"A comparative analysis of how courts in different countries deal with Jurisdiction and Arbitration Clauses in Bills of Lading and other Sea Carriage Documents"

The United States Position

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1. BACKGROUND AND HISTORY

The courts in the United States initially took different paths when addressing jurisdiction and arbitration clauses. It was not until 1995, when the distinction between arbitration and forum selection clauses was more or less eliminated by the United States Supreme Court in Vimar Segura y Reaseguros v. M/V Sky Reefer, 115 S. Ct 2322 (1995)("SKY REEFER")

A. ARBITRATION CLAUSES Prior to SKY REEFER

Unlike, jurisdiction clauses, arbitration clauses were given early recognition in the United States. The Federal Arbitration Act (FAA) enacted in 1947 provided:

> 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 a 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. 9 U.S.C. section 2.

The FAA describes "maritime transactions" to 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." 9 USC section 1.

The FAA applies to "commerce among the several states or with foreign nations…." 9 USC section 1.

It further provides that if a maritime contract contains an arbitration clause, any suit brought in the United States court is automatically stayed as long as the arbitration decision is pending and the issue is arbitrable pursuant to the contracts terms. 9 USC section 3.

Given the above, it certainly appears that the intent of the drafters were that arbitration clauses were to be honored and upheld. However, issues did arise; such as when another federal statute contained specific provisions as to how contract disputes were to be resolved and it did not call for arbitration. This issue was addressed by the United States Supreme Court in Wilko v. Swan, 346 U.S. 427 (1953) wherein the Court held that the parties could not be bound to arbitrate the dispute because the provisions in the Securities Act of 1933 would prevail over the FAA's provisions.

The FAA's arbitration provision was continually tested. See for example, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. , 473 U.S. 614 (1985). There, the United States Supreme Court 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 which requires that we rigorously enforce agreements to arbitrate." 346 US at 625-26.

After these rulings, many in the Admiralty field wondered whether courts would hold that the United States Carriage of Goods by Sea Act invalidated arbitration clauses contained in bills of lading. They didn't have to wonder for too long, because the question was definitively answer by the United States Supreme Court in SKY REEFER.

In SKY REEFER, the plaintiff took the position that the arbitration provision in the FAA conflicted with COGSA's prohibition against the carrier reducing its liability below the floor set in COGSA. It was argued that the existence and enforcement of an arbitration clause in a contract subject to COGSA had the potential to lessen the carrier's liability.

The Court elected not to see a direct conflict because it found that the foreign forum's laws would not necessarily reduce a carrier's liability and therefore the selection of a foreign forum, per se, would not be considered a reduction in liability.

The decision will be discussed more fully below in Section 1. C.

B. JURISDICTION CLAUSES PRIOR TO SKY REEFER

Prior to the SKY REEFER decision, forum selection and law clauses were not viewed favorably. In Knott v. Botany Mills, 179 U.S. 69 (1900), the Supreme Court resolved a matter involving a bill of lading that stipulated that British law would apply to any dispute arising from the carriage. The carriage involved a cargo of wool aboard a British vessel transiting from Buenos Aires to New York. The Supreme Court held that the Harter Act overrode and nullified the provision. 179 U.S. at 77. As can be seen, this decision was rendered prior to the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, commonly referred to as the "Hague

Rules". 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.

In 1936, The Hague Rules were adopted as domestic legislation by the United States with some modifications as the Carriage of Goods by Sea Act (COGSA). 47 U.S.C. §§ 1300-1313. The United States ratified the Hague Rules with the same modifications in 1937.

Neither the Hague Rules nor COGSA addressed choice of forum or choice of law clauses in bills of lading.

Article 3 Section 8 of the Hague Rules was often used to challenge arbitration clauses and it was also used to challenge jurisdiction clauses. It provided in relevant part:

> 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….

It was argued that a bill of lading requiring a matter to be heard in a forum outside the United States and/or requiring the application of a law other than U.S. law, would violate of Article 3 Section 8.

In the United States there were early decisions where the Courts found that COGSA, "contained no express grant of jurisdiction to any particular courts nor any broad provisions of venue" and therefore if the limitations and defenses available to the carrier in the foreign jurisdiction were not substantially different than those available under American law than the clause was enforceable. See for example Wm. H. Muller & Co. v. Swedish American Line, 224 F.2d 806 (2nd Cir. 1955), *cert denied*, 350 U.S. 903 (1955).

A decade or so later, the Second Circuit re-visited the issue in Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967). There, the court held that a clause in the bill of lading declaring the courts of Norway the exclusive forum violated COGSA and was thus invalid. The court relied on Art. 3 Section 8. The court explained that if it upheld the jurisdiction clauses, it would be required to evaluate each individual forum to determine whether those laws would result in the carrier's liability being lessen below the floor set by COGSA.

Less than a decade later the United States Supreme Court took up the issue in M/S Bremen v. Zapata Off-Shore Company, 407 U.S. 1 (1972)("BREMEN"). At issue was a forum selection clause in a towage contract entered into between a German towage company and an American offshore drilling company for towage of an offshore drilling rig from Louisiana to the Adriatic Sea. The contract contained a clause requiring that "any dispute arising must be treated before the London Court of Justice." Id. at 2. While the rig was being towed in the Gulf of Mexico, it sustained damage and was brought into a port in Florida. The rig owner filed suit in Florida against the German towage company. The German towage company challenged the jurisdiction. The lower court held the forum selection clause unenforceable and the appellate court affirmed.

The matter was appealed to the United States Supreme Court where it reversed the lower courts and held that jurisdiction clauses in maritime contracts should be enforced absent a strong showing of same reason for setting them aside. The Supreme Court offered that a court could set aside jurisdiction clauses if the party challenging the clause could clearly show that the enforcement of the same would be "unreasonable and unjust" or that the clause would be "invalid for such reasons as fraud or overreaching." 407 U.S. at 15. Therefore, according to the Supreme Court, only where a jurisdiction clause "would contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision," would the clause be invalidated. Id at 17.

In addition, The Court also addressed the application of the doctrine of "*forum non conveniens*" as it applied to jurisdiction clauses. The Court stated that the complaining party bears a heavy burden of proof to invalidates a forum selection clause even if the remoteness of the chosen forum intimates that the clause is part of an adhesion contract.. Id.

The Court explained the policy behind its decision:

> 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 the contracting. Id. at 17-18.

Another argument quickly dispensed with was a challenge to the specific language of the forum selection clause being permissive rather than mandatory. The Court found that the clause's succinct language was clearly mandatory, even with respect to *in rem* actions. Id at 20.

After the BREMEN decision, United States courts also upheld jurisdiction clauses in charter party contracts. See for example, Sanko Steamship Co. v. Newfoundland Refining Co., 1976 AMC 417 (S.D.N.Y. 1976) *aff'd*, Case No. 76-7060 (2d Cir. 1976). There a time charter party required that the contract be governed by English law and that all disputes be litigated or arbitrated in England. Id. at 419.

Although many courts after BREMEN began upholding jurisdiction clauses, not all followed suit. For example, the Fifth Circuit held both Hughes Drilling Fluids v. M/V Lou Fo Shan, 852 F.2d 840 (5th Cir. 1988) and Conklin & Garrett v. M/V Finnrose, 826 F.2d 1441 (5th Cir. 1987) that requiring the shipper to bring an action in a foreign forum would of necessity "lessen the liability of the carrier," which is prohibited under COGSA.

C. THE VIMAR SEGUORS Y REASEGUROS v. M/V SKY REEFER DECISION

Vimar Seguors y Reaseguros v. M/V Sky Reefer, 115 S. Ct. 2322 (1995) involved the carriage of a cargo of oranges 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, owned by a Panamanian company, was time chartered to a Japanese carrier.. Once the carrier received the cargo in Morocco, it issued to the Moroccan supplier a form bill of lading containing the contract terms on the back of the bill. 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. Id at 2325. 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 a federal district court in the State of Massachusetts. The vessel and its owner moved to stay the action and to compel arbitration in Tokyo pursuant to the terms in the bill of lading and the provisions of the FAA. Id at 2330.

The carrier's motion to stay the action and compel arbitration was granted by the district court. It also certified for interlocutory appeal the question of whether the provisions of Section 3, Clause 8 of COGSA would nullify a forum clause contained in a bill of lading.

The First Circuit Court of Appeals 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. The court found however, that because the Federal Arbitration Act applied, that the conflict between the mandate of the FAA would trump the prohibition of COGSA. Id. at 731-32. The United States Supreme Court agreed to hear the matter and affirmed.

The shipper raised two issues against the enforcement of the arbitration clause. First, it claimed that the forum clause was unenforceable because it was part of an adhesion contract. Id. at 2325. Second, it claimed that the forum clause violated COGSA Article 3, Section 8 which prohibits any language in a bill of lading that would "lessen the liability" of a 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. Id at 2326. The shipper's argument implied that such forum selection clauses could potentially limit liability because there was no guarantee that a foreign forum would apply COGSA or its equivalent. Id at 2329.

The Supreme Court dismissed the adhesion argument by 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.

With respect to the purported COGSA prohibition on forum selection clauses, the Supreme Court invalidated the rule set forth in Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967)(*en banc)*. The Court explained that Section 3, Clause 8 of COGSA was designed to prevent clauses in bills of lading that would lessen the specific duties and liabilities COGSA placed on a carrier. Id at 2327. The Court found that forum selection clauses in bills of lading would not reduce these liabilities per se.

As to the question of whether the foreign forum will apply a law equivalent to COGSA;the court held that 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. Id at 2330. The Court did state that it would find the imposition of an inferior law "repugnant to the public policy of the United States" and would decline enforcement on that ground. Id.

The Court explained 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.'" Id at 2328.

The Court concluded by stating:

> 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. Id at 2329.

2. ARBITRATION CLAUSES AND JURISDICTION CLAUSES AFTER SKY REEFER

A. Southern Coal Corporation v. IEG Pty Ltd and MS "ANITA" Kai Freese GmbH & Co. KG, (E.D. Va, February 26, 2016)

The above case addressed two issues, one the proper procedure to be used to compel arbitration and secondly, how a court should handle a matter where some of the parties have the right to arbitrate their claim and other defendants do not.

The case involved a shipment of shovels from Newcastle, Australia that were to be delivered in Norfolk, Virginia. Southern Coal Corporation's ("Southern Coal") agent, AAMAC contracted with IEG Pty Ltd ("IEG") to arrange the transportation. IEG advised that it had chartered space on board the vessel BBC RIO GRANDE, owned and operated by MS "Anita" Kai Freese ("Freese"). The shovels were loaded onboard; however, rather than proceeding to Norfolk, the vessel was diverted to Masan, South Korea where the shovels were removed from the vessel. Eventually, the shovels were loaded on board the MV CLIPPER NEW HAVEN which was operated by BBC Chartering & Logistic GmbH & Co. KG ("BBC"). A second booking note and bill of lading was issued.. Not surprisingly, the shovels arrived in a damaged state.

Southern Coal filed suit in the Western District of Virginia against IEG, and other parties. After the complaint was amended the remaining defendants were IEG and Freese.

Freese brought a Motion to dismiss for improper venue under Rule 12(b)(3) pursuant to the old Fourth Circuit precedent established in Sucampo Pharm., Inc. v. Astellas Pharma, Inc., 471 F.3d 544, 550 (4th Cir. 2006). The court however explained that Sucampo was no longer good law in light of the United State Supreme Court decision in Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 134 S.Ct. 568 (2013).

The court explained that:

> In Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, the Supreme Court held that Rule 12(b)(3), "authorize[s] dismissal only when venue is 'wrong' or 'improper' in the forum in which it was brought." Atl.

Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 134 S. Ct. 568, 577 (2013). Whether venue is wrong or improper is governed by the provisions of 28 U.S.C.A. § 1391. Under 28 U.S.C.A. § 1391(b), a civil action may be brought in: "(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action."

According to the Supreme Court, the proper analysis when venue is challenged for dismissal is to look only to whether the case falls within one of the categories of § 1391(b) only.

Atl. Marine, 134 S. Ct. 577. If venue does fall within one of these categories, venue is proper; if not, venue is improper. Id. If venue is found to be improper the case must be dismissed or transferred under 28 U.S.C. § 1406(a), Id. However, in contrast to the previously existing precedent in this Circuit, "Whether the parties entered into a contract containing a forum-selection clause has no bearing on whether a case falls into one of the categories of cases listed in § 1391(b). As a result, a case filed in a district that falls within § 1391 may not be dismissed under § 1406(a) or Rule 12(b)(3)." Atl. Marine, 134 S. Ct. at 577. Where—as is here—the venue is proper,[1] the party must enforce the forum selection clause by another means other than Rule 12(b)(3).

The court thereafter decided to construe the motion as one to compel arbitration.

The court had to address the fact that multiple bills of lading and booking notes existed for the transportation of the shovels that should have been delivered under one bill of lading and one booking note. However, once the shovels were abandoned in Masan, a second booking note and bill of lading was issued for the transportation of the shovels from Masan to Virginia. The second booking note contained a Jurisdiction and Arbitration Clause providing for arbitration in London in accordance with the London Maritime Arbitrators Association terms.

Southern Coal’s argument was that they should not have to arbitrate in London, because it was only through the breach of the original contract that the second booking note and bill of lading came into existence. Southern Coal’s position was that they were being penalized because what should have been one carriage under one bill of lading

was now two separate agreements making it impossible for Southern to sue the “carrier” in a single action and single forum and that was not what Southern Coal bargained for when it first entered into the original Booking Note and the First Bill of Lading.

The court held that they would not invalidate the arbitration clause because the party seeking arbitration may have breached the agreement because that would violate the strong federal policy in favor of arbitration.

The court explained that:

> The fact that the arbitration clause places arbitration in a foreign forum does not reduce its enforceability. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636-37, 105 S. Ct. 3346, 3359, 87 L. Ed. 2d 444 (1985)("There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism. To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties."). Specifically in the context of the Carriage of Goods by Sea Act ("COGSA"), the Supreme Court has found that the wide sweeping provisions of COGSA did not invalidate foreign arbitration and that concerns that the parties would be unable to enforce their legal protections. Vimar seguros y Reaseguros, S.A. v. Sky Reefer 515 U.S. 528, 541 (1995)(hereinafter "Sky Reefer").

Based upon the above, the court found that it must uphold the arbitration clause with respect to the claims between Southern and Freese.

However, the court was not going to dismiss the action, because

> "Were there no subsequent opportunity for review and were we persuaded that 'the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies..., we would have little hesitation in condemning the agreement as against public policy.'" Sky Reefer, 515 U.S. at 540 (quoting Mitsubishi, 473 U.S. at 638)…. Accordingly, this Court finds that in compelling arbitration of the claims between Southern and Freese, it must stay the suit between the parties and retain jurisdiction during the pendency of the foreign arbitration.
>
> Compelled arbitration of the claims against Freese does temporarily bifurcate the present suit. While the separation of the defendants is not

ideal, the Supreme Court has explicitly discussed that where there exist both arbitrable and non-arbitratable claims, the arbitrable claims must be submitted to arbitration pursuant to the Federal Arbitration Act and the strong public policy of enforcing arbitration clauses. KPMG LLP v. Cocchi, 132 S. Ct. 23, 24 (2011). Specifically, the Court considered the even where the submission of arbitrable would separate the dispute into multiple forums:

> The Act has been interpreted to require that if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation. From this it follows that state and federal courts must examine with care the complaints seeking to invoke their jurisdiction in order to separate arbitrable from nonarbitrable claims. A court may not issue a blanket refusal to compel arbitration merely on the grounds that some of the claims could be resolved by the court without arbitration.

The Court stayed the action for the shorter of 6 months or the completion of the arbitration.

B. Idaho Pacific Corporation v. Binex Line Corporation, Case No. 4:15-cv-00510-CWD, (D. Idaho March 1, 2016)

In this case, the plaintiff, Idaho Pacific Corporation ("Idaho Pacific") alleged that it did not receive a copy of the original bill of lading for the initial shipment or for the return shipment of potato flour that was returned because it failed to meet the standards required by the receiver. Idaho Pacific brought an action against Binex Line Corporation ("Binex") the carrier arising out storage costs incurred when the product was returned.

When the return shipment arrived in Oakland, California the potato flour had to be sampled by the Food and Drug Administration. The potato flour was moved to a storage facility and sampled. Approximately one month later it was released from storage after the test results came back.

Idaho Pacific and Binex disagreed as to whether the potato flour had to remain in storage while awaiting the FDA test results. Binex claimed that the cargo could not be moved from the storage facility until after the results were obtained.

Binex shipped the potato flour from Oakland by rail destined for Ririe, Idaho. While in transit it insisted that Idaho Pacific pay for its freight charges. Idaho Pacific refused to pay all of the charges. Binex refused to deliver the potato flour.

Idaho Pacific filed suit in the Idaho state court seeking the return of the potato flour. The next day, Binex Line, filed a motion to transfer or dismiss with the federal district in Idaho.

The court explained that to decide the motion to transfer or dismiss the court needed to determine the proper forum in which to adjudicate the complaint. The Court explained that if the forum selection clause were binding and no exceptional circumstances were present, then Idaho Pacific would be contractually obligated to pursue its claims in the U.S. District Court for the Central District of California. If the forum selection clause were inoperable or exceptional circumstances weigh in favor of non-enforcement, the case would remain in the District of Idaho.

The bill of lading contained a forum selection clause that required any claims relating to the shipment be resolved in the U.S. District Court for the Central District of California.

The court determined that in order to resolve whether the forum selection clause was enforceable, it had to determine whether COGSA or the Carmack Amendment applied.

To reach its determination the court referred to the U.S. Supreme Court decision in Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 96 (2010)("Regal Beloit) wherein the court explained that "[a]lthough COGSA imposes some limitations on the parties' authority to adjust liability, it does not limit the parties ability to adopt forum-selection clauses (citing to Vimar Sky Reefer).

The court found that COGSA and not the Carmack Amendment applied. It next had to determine if there were any exceptional circumstances as to why the forum selection clause should not be enforced.

The court noted that:

> "[a] forum selection clause must be given controlling weight in all but the most exceptional circumstances." Citing to Atlantic Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 134 S. Ct. 568, 579 (2013).

The Supreme Court in Atlantic Marine explained that "only under extraordinary circumstances unrelated to the convenience of the parties should a [Section] 1404(a) motion be denied. Id at 581.

The court referred to the United States Supreme Court's analysis in Atlantic Marine which set explained how a forum selection clause alters the Section 1404(a) analysis:

> "First, the plaintiff's choice of forum merits no weight." *Atlantic Marine*, 134 S.Ct. at 582. "Rather, as the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted" *Id*.
>
> "Second, a court evaluating a defendant's [Section] 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties' private interests," such as convenience. *Id*. "When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." *Id*. "A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum." *Id*. And, "[a]s a consequence, a district court may consider arguments about public interest factors only." *Id*.
>
> Third and finally, "when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a [Section] 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules—a factor that in some circumstances may affect public-interest considerations." *Id*.

Idaho Pacific argued that Idaho's public policy against forum selection clause should render the current forum selection clause void. Idaho Code Section 29-110 provides in relevant part:

> (1) Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals, or which limits the time within which he may thus enforce his rights, is void as it is against the public policy of Idaho. Nothing in this section shall affect contract provisions relating to arbitration so long as the contract does not require arbitration to be conducted outside the state of Idaho.

The Idaho District Court rejected the argument:

> "because "[i]f Idaho Code § 29-110(1) was determinative, striking down the forum selection clause would be *routine* rather than *extraordinary*, standing *Atlantic Marine* on its head." (emphasis in original). Accordingly, the Court rejects Idaho Pacific's argument that Idaho's public policy against forum selection clauses, without more, is sufficient to invalidate the clause at issue here.

However, the Court did not transfer the case to the California District Court.

Binex argued that Idaho Pacific was listed on the bill as the consignee. Alternatively, they argued that Idaho Pacific accepted the bill of lading and should be bound by it. The Court found however that Idaho Pacific never referenced the bill of lading or its terms in its complaint and it specifically alleged that it neither negotiated nor received the bill of lading for the return shipment until after it filed suit.

The Court noted that upholding forum selection clauses is favored; however, they explained that the majority of the cases stressed that the clause was bargained for by the parties, citing as authority for its position:

> *Atlantic. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 579 (2013) ("'interest of justice' is served by holding parties to their bargain."); *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 15 (1972) ("There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, [ ], should be given full effect."); *Stewart Org., Inc. v. Ricoh Corp*., 487 U.S. 22, 29 (1988) ("the District Court will be called on to address such issues as the convenience of a Manhattan forum given the parties' expressed preference for that venue, and the fairness of transfer in light of the forum-selection clause and the parties' relative bargaining power."); and *Wada Farms, Inc. v. Jules & Associates, Inc*., 2015 WL 128100, at *2 (D. Idaho Jan. 7, 2015) ("A valid forum selection clause bargained for by the parties, protects their legitimate interests and further vital interests of the justice system.").

The Court concluded that there was no evidence that any bargaining occurred in the present case between Binex Line and Idaho Pacific for the forum selection clause or any of the other terms contained in the bill of lading. Based upon their finding that Idaho Pacific's lack of bargaining power qualifies as an exceptional circumstance the court would not enforce the forum selection clause contained in the bill of lading and denied the defendant's motion to transfer.

C. Amazon Produce Network, LLC v. NYK Line, (E.D. Pa September 21, 2015).

In this case the NYK Line sought to have the action transferred to the Tokyo District Court pursuant to the terms of the applicable bill of lading. Amazon Produce Network ("Amazon Produce") sought to avoid the transfer and argued that the Japanese Court would apply the Hague-Visby rules to the exclusion of COGSA and in doing so would reduce the carrier's liability.

(**Obviously to most of us this would cause some head scratching because the Hague-Visby Rules provide for 666.67 SDRs per package and COGSA provides for USD $500.00.)**

Amazon Produce retained a Japanese attorney as an expert, but it appears that their expert miscalculated. They reversed the conversion, so that 1 SDR equaled US $.724763 resulting in a package limitation value of $483.18 which is lower than the USD $500.00. The correct calculation would result in a package limitation value exceeding COGSA's package limitation.

NYK Line pointed out the error and the Court granted NYK's motion.

3. CURRENT POSITION

Although one can never rule out what a court may do in a common law system, it would seem safe to say that arbitration clauses and jurisdiction clauses are accepted in the United States. However, that does mean that the parties will not stop trying to find ways to avoid them.

4. The UNITED STATES WILL LIKELY OPT-IN TO CHAPTER 14

It may be remembered that the United States was a leading advocate of the compromise approach during the UNCITRAL negotiations over the inclusion of a provision on jurisdiction. See, Michael Sturley Report Proposal by the United States of America, U.N. doc. no. A/CN.9/WG.III/WP.34¶¶30-35 (2003).

5. IS THERE NEW LEGISLATION THAT WILL AFFECT THE CURRENT POSITION?

The Arbitration Fairness Act of 2015 is a bill to amend Title 9 of the United States Code. If enacted, it could potentially impact on claims arising under Passenger Tickets. As it presently stands many Cruise Lines require that all disputes, other than for emotional or bodily injury, illness to or death, are to be subject to binding arbitration. If the Arbitration Fairness Act of 2015 becomes law, such would be rendered unenforceable.

Below is a copy of the proposed bill.

Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Arbitration Fairness Act of 2015”.

SEC. 2. FINDINGS.

The Congress finds the following:

(1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

(2) A series of decisions by the Supreme Court of the United States have interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress.

(3) Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights.

(4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions.

(5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.

SEC. 3. ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND

CIVIL RIGHTS DISPUTES.

(a) IN GENERAL.—Title 9 of the United States Code is amended by adding at the end the

following:

“CHAPTER 4—ARBITRATION OF EMPLOYMENT, CONSUMER,

ANTITRUST, AND CIVIL RIGHTS DISPUTES

“Sec.

“401. Definitions.

“402. Validity and enforceability.

“§ 401. Definitions

“In this chapter—

“(1) the term ‘antitrust dispute’ means a dispute—

“(A) involving a claim for damages allegedly caused by a violation of the antitrust laws (as defined in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12)) or State antitrust laws; and

“(B) in which the plaintiffs seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

“(2) the term ‘civil rights dispute’ means a dispute—

“(A) arising under—

“(i) the Constitution of the United States or the constitution of a State; or

“(ii) a Federal or State statute that prohibits discrimination on the basis of race, sex, disability, religion, national origin, or any invidious basis in education, employment, credit, housing, public accommodations and facilities, voting, or program funded or conducted by the Federal Government or State government, including any statute enforced by the Civil Rights Division of the Department of Justice and any statute enumerated in section 62(e) of the Internal Revenue Code of 1986 (relating to unlawful discrimination); and

“(B) in which at least 1 party alleging a violation of the Constitution of the United States, a State constitution, or a statute prohibiting discrimination is an individual;

“(3) the term ‘consumer dispute’ means a dispute between an individual who seeks or acquires real or personal property, services, securities or other investments, money, or credit for personal, family, or household purposes and the seller or provider of such property, services, securities or other investments, money, or credit;

“(4) the term ‘employment dispute’ means a dispute between an employer and employee arising out of the relationship of employer and employee as defined in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203); and

“(5) the term ‘predispute arbitration agreement’ means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

“§ 402. Validity and enforceability

“(a) IN GENERAL.—Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.

“(b) APPLICABILITY.—

“(1) IN GENERAL.—An issue as to whether this chapter applies to an arbitration agreement shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

“(2) COLLECTIVE BARGAINING AGREEMENTS.—Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.”.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Title 9 of the United States Code is amended—

(A) in section 1, by striking “of seamen,” and all that follows through “interstate commerce”;

“4. Arbitration of employment, consumer, antitrust, and civil rights disputes 401”.

(B) in section 2, by inserting “or as otherwise provided in chapter 4” before the

period at the end;

(C) in section 208—

(i) in the section heading, by striking “Chapter 1; residual application” and inserting “Application”; and

(ii) by adding at the end the following: “This chapter applies to the extent that this chapter is not in conflict with chapter 4.”; and

(D) in section 307—

(i) in the section heading, by striking “Chapter 1; residual application” and inserting “Application”; and

(ii) by adding at the end the following: “This chapter applies to the extent that this chapter is not in conflict with chapter 4.”

(2) TABLE OF SECTIONS.—

(A) CHAPTER 2.—The table of sections for chapter 2 of title 9, United States Code, is amended by striking the item relating to section 208 and inserting the following:

“208. Application.”.

(B) CHAPTER 3.—The table of sections for chapter 3 of title 9, United States Code, is amended by striking the item relating to section 307 and inserting the following:

“307. Application.”.

(3) TABLE OF CHAPTERS.—The table of chapters for title 9, United States Code,

is amended by adding at the end the following:

SEC. 4. EFFECTIVE DATE.

This Act, and the amendments made by this Act, shall take effect on the date of enactment of this Act and shall apply with respect to any dispute or claim that arises on or after such date.