSA") governs bills of lading for cargo shipped to or from the United States; under COGSA, a court will not enforce any clause in a bill of lading that lessens or relieves the liability of the carrier.[34] COGSA is the American adoption of the Hague Rules, originally adopted by the International Law Association in 1921.[35] The International Law Association and the Comite Maritime International promulgated The Hague Rules to govern international bills of lading.[36] The Hague Rules standardized most provisions contained in bills of lading while still allowing shippers and carriers freedom to contract in other areas.[37] COGSA replaced the Harter Act in foreign commerce when it was enacted by the United States, but domestic commerce involving the nation's waterways continues to be governed by the Harter Act.[38] The goal

---

34. Kenneth M. Klemm, *Forum Selection in Maritime Bills of Lading Under COGSA*, 12 FORDHAM INT'L L.J. 459 (1989). A bill of lading is an instrument of title to goods that are shipped and may be used to transfer title or as security in financing shipment of goods. JO DESHA LUCAS, ADMIRALTY: CASES & MATERIALS 587 (4th ed. 1996). The bill of lading also acts as a receipt for goods delivered to the carrier evidencing the condition and quantity of goods shipped. *Id.* at 588. Where a bill of lading contains no reservations regarding the condition of the goods received by the carrier, the so-called "clean" bill of lading establishes the good condition of the goods received by the carrier. *Id.* Furthermore, the bill of lading acts as a memorial of the underlying shipping contract. *Id.* at 589.

35. Klemm, *supra* note 34, at 466. "The Hague Rules represented the first international effort to regulate bills of lading used for ocean transport" resulting in the standard regulation of bills of lading in major maritime nations resulting in less disparity between the laws of these nations. *Id.* at 482–483. One purpose behind the codification of regulations in bills of lading was the rampant abuse by carriers in excepting themselves from liability. *See* Christian B. Miller, *M/V Sky Reefer: Clear Sailing for Foreign Arbitration Clauses Under COGSA*, 18 HOUS. J. INT'L L. 935, 942 (1996).

36. Klemm, *supra* note 34, at 465–66.

37. *Id.*

38. *Id.* at 484. Parties involved in domestic commerce may choose for COGSA to apply to bills of lading, but there must be language expressly incorporating COGSA in the bill of lading. *Id.* at 468–69.

of the Hague Rules and, by extension, COGSA as their U.S. enactment, "is to create clear and uniform allocation of responsibility for cargo losses on an international scale . . . [through the imposition of] certainty, symmetry, and fairness into the system."[39] All major maritime nations adopted the Hague Rules, resulting in more certainty in the shipping industry as to the treatment provisions of bills of lading will receive in other nations.[40] Under COGSA, a court in the United States will not enforce a clause in a bill of lading that acts to lessen or relieve the liability of the carrier.[41] Some courts have interpreted the language of COGSA section 3(8) as invalidating forum selection clauses in bills of lading stating that forum selection clauses tend to lessen the liability of the carrier.[42]

A. Forum Selection Clauses under Indussa & The Bremen

Forum selection clauses under COGSA have not met with uniform treatment. In *Indussa Corp. v. S.S. Ranborg*, the Second Circuit held that COGSA section 3(8) results in a *per se* invalidation of forum selection clauses in bills of lading because they tend to lessen the liability of the carrier.[43] The Court held that Congress intended to invalidate any contractual provision that acts to prevent a shipper from gaining jurisdiction in the United States for a shipment covered by COGSA.[44] The Fourth, Fifth, and Eleventh Circuits follow the *per se* rule promulgated by the *Indussa* court disallowing any forum selection clauses in maritime contracts.[45]

---

39. *See* Miller, *supra* note 35, at 954.

40. Klemm, *supra* note 34, at 467. The adoption of the Hague Rules by most of the maritime nations in the world including the United States has provided uniformity in both the United States and abroad as to regulation of bills of lading. *Id.*

41. *Id.* at 459. Article 3(8) as adopted by the United States Congress 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 the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. 46 U.S.C. § 1303(8) (1998).

42. Klemm, *supra* note 34, at 469–70.

43. Indussa Corporation v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967).

44. *Id.* at 204.

45. *See* Hughes Drilling Fluids v. M/V Luo Fu Shan, 852 F.2d 840 (5th Cir. 1988) (extending the non-enforceability of forum selection clauses to cases involving the general average); Conklin & Garrett, Ltd. v. M/V Finnrose, 826 F.2d 1441 (5th Cir. 1987) (forum selection clause where Finland to serve as the forum held invalid even though the application of COGSA was stipulated); Unions Ins. Soc'y of Canton, Ltd. v. S.S. Elikon, 642 F.2d 721 (4th Cir. 1981) (forum selection clause requiring litigation in Germany held invalid under § 3(8) of COGSA); State Establishment for Agricultural Product Trading v. M/V Wester-

Another approach to forum selection clauses in bills of lading under COGSA is the Rule of Reason approach promulgated in *The Bremen.*[46] *Bremen* involved a bill of lading not covered under COGSA; however, the decision provided an incentive for other courts to adopt a more reasonable approach than the *Indussa per se* rule when considering the enforceability of forum selection clauses in bills of lading under COGSA.[47] The Court noted "the provision for a neutral forum alleviated the 'uncertainty and possibly great inconvenience to both parties' that might arise if a suit could be brought in any jurisdiction where an accident could occur."[48] This approach seeks a determination of the reasonableness of the forum selection clause in the context of the facts of a particular case.[49] The court held forum selection clauses valid absent any evidence of undue influence, fraud, or unequal bargaining power.[50] Since *The Bremen,* most federal courts have upheld forum selection clauses in bills of lading requiring foreign arbitration under the Rule of Reason approach.[51]

B. Forum Selection under Sky Reefer

The decision of the Court in *Vimar Seguros y Reaseguros v. M/V Sky Reefer* further supported the enforcement of forum selection clauses under COGSA, at least when the forum selection clause relates to arbitration.[52] In *Sky Reefer,* the bill of lading contained mandatory arbitration and forum selection clauses requiring arbitration to take place in Tokyo, Japan for any disputes arising out of the bill of lading.[53] The Supreme Court concluded that the forum selection clause did not lessen the liability of the carrier because the cost the cargo owner would incur in the resolution of the dispute did not lessen any type of carrier liability as prohibited under

---

munde, 838 F.2d 1576 (11th Cir. 1987) (finding foreign arbitration clauses to be *per se* invalid or that the arbitration clause would be unenforceable without actual notice to the shipper).

46. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

47. Klemm, *supra* note 34, at 476–77.

48. *Id.* (citing *The Bremen,* 407 U.S. at 13).

49. *Id.* at 476.

50. *The Bremen,* 407 U.S. at 12.

51. *See* Son Shipping Co. v. De Fosse & Tanghe, 199 F.2d 687 (2d Cir. 1952) (holding a provision of a charter party requiring arbitration in New York City for disputes incorporated into the bill of lading and enforceable); Uniao de Transportadores Para Importacao, Ltda. v. Companhia de Navigacao Carregadores Acoreanos, 84 F. Supp. 582 (E.D.N.Y. 1949) (holding that COGSA did not forbid a forum selection clause selecting Lisbon, Portugal as the forum).

52. Vimar Seguros y Reaseguros v. M/V Sky Reefer, 515 U.S. 528 (1995).

53. *Id.* at 531.

COGSA section 3(8).[54] The Court held that although the lessening of carrier liability for duties or obligations under COGSA is prohibited, "an increase in transaction costs associated with pursuing litigation was not the kind of liability contemplated by COGSA."[55] Therefore, lessening of carrier liability under COGSA excludes increased transaction costs that are the result of adjudicating disputes in a foreign country where there is no difference in the actual liability of the carrier.[56] The Court also observed in the *Sky Reefer* decision that no country adhering to the Hague Rules prohibited forum selection clauses as invalid under COGSA section 3(8).[57]

In 1996, the Maritime Law Association proposed a revision of COGSA currently under consideration by the Senate subcommittee on Surface Transport.[58] As to forum selection clauses, section 7(i)(2) states:

> In general . . . a provision in a contract of carriage . . . that specifies a foreign forum for litigation or arbitration of a dispute to which this Act applies is null and void if . . . the port of loading or port of discharge is, or was intended to be, in the United States; or the place where the goods are received by a carrier or the place where the goods are delivered to a person authorized to receive them is, or was intended to be, in the United States. [59]

---

54. *Id.* at 540 (citing Responsibilities and Liabilities of Carrier and Ship, Limitation of Liability for Negligence, 46 U.S.C. § 1303(8) (1995). The type of liability that may not be limited by COGSA is "liability for loss or damage . . . arising from negligence, fault, or failure in the duties or obligations in this section." *Id.* This does not address the expense or the means of enforcing liability.

55. Miller, *supra* note 35, at 939. There was only a passing mention in the majority opinion of the distinction between a foreign forum selection arbitration clause and a foreign forum selection litigation clause and it appears the majority has decided the treatment of both. *Sky Reefer*, 515 at 540.

56. Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983–1995: A Sea Change*, 31 WAKE FOREST L. REV. 1, 35 (1996). The Court defended this argument stating "isn't there something . . . antique about the argument that by having to go to Tokyo or Morocco . . . the injured party is being dragged around the world . . . [when] as a marine insurer, [you] have some sense of your exposure to appear in various forums or arbitration around the world." Jaipat S. Jain, *Clarifying Foreign Arbitration in the Carriage of Goods by Sea*, 10 AM. REV. INT'L ARB. 47, 55 (1999) (citing Oral argument with petitioner-appellant, 1995 WL 242268, at page 10).

57. Jain, *supra* note 56, at 55.

58. *Id.* at 67.

59. MLA Document No. 724, May 3, 1996: *Revising the Carriage of Goods by Sea Act, available at* http://www.admiraltylaw.com/tetley/cogsa99.htm (last visited Nov. 11, 2002).

This bill, if passed, would act to prevent foreign litigations and arbitrations involving the ocean carriage of goods.[60]

C. *Forum non Conveniens approach to Forum Selection Clauses*

A final approach to forum selection clauses contained in arbitration agreements is the use of a *forum non conveniens* analysis to determine the validity of forum selection clauses in bills of lading covered by COGSA.[61] In the determination of the proper forum for a case, the court must balance private interest factors against public interest factors.[62] The court could use this analysis in determining whether the laws of another country would lessen or relieve a carrier's liability and thereby violate COGSA.[63] The downside of the use of the *forum non conveniens* analysis is the great burden placed on the moving defendant to provide the basis upon which relief can be granted due to the discretionary nature of the doctrine.[64]

D. *Forum selection as it Stands*

As it stands now, no *per se* invalidation of foreign forum selection clauses in bills of lading under COGSA exists. Courts may not invalidate such clauses where the only lessening of liability is due to increased costs associated with the process of resolving the issue in the forum. Only when the lessening of liability results in a substantive legal difference may the forum selection clauses be invalidated. While *Sky Reefer* clarifies the Court's desire to uphold forum selection clauses where possible and recognizes that COGSA does not, by its terms, nullify foreign forum

---

60. *See* Jain, *supra* note 56, at 68.

61. Klemm, *supra* note 34, at 490. The doctrine of forum non conveniens "permits a court to decline jurisdiction when an adequate alternate forum exists in which to hear a case." *Id.*

62. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). Private interest factors include the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Id.* at 508. The public factors include public policy concerns, judicial efficiency, the local public interest in having the local disputes resolved locally; the avoidance of conflict/choice of law issues; and the unfair burdening of citizens in an unrelated forum with jury duty. *Id.* This approach presumes the choice of forum made by the parties should control so long as it does not contravene COGSA.

63. Klemm, *supra* note 34, at 490.

64. *Id.* at 491.

selection clauses; the Court avoided answering under what circumstances a forum selection clause would be invalidated under COGSA.[65]

III. CHOICE OF LAW IN MARITIME ARBITRATION

Under common law, the law of the forum where an arbitral proceeding took place controlled the arbitration because the enforcement of arbitration agreements or awards was deemed procedural or remedial in nature.[66] Common law did not historically favor agreements that were revocable at any time prior to an award.[67] State legislatures took on the burden of adopting rules in favor of binding arbitration, resulting in the common-law rule of revocability losing favor.[68]

A. The Lex Maritima

Parties to a maritime contract often state the *lex maritima* (the general maritime law), applies to settle any disputes that may arise.[69] "[M]aritime customs, codes, conventions, and practices from earliest times to the present, (which have no international boundaries and which exist in any particular jurisdiction unless limited or excluded by a particular statute)" make up the *lex maritima*, a part of the *lex mercatoria* (the general commercial law).[70] Common aspects of the *lex maritima* found in maritime arbitrations and in the law of the United States include vessel attachment, the theory of abandonment, the general maritime law of liens, *forum non conveniens*, general average, and maintenance & cure actions.[71] Three general reasons for reference to international trade usages and practices in maritime arbitration awards are:

---

65. Hayford, *supra* note 56, at 34.

66. Klemm, *supra* note 34, at 478.

67. *Id.* at 479.

68. *Id.*

69. William Tetley, Q.C., *The General Maritime Law-The Lex Maritima (with a Brief Reference to the IUS Commune in Arbitration Law and the Conflict of Laws)*, 20 SYRACUSE J. INT'L L. & COM. 105, 108 (1994).

70. *Id.* The *lex maritima* consisted of oral rules, customs and usages relating back to navigation and maritime commerce and may be traced back to Rhodian Law of c.800 B.C.E. William Tetley, Q.C., *Glossary, available at* http://tetley.law.mcgill.co (last visited Nov. 11, 2002). In medieval Western Europe it developed as part of a broader mercantile law (*lex mercatoria). Id.* The *lex maritima* was gradually codified through the middle ages in the Rôles of Oléron and the Consolto del Mare, and the Laws of Wisby. *Id.* The *lex mercatoria* is a body of customary mercantile law that developed in medieval Europe. *Id.* The rules acted as a guideline for judges and arbitrators. *Id.*

71. Tetley, *supra* note 69, at 123–28.

> 1) arbitrators are often familiar with the usage of particular trades from their own personal experience; 2) many modern arbitration laws and private arbitration rules require arbitrators to take account of relevant trade usages, regardless of what law is to govern the dispute; and 3) arbitrators enjoy broad discretion to apply rules of law, including rules chosen by the parties and non-national law, such as the *lex mercatoria*.[72]

The substance of the *lex maritima* can be difficult to ascertain because it is made up of usages and practices that change over time, however, it remains a strong force in international arbitration in the United States and in Europe.[73]

When parties agree the law of a particular state will govern their arbitration, courts will generally recognize and enforce the choice of law clause.[74] However, in maritime arbitrations:

> Parties are not free to burden the arbitration process under the Federal Act by adopting state law which shifts the determination of disputes from arbitrators to courts. To allow parties to so contract would undermine the provisions of the Federal Act. Congress, in enacting the Federal Arbitration Act, exercised its power over admiralty and interstate commerce. Any arbitration contract involving one of those areas is governed by the Federal Act. To permit the parties to contract away the application of the Act by adopting state law to govern their agreement would be inconsistent with the Act itself.[75]

Despite the presence of a choice of law clause in a contract subject to maritime arbitration, the FAA, not state law, will govern any arbitration clause involving maritime matters.[76] The FAA must resolve any question of who will resolve disputes involving the contract.[77]

Forum selection clauses are presumptively valid absent any federal legislation to the contrary, but no clear decision has been handed down regarding the validity of choice of law clauses in admiralty law.[78] Through

---

72. *Id.* at 139.
73. *Id.*
74. *See* Jiang, *supra* note 31, at 488.
75. *Id.* at 489.
76. *See* Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263 (1976).
77. *See id.*
78. George K. Walker, *The Interface of Criminal Jurisdiction and Actions Under the United Nations Charter with Admiralty Law*, 20 TUL. MAR. L.J. 217, 246 (1996).

the selection of a particular choice of law, the parties may seek to avoid unfavorable results.[79] A particular choice of law may also create a set of problems as the choice of a particular law may result in a different standard of liability.[80] Choice of law clauses have been upheld in admiralty cases in a variety of contexts absent a legislative policy against it.[81]

B. Choice of Law After Sky Reefer

The Court's decision in *M/V Sky Reefer* upholding a foreign arbitration clause in a contract that also contained a foreign choice of law clause further complicates the issue. The Court held a foreign arbitration clause in a bill of lading under COGSA valid absent a lessening of the carrier's statutory liability, to the exclusion of increased transaction and litigation costs.[82] The majority essentially concluded that no conflict existed between COGSA and the FAA, and refuted the argument that the enforcement of foreign arbitration clauses in COGSA claims effectively lessens the liability of the carrier as prohibited by section 3(8) of COGSA.[83]

In the *Sky Reefer* decision, Justice Kennedy acknowledged that the application of Japanese law would likely lessen the liability of the carrier.[84] The carrier's liability would be lessened because the duties and exemptions under the Japanese Hague Rules differ from those of COGSA.[85] The Court did not rule on the issue of the carrier's likely lower liability through the application of Japanese law, deeming any decision on that issue premature as the award-enforcement stage had not been reached.[86] In *Sky Reefer,* Justice Kennedy stated "[the Court] would have little hesitation in condemning [an] . . . agreement as against public policy [if the Court were persuaded] . . . the choice-of-forum and choice-of-law clauses operated in

---

79. *Id.* at 245.

80. *Id.*

81. *Id.* at 246. For a discussion of prior admiralty cases in which a choice of law clause was upheld, *see* DeNicola v. Cunard Line, 642 F.2d 5, 6–11 (1st Cir. 1981).

82. Vimar Seguros v. Reasoeguros, S.A. v M/V Sky Reefer, 515 U.S. 528 (1994). *See also,* Charles M. Davis, *Sky Reefer: Foreign Arbitration & Litigation Under COGSA,* 8 U.S.F. MAR. L.J. 73,78 (1995). "Implicit in the Court's holding is the determination that foreign forum selection clauses and foreign arbitration clauses only affect the means of enforcement of COGSA, not the rights themselves." *Id.*

83. *Id.* at 79. Courts have, however, refused to enforce foreign forum selection clauses where the selected forum bears no direct relationship to the parties. *Id.*

84. *M/V Sky Reefer,* 515 U.S. at 539–54.

85. *Id.*

86. Joseph C. Sweeney, *The Prism of COGSA,* 30 J. MAR. L. & COM. 543, 590 (1999) (citing *M/V Sky Reefer,* 515 U.S. at 540).

tandem as a . . . waiver of a party's right."[87] The fundamental fairness of choice of law clauses in arbitration agreements has not been addressed by the Supreme Court, however, the Court's decision in *M/V Sky Reefer* has opened up the possibility of two proceedings for every major admiralty dispute: a decision by a foreign court or arbitral tribunal on the merits of the case, followed by a decision in an American court to determine the fundamental fairness of the foreign decision.[88]

C. Choice of Law as it Stands

Maritime arbitrations, despite any choice of law, incorporate the tenets of the *lex maritima* because the United States adopted the general maritime law in existence in 1789 in its entirety.[89] As to a foreign choice of law in an arbitration agreement, the Court has not made a definitive finding. It appears the courts of the United States will not address choice of law clauses until the award enforcement stage of the proceedings. This creates the probability of two proceedings, an arbitration in the foreign forum, followed by a determination of fundamental fairness as to application of foreign law. Clearly, the Court needs to address whether or not a foreign choice of law would act to lessen the liability of the carrier on a substantive level and thereby invalidate the choice of law clause under COGSA section 3(8) prior to a proceeding on the merits taking place.

IV. DAMAGES IN MARITIME ARBITRATIONS

The award of damages can remedy almost any breach in a maritime contract. Generally, there are two types of damages at issue: compensatory and punitive damages.[90] Compensatory damages act to compensate the shipper when cargo is lost or damaged during transit as a result of a breach by the carrier.[91] Compensatory damages put the shipper in the same position he would have occupied had the contract been fully performed and the cargo delivered on time without damage.[92] Courts usually determine

---

87. *M/V Sky Reefer*, 515 U.S. at 540. Justice Steven's dissent indicated that the majority's division of § 1303(8) into substantive and procedural aspects was "perverse." *Id.* at 551.

88. Sweeney, *supra* note 86, at 593.

89. Tetley, *supra* note 69, at 122.

90. Matthew P. Vafidis, *Remedies for Breach of the Contract of Carriage*, 3 U.S.F. MAR. L.J. 77, 79-80 (1990–91).

91. *Id.*

92. *Id.* While the theory is to place the shipper in the same position he would have occupied absent the breach, the practice is generally concerned with the practical problem

the measure of damages as the difference between the fair market value of the damaged goods at the port of destination, and the condition the goods were in when shipped.[93] The value of cargo subject to price fluctuations can be determined through expert testimony or an industry guide. Where the price of the cargo is relatively stagnant, value can be determined from the invoice price charged by the seller in the underlying transaction.[94] The actual value of goods delivered in damaged condition can be difficult to determine. Where the damaged cargo is sold in a reasonable sale, the amount received in the sale acts as the actual value of the damaged goods.[95]

The fact that a carrier has a right under COGSA, or in a bill of lading, to limit their liability in compensatory damages to $500 per package or customary freight unit presents problems in damage awards.[96] The terms contained in the bill of lading generally act to define the package or customary freight unit in a particular transaction, however, the definitions contained in the bill of lading only apply if they do not contravene case law interpreting COGSA.[97] Inconsistent interpretations of "customary freight unit" include the rate customarily used in trade or the actual unit the parties used in their calculation of freight.[98] The most common measure of a "customary freight unit" is the unit of measurement upon which freight is charged.[99]

A. The Award of Prejudgment Interest & Costs and Fees

Absent exceptional circumstances, prejudgment interest may generally be granted in maritime arbitrations.[100] The purpose behind the award of

---

of valuing the damaged or lost cargo. Most actions concerning commercial shipments are brought by subrogated insurers, so that the level of actual loss to the shipper is rarely dealt with by the courts. *Id.* at 80.

93. *Id.* (citing Andrew Wier Commodities, Inc. v. M/V Stonewall Jackson, CIV. A. No. 89-2960 (E.D. La., 1990)).

94. *Id* at 81.

95. Vafidis, *supra* note 90, at 81–2.

96. *Id.* at 86. The shipper must be given a fair opportunity to avoid the package limitation through a declaration of a higher value on the cargo. *Id.*

97. *Id.* at 89. Where the bill of lading is internally inconsistent or contains no reference to the number of packages the determination is computed by looking at the totality of the circumstances surrounding the shipment. *Id.* at 90.

98. FMC Corp. v. S.S. Marjorie Lykes, 851 F.2d 78, 80 (2d Cir. 1988); *See also* Aetna Ins. Co. v. M/V Lash Italia, 858 F.2d 190 (4th Cir. 1988); *See also* Morris Graphics, Inc. v. Trans Freight Lines, Inc. No. 88 civ. 3583 (S.D.N.Y., 1990).

99. *S.S. Marjorie Lykes*, 851 F.2d 22 at 80.

100. Vafidis, *supra* note 90, at 103.

prejudgment interest is to compensate for the loss of use of the funds.[101] Although discretionary, the rate of interest applied to awards varies.[102] One method requires the application of the average Treasury bill interest rates over a period of time.[103]

As part of a claim, parties to an arbitration may ask the arbitral tribunal to consider a claim for costs and fees.[104] Costs and fees in arbitration generally fall into two categories: the costs of the proceedings themselves and the costs of the parties.[105] Generally, there are three issues the arbitral tribunal will consider in deciding whether to award costs and attorney's fees: "(1) whether they have the authority to award these costs and fees; (2) if so, how should they allocate them between the parties; and (3) how much should they award."[106] Where the agreement provides for the award of attorney's fees and costs, the arbiters will determine the award in line with the agreement.[107] Where, however; no provision addressing the award of attorney's fees and costs exists, the arbitral tribunal may resolve the question with the applicable procedural or substantive law, general principles of fairness and reasonableness, and the arbitral rules governing the dispute.[108] Generally, the policies upheld through the award of costs and attorney's fees include: punishment of the losing party, indemnification of the prevailing party, and the deterrence of frivolous and bad faith litigation.[109]

---

101. *Id.* at 103. Despite the purpose behind prejudgment interest, arbitrators have generally refrained from awarding compound rather than simple interest despite the closer resemblance of compound interest to the commercial reality. *Id.* Although simple interest remains the most common, recently, in non-maritime cases, there has been a move towards the award of compound interest. *Id.* at 103–04.

102. *Id.* at 103–04.

103. *Id.*

104. John Yukio Gotanda, *Awarding Costs and Attorney's Fees in International Commercial Arbitrations*, 21 MICH. J. INT'L L. 1, 9 (1999).

105. *Id.* The fees and expenses of the arbitral tribunal and the administrative fees of the administering authority are included in the costs of the proceedings. *Id.* The costs of the parties are the legal costs, including attorney's fees, fees and expenses of witnesses, professional services fees such as those for experts or advisors, and incidental expenses such as telephone, copying, and facsimile. *Id.*

106. *Id.* at 3.

107. *Id.* at 4.

108. *Id.* at 3–4.

109. Gotanda, *supra* note 104 at 5. The tradition of awarding attorney's fees and costs can be traced to Roman law in which the losing party was required to pay the prevailing party's costs. *Id.* For a broad historical background on the practice of awarding attorney's fees and costs, *see* Werner Pfenningstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37 (1984).

Generally the American Rule governs arbitrations in the United States meaning that absent a specific clause in a contract, specific statute, or clause in the applicable arbitration rules, each party will bear their own costs.[110] The FAA, which applies to all cases involving interstate commerce and international arbitration, does not expressly address the award of attorney's fees and costs.[111] In contrast, the rules of the Society of Maritime Arbitrators (hereinafter "SMA") give arbitral tribunals broad discretion to award attorney's fees and costs.[112]

B. Awards of Punitive Damages

An award of punitive damages does not seek to compensate a wronged party. Punitive damages punish wrongdoers in order to deter them and others from repeating the behavior for the benefit of the public and the interest of society.[113] Whether or not an arbitral tribunal may award punitive damages is unclear. Proponents of punitive damage awards in maritime arbitrations argue that "[a] contract that forces parties to arbitrate all disputes may shield a wrongful party from the penalty it might have been subject to in a court proceeding while, at the same time, the aggrieved party may be denied the reward he or she truly desires."[114] Those who do not favor the award of punitive damages in maritime arbitrations focus on the subjective nature of punitive damages and the lack of objective criteria upon which their appropriateness may be measured.[115] Maritime law generally permits punitive damages, but does not allow them in actions covered by COGSA because the statute itself disallows recovery in excess of the *actual damage*.[116] Other arguments against the award of punitive damages by arbitral tribunals include the concept that only the state, not

---

110. *Id.* at 11. Exceptions to the American rule have developed, including: when the applicable law or arbitral rules authorize the award of attorney's fees expressly; where the parties authorize the award of attorney's fees; and when a party has been found guilty of contempt or court, has acted in bad faith, or engaged in misconduct. *Id.* at 12–13.

111. *Id.* at 11.

112. Maritime Arbitration Rules of the Society of Marine Arbitrators, Inc., *reprinted in* World Trade & Arb. Mat'l § 30 (Jan. 1995).

113. 22 AM. JUR. *2d, Damages* § 237 (1994).

114. Lorenzo Marinuzzi, *Punitive Damages in Arbitration the Debate Continues*, 52 SUM DISP. RESOL. J. 67 (1997).

115. Dion C. Raymos, *Punitive Damage Awards in Maritime Arbitration: A Legitimate Part of the Arbitrator's Arsenal?* 10 MAR. LAW. 251, 259 (1985) (citing Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 354 (1976) (quoting Publishers' Ass'n. V. Newspaper & Mail Deliverers' Union, 280 A.D. 500, 503 (1952)).

116. *Id.* at 259–61.

arbitral panels, has the power to punish wrongdoers and the lack of review of arbitral awards.[117]

Despite these arguments, where there is a proper arbitral award, punitive damages have been upheld as proper.[118] The SMA also recognizes that in limited cases, the law permits the granting of punitive damages to punish a wrongdoer who acts with ill will, actual malice or a conscious disregard of the welfare of others.[119] Despite the fact that federal law permits an arbitral panel to award punitive damages, marine arbitrators have shown "noble restraint" in the exercise of that power.[120]

C. Current State of Damages

A wide variety of damages are available in maritime arbitrations including: compensatory damages, attorney's fees and costs, prejudgment interest, and punitive damages. While punitive, as well as compensatory, damages are within the power of arbitration tribunals to award, a reluctance to award them prevails. Many argue that "if an arbitrator has the power to hear a case and punitive damages are available under maritime law, he should . . . award complete relief-including punitive damages."[121]

V. CONCLUSION

In conclusion, one can readily see that maritime arbitrations have facets not found in many other types of arbitrations due to their highly transient and international nature. Some aspects of maritime arbitration are long settled and clearly support the goals of the FAA and COGSA, such as the imposition of interim measures, an essential element protecting the respective rights of the parties, preserving the status quo, and to promoting the effectiveness of arbitration as an alternative to litigation. Other areas of maritime arbitration remain unsettled and in transition, such as the area

---

117. *Id.* at 262–63.

118. William P. Byrne, *The Effect of RICO on Maritime Arbitration*, 12 TUL. MAR. L.J. 77, 83 (1987). *See, e.g.*, Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 598 F. Supp. 353 (N.D. Ala. 1984) (because the arbitration clause provided for "any relief", the court found the award of punitive damages as justified absent any "clearly restrictive language" in the arbitration agreement that indicated the parties unwillingness to accept an arbitral award of punitive damages); Willis v. Shearson/Am. Express, Inc., 569 F. Supp. 821 (M.D.N.C. 1983) (arbitration clause stating "any controversy arising out of or relating to" was broadly interpreted to authorize the award of punitive damages by an arbitrator who heard the matter).

119. Raymos, *supra* note 115, at 265.

120. *Id.* at 264.

121. *Id.* at 268.

of foreign forum selection clauses and foreign choice of law clauses in arbitration agreements.

Courts have held that such clauses may not be invalidated where the only lessening of liability is the result of increased costs associated with resolving the issue. Only where the lessening of liability results in a substantive legal difference may a court invalidate a forum selection clause. However, in reality, so long as courts evaluating foreign forum selection clauses do not look beyond the costs of arbitration in the forum, to actual effect of the foreign forum, i.e. the law that will be applied in that forum, the probable result is two proceedings: one proceeding on the merits, and another proceeding for a determination of fundamental fairness as to application of foreign law.

While damages are a relatively settled matter in maritime arbitrations, movement toward the award of punitive damages in maritime arbitrations is evident. The award of punitive damages in maritime arbitrations will afford those who utilize arbitration complete relief for their claims and prevent a benefit to those who should be held responsible for their actions, yet seek to avoid responsibility through the arbitral forum.

Maritime arbitration must act to preserve its status as a long standing tool to settle maritime disputes. In proper cases, specifically, ones in which COGSA does not apply, arbiters must begin to use punitive damages as a weapon in their arsenal to punish transgressions perpetuated with actual malice, ill will, or with reckless disregard for others.

More importantly, the Court's decision in *M/V Sky Reefer* has acted to destroy the less expensive and more efficient nature of maritime arbitration, an area in which most disputes are international. Courts must look beyond the costs to the parties in a foreign forum in evaluating a foreign forum selection clause; failure to do this will result in increased costs to the parties involved and interminable delay in the adjudication of disputes because two proceedings will be required: a decision by a foreign court or arbitral panel on the merits of the case followed by a decision in an American court to determine the fundamental fairness of the foreign decision. When evaluating foreign forum selection clauses, courts must look beyond the transaction costs in the foreign forum and look to the fundamental fairness of the applicable law in the forum.