WHAT I WISH THE SUPREME COURT WOULD DECIDE: REVIEW BY A US COURT OF A FOREIGN ARBITRATION AWARD ISSUED IN A DISPUTE TO WHICH COGSA APPLIES -- WHAT STANDARD APPLIES?

LeRoy Lambert*
President/Regional Claims Director
Charles Taylor P&I Management (Americas), Inc.

In *Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) ("Sky Reefer"), a bill of lading contained a clause requiring all disputes arising under the bill of lading to be resolved by arbitration in Tokyo. The United States Carriage of Goods by Sea Act (COGSA),\(^1\) renders invalid, by statute, any clause in a bill of lading which lessens the liability of the carrier of the goods below that allowed by COGSA. In *Sky Reefer*, the cargo owner, relying on well-settled case law,\(^2\) contended that requiring it to arbitrate in Tokyo before a Japanese arbitrator who would apply Japanese law "lessened the liability of the carrier" below that allowed by COGSA and hence the arbitration clause should not be enforced. The Court dispensed with this argument in the following passage (emphasis added):

Whatever the merits of petitioner's comparative reading of COGSA and its Japanese counterpart, its claim is premature. At this interlocutory stage it is not established what law the arbitrators will apply to petitioner's claims or that petitioner will receive diminished protection as a result. The arbitrators may conclude that COGSA applies of its own force or that Japanese law does not apply so that, under another clause of the bill of lading, COGSA controls. **Respondents seek only to enforce the arbitration agreement. The district court has retained jurisdiction over the case and "will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed."** *Mitsubishi Motors*, 473 U. S., at 638; cf. 1 Restatement (Third) of Foreign Relations Law of the United States §482(2)(d) (1986) ("A court in the United States need not recognize a judgment of the court of a foreign state if . . . the judgment itself, is repugnant to the public policy of the United States"). **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."** *Mitsubishi Motors*, supra, at 637, n. 19. Cf. *Knott v. Botany Mills*, 179 U.S. 69 (1900) [nullifying choice of law provision under the Harter Act, the statutory precursor to COGSA, where British law would give effect to provision in bill of lading that purported to exempt carrier from liability for damage caused by carrier's negligence in loading and stowage of cargo]; *The Hollandia*, [1983] A. C. 565, 574-575 (H. L. 1982) (noting choice of forum clause "does not ex facie offend against article III, paragraph 8," but holding clause unenforceable where "the foreign court chosen as the exclusive forum would apply a domestic substantive law which would result in limiting the carrier's liability to a sum lower than that to which

---

* I acknowledge with thanks the assistance of James J. Lambert, J.D. candidate, May 2015, Duke University School of Law. I also thank several colleagues at the bar for helpful leads with respect to case law developments and secondary sources.

1 Ch. 229, 49 Stat. 1207 (1936) *(reprinted in note following 46 U.S.C. § 30701).*

2 *E.g., Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (en banc).
he would be entitled if [English COGSA] applied\(^\text{6}\)). Under the circumstances of this case, however, the First Circuit was correct to reserve judgment on the choice of law question, 29 F. 3d, at 729, n. 3, as it must be decided in the first instance by the arbitrator, cf. Mitsubishi Motors, supra, at 637, n. 19. As the District Court has retained jurisdiction, mere speculation that the foreign arbitrators might apply Japanese law which, depending on the proper construction of COGSA, might reduce respondents’ legal obligations, does not in and of itself lessen liability under COGSA §3(8).

In *Sky Reefer*, the district court had retained jurisdiction over the case, prompting, apparently, the conscience salve in the highlighted portion of the passage quoted above. But to any practitioner familiar with arbitration, this passage was, and remains, puzzling.\(^\text{3}\) The Court did not mention the United Nations Convention on the Enforcement and Recognition of Foreign Arbitral Awards ("Convention"),\(^\text{4}\) to which the US and Japan are signatories. Article V of the Convention lists seven grounds upon which a court may refuse to enforce an arbitral award, one of which is relevant here: "The recognition or enforcement of the award would be contrary to the public policy of that country [where enforcement is sought]."\(^\text{5}\)

Research has not found a COGSA case which returned to the US following a foreign arbitration.\(^\text{6}\) Unlike the situation in *Sky Reefer*, district courts now routinely *dismiss* actions outright when they enforce a foreign arbitration or forum clause.\(^\text{7}\) But, if and when the losing party in a foreign arbitration ever did return to the US to afford itself "the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws had been addressed," what sort of opportunity would that be? What would the standard of review be?

Indeed, even for a district court which retained jurisdiction, it is not clear how, procedurally, the matter could be presented to the district court. The Convention refers only to enforcing an award, not vacating one. What are cargo interests to do if they believe the foreign arbitrators lessened the liability of the carrier below that allowed by COGSA?

In other words, if the cargo interests received an award in an amount less than that which would be allowed under COGSA, they have still received an award in their favor. The cargo interests would not wish to confirm such an award; rather they would wish to vacate it. Moreover, the carrier has likely paid it already.\(^\text{8}\)


\(^5\) Convention, Article V(2)(b).


\(^7\) See Force, supra note 3 at 411.

\(^8\) It is also conceivable that the carrier interests could be disgruntled. For example, suppose the foreign arbitrators failed to find the carrier was entitled to the package limitation, or that the claim was time-barred,
But let’s suppose that, somehow, on some procedural basis, the district court reviews the award. What might “contrary to the public policy” of the U.S. mean in this context?

The cargo interests would contend that COGSA, a U.S. statute, expresses the “public policy” of the US. However, cases have generally narrowly construed this defense; after all, it is also the law of the land to enforce foreign arbitral awards falling under the Convention.9

Moreover, assume the Japanese arbitrators, applying choice of law principles under U.S. or Japanese law, concluded as a matter of law that Japanese law applied? Or, suppose they find that COGSA applied and simply got it wrong? Cases are legion that courts will not disturb an award because the arbitrators made a mistake in law.10

If the issue remained in the context of cargo damage cases under COGSA, I fear the issue has ended with a whimper and in despair. Parties have given up, and the courts do not particularly care. Only the arrival of the Rotterdam Rules can revive the development of the law in the United States in this area.

Ironically, however, the issue raised and left hanging by Sky Reefer has been rescued from obscurity and indifference in the seafarer personal injury context. Many employment contracts between seafarers and non-US flag shipowners require arbitration of employment and workplace injury disputes in a non-US forum, often the home country of the seafarer. Despite strenuous and repeated challenges by the plaintiff’s bar, the United States Court of Appeals for the 11th Circuit has enforced arbitration agreements in employment contracts for non-US seafarers when the Convention applies, holding that the public policy defense applies only to an action to enforce the award, not an action to prevent the arbitration from going forward in the first place.11

Attention is now directed at two cases, one in the Fourth Circuit and one in the Fifth Circuit.12 Both concern claims by Filipino seamen who were injured in the U.S. on foreign-flag ships and whose employment contracts called for resolution in the Phillipines under the Standard Terms and Conditions Governing Employment of Filipino Seafarers On Board Ocean-Going Vessels.

or that the error in navigation defense applied. But in such case, the carrier, the party who obtained the dismissal of the case from the US in favour of the foreign forum chosen in the carrier’s bill of lading would be unlikely to return to the US and ask the US court to vacate the award. Practically, the cargo interest would likely seek enforcement in the country where the arbitration took place and, presumably, where the carrier has assets. If, however, the cargo interest sought to enforce the award in the US, and the carrier would have to prove a defence allowed under the Convention. The question as to the applicable standard of review would remain.


10 E.g., Europcar Italia S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310, 316 (2d Cir. 1998) (under Convention, award cannot be avoided solely on basis of an error of law or fact).

11 E.g., Lindo v. NCL (Bahamas), Ltd., 652 F. 3d 1257 (11th Cir. 2011).

Both proceeded to arbitration in the Phillipines, following stays of their previously filed U.S. actions. In both cases, the Filipino arbitrator found that Filipino law, not U.S. law applied. Following awards in their favor, each returned to the U.S. to seek review by the U.S. court.13

Both courts held U.S. law applied, that U.S. law with respect to the rights and remedies of seafarers constituted “public policy” of the U.S. within the meaning of Article V(2)(b), that the awards violated such “public policy,” and, accordingly, both court refused to enforce the awards.14

An appeal to the Fifth Circuit in Asignacion was argued in September 2014.

The Supreme Court may yet grant my wish.

13 In Aggarao, the seafarer moved to vacate and the shipowner moved to confirm. The court noted, 2014WL 2014 WL 3894079 at *1 n.5, that the Convention did not provide for a motion to vacate an award, only a motion to enforce the award. The shipowner moved to enforce the award and dismiss the action, thereby providing the court with a procedural vehicle to review the award under Article V(2)(b). Similarly, the shipowner in Asignacion moved to confirm the award by way of defense to the U.S. action.

14 The court in Aggarao, 2014 WL 3894079 at *8, found that U.S. law applied under the tests laid out in Lauritzen v. Larsen, 345 U.S. 571 (1953) and Hellenic Lines v. Rhoditis, 398 U.S. 306 (1970). The court in Asignacion, 2014 WL 632177 at *6-7 and 10, found that the law of the flag, here the Marshall Islands, applied; however, since the Marshall Islands had incorporated the general maritime law of the U.S. into its law, the court rejected the argument that the arbitrator therefore violated the public policy of the Marshall Islands, not the public policy of the U.S., where enforcement was being sought and where the action was pending.