



WHY YOU MIGHT HAVE TO SUE YOUR CARRIER IN A FOREIGN COURT

Legal Corner By David Street, IHSA Legal Counsel

Are you aware that most foreign ocean carriers require customers to sue them in their home countries in the event of cargo loss or damage? If so, you may also be aware that the United States Supreme Court has decided that there is nothing wrong with this requirement. But, doesn't it seem a little strange that a U.S. importer that pays for an ocean carrier to bring its goods into the United States might have to sue that carrier in a foreign country thousands of miles away for loss or damage to his goods? At least one Supreme Court justice thinks so.

Virtually every bill of lading has a section providing that the carrier may only be sued in certain places. This is called a forum selection clause because the carrier selects a forum where it would like to be sued and then imposes that forum on the shipper simply by putting the clause on the back of its bill of lading. You will not be surprised to learn that many forum selection clauses on bills of lading require that suits be brought in the city and country where the carrier has its headquarters. For example, COSCO's bill of lading provides as follows:

This Bill of Lading is governed by the laws of the People's Republic of China. All disputes arising under or connection with this Bill of Lading shall be determined by the laws of the People's Republic of China and any action Carrier shall be brought before the Shanghai Maritime Court or other maritime courts in the People's Republic of China as the case may be.

Thus, if the customer has a problem with COSCO to which the bill of lading applies, it will have to go to Shanghai to sue COSCO. In general, the same is true for many other foreign carriers. For example, if a customer has a problem with Hyundai, it may have to bring suit in the courts of Seoul, Korea. If a customer has a problem with Hapag-Lloyd, it may have to sue in Hamburg, Germany.

Until 1995, courts in the United States uniformly rejected enforcement of foreign forum selection clauses in ocean carriers' bills of lading. Most courts based their decisions rejecting these forum selection clauses on reasoning similar to that of the United States Court of Appeals for the Second Circuit in the case of *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2nd Cir. 1967).

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The *Indussa* court noted that there are two potential problems with foreign forum selection clauses. First, the Carriage of Goods by Sea Act (COGSA), which applies to shipments in the U.S. trades, clearly specifies that COGSA “shall apply to all contracts for carriage of goods by sea to and from ports of the United States in foreign trade.” If the court were to uphold a foreign forum selection clause, there is no guarantee the foreign court would apply COGSA even if the shipment is in the United States trades. Second, the court noted that § 3(8) of COGSA forbids any clause in a bill of lading from reducing the carrier’s liability below the standards set forth in COGSA itself. The court found that foreign forum selection clauses would violate this requirement. The court stated:

A clause making a claim triable only in a foreign court will almost certainly lessen liability if the law which the court would apply was neither the Carriage of Goods by Sea Act nor the Hague Rules [upon which COGSA is based]. Even when the foreign court would apply one or the other of these regimes, requiring trial abroad *might* lessen the carrier’s liability since there could be no assurance that it would apply them in the same way as would an American tribunal subject to the uniform control of the Supreme Court.

For both of these reasons, the court in the *Indussa* case held that a carrier could not force an American shipper to go to a foreign court to file suit on a claim under the carrier’s bill of lading.

Between the date of this decision in 1967 and 1995, every U.S. court faced with this issue refused to enforce a foreign forum selection clause in a carrier’s bill of lading. In 1995, however, the Supreme Court reversed this rule in a case titled *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*. In this case the Supreme Court looked at the same two issues that the *Indussa* court reviewed, but came up with diametrically opposed answers. With regard to the potential problem that the foreign court might refuse to apply COGSA, the Supreme Court decided this problem did not have to be addressed until it actually happens. In other words, if a foreign court refuses to apply COGSA and that results in the carrier escaping responsibility it would have had under COGSA, the U.S. courts can address that problem after it occurs. The fact that the U.S. shipper would have to file two lawsuits when this happens did not appear to be of concern to the court.

With regard to the prohibition in COGSA against lessening the carrier’s liability, the Supreme Court held that this portion of COGSA only refers to the \$500 per package liability and does not cover more informal problems such as the cost and expense to the U.S. customer of having to sue the carrier in a foreign court. The Supreme Court stated:

The statute thus addresses the lessening of the specific liability imposed by [COGSA], without addressing the separate question of the means and costs of enforcing that liability. The difference is that between explicit statutory guarantees and the procedures for enforcing them, between applicable liability principles and the forum in which they are to be vindicated.

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In other words, according to the Court, Congress was not concerned with the extra cost and expense the shipper would have to incur to sue the carrier overseas. The court further noted that:

Nothing in this section [of COGSA], however, suggests that the statute prevents the parties from agreeing to enforce these obligations in a particular forum.

The majority opinion here did not even acknowledge that there is no such thing as an “agreement” between the shipper and the carrier on the terms of a bill of lading. The carrier’s customer only has one choice, to ship its goods or not. If it ships its goods with the carrier, it necessarily accepts the terms and conditions of the carrier’s bill of lading. Such contracts, which are essentially “take-it-or-leave-it,” are referred to as “contracts of adhesion.”

One Supreme Court justice, Justice Stevens, dissented from this opinion. He directly addressed the “contract of adhesion” problem in the following language:

In my opinion, this view of the [majority decision] is flatly inconsistent with the purpose of COGSA § 3(8). That section responds to the inequality of bargaining power inherent in bills of lading and to carriers’ historic tendency to exploit that inequality whenever possible to immunize themselves from liability for their own fault. A bill of lading is a form document prepared by the carrier, who presents it to the shipper on a take-it-or-leave-it basis.

Clearly, Justice Stevens understood the realities of the ocean shipping business better than his fellow Justices. In terms of the argument that the extra costs of enforcing a claim in a foreign court does not lessen the carrier’s liabilities, Justice Stevens said:

The foreign-[forum] clause imposes potentially prohibitive costs on the shipper, who must travel – and bring his lawyers, witnesses, and exhibits – to a distant country in order to seek redress. The shipper will therefore be inclined to settle the claim at a discount or to forego bringing the claim at all. The foreign-law clause leaves the shipper who does pursue his claim open to the application of unfamiliar and potentially disadvantageous legal standards, until he can obtain review (perhaps years later) in a domestic forum...

Justice Stevens’ points, as a matter of common sense, are very compelling.

The real distinction between the majority decision and Justice Stevens’ dissent may be based on a differing conception of the how the law should be applied and disputes resolved in an age where the world keeps getting smaller and trade between countries becomes more prominent. The majority decision touched on this point when it stated that the “skepticism of the ability of foreign arbitrators to apply COGSA or Hague Rules ... must give way to contemporary principles of international comity and practice.” The majority further stated that:

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If the United States is to be able to gain 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 a manner as to violate international agreements. That concern counsels against construing COGSA to nullify foreign arbitration clauses because of inconvenience to the plaintiff or the distrust of the foreign arbitrators of apply the law.

It is possible - - maybe even probable - - that U.S. importers could see this language as merely an eloquent and high-flying rationale for throwing U.S. shippers to the mercy of foreign carriers. In fact, for U.S. shippers with smaller claims, the necessity of suing the carrier in a foreign jurisdiction "is a practical immunization of a carrier from liability" as one commentator has noted. Certainly, the playing field for suits between shippers and carriers is not a level one. How does a shipper address this issue? One answer is to purchase marine cargo insurance and let the insurer deal with the foreign courts. Another would be to get to know a lot of foreign lawyers. You may need them!

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