Jurisdiction and Forum Selection in International Maritime Law

Essays in Honor of Robert Force

Edited by

Martin Davies

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Professor Robert Force

Preface

Few, if any, people have had as much influence on American maritime law as Robert Force. He has left his mark on the law both directly, through his research and writing, which have often guided court opinions, and indirectly, through his teaching in Tulane Law School's Admiralty Law program, which has influenced hundreds of maritime lawyers now in practice all around the world. He was the founding Director of the Tulane Maritime Law Center, a position he held for twenty years, from 1984 to 2004. In those two decades, he transformed the Center from its fledgling beginnings into the pre-eminent site for maritime law scholarship in the United States.

Bob Force's influence on maritime law is not confined to the United States. He has taught or given public presentations in a dozen countries on five continents. He advised the governments of China and Panama on their respective Maritime Codes and was honored by the President of Panama with the Order of Balboa in recognition of his services to Panama maritime law and its legal community. His name is known wherever maritime law is studied.

Bob Force was born in Philadelphia, Pennsylvania and attended Temple University. He graduated with the degrees of B.S. and LL.B. before spending a year at the University of Adelaide Law School in Australia as a Fulbright Scholar. On his return to the United States, he completed an LL.M. degree in Comparative Law at New York University. He then clerked for the President Judge of the Pennsylvania Court of Common Pleas, the Hon. Joseph Sloane, and later for a federal district court judge, the Hon. Alfred L. Luongo of the U.S. District Court for the Eastern District of Pennsylvania. He was already teaching at law school while completing these judicial clerkships, and after one year in private practice, he became a full-time academic, beginning his career at Indiana University, Indianapolis. He moved to New Orleans in 1969, to take up a position at Tulane Law School, where he has taught ever since. He became Director of the Tulane Maritime Law Center on its creation in 1984 and has been Niels F. Johnsen Professor of Maritime Law since 1989, having been Thomas Pickles Professor of Law before the Johnsen chair was endowed.

Davies (ed.), *Jurisdiction and Forum Selection in International Maritime Law*, vii–viii

This book of essays is the product of a symposium held at Tulane University on September 30 and October 1, 2004, to honor Bob Force's 70th birthday. A distinguished group of international maritime lawyers came to New Orleans from Canada, China, Finland, New Zealand, Switzerland, South Africa and the United Kingdom to deliver draft papers and to engage in round-table discussions. The international visitors were joined by Professors Martin Davies and Athanassios Yiannopoulos from Tulane Law School and, of course, by Professor Force himself.

The general theme of jurisdiction and forum selection was chosen because it combines difficult theoretical issues with great practical significance. Forum selection in maritime cases has lately had a lower profile than substantive maritime law, mainly because of the work of UNCITRAL Working Group III on the proposed new carriage of goods convention still called (rather inelegantly), 'Draft instrument on the carriage of goods [wholly or partly] [by sea]'. Nevertheless, forum selection is just as important as substantive maritime law, if not more so, because it is the first and sometimes only point of engagement in international maritime litigation. In maritime law, as in many other fields of law, '[t]he battle over where the litigation occurs is typically the hardest fought and most important issue in a transnational case'.[1] The essays in this book provide a sustained analysis of that battle by leading maritime lawyers from around the world. The result is a fitting tribute to the work of our friend and colleague, Robert Force.

Martin Davies
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[1] D.W. Robertson & P.K. Speck, 'Access to State Courts in Transnational Personal Injury Cases: *Forum Non Conveniens* and Antisuit Injunctions' (1990) 68 *Texas Law Review* 937, 938.

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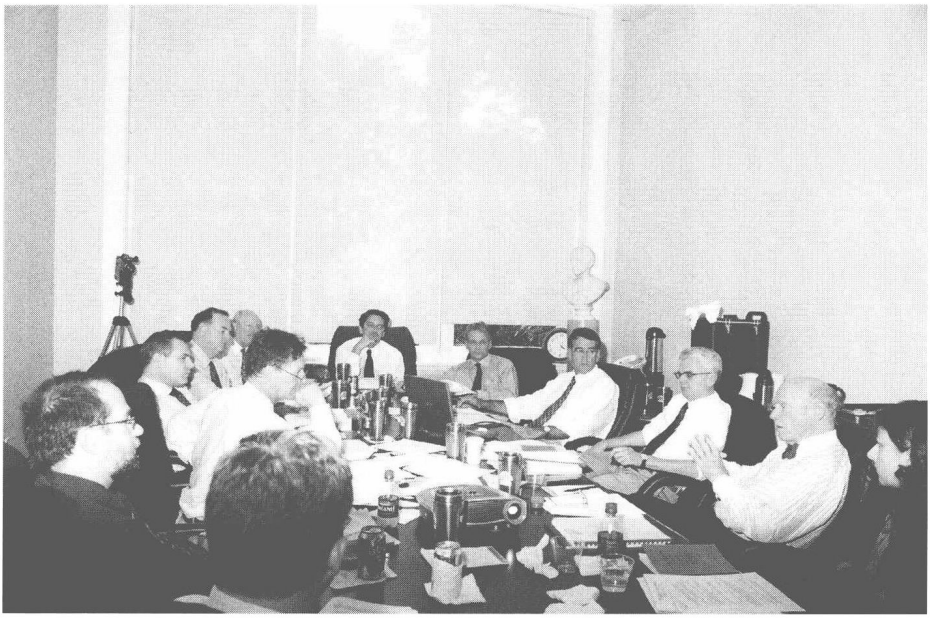

The contributors in conference: (from L to R) Paul Myburgh, Nigel Meeson, Peter Murray, Robert Force, Hilton Staniland, Martin Davies, Alexander von Ziegler, John Hare, Hannu Honka, William Tetley (speaking).

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Chapter 1
Forum Selection Clauses in International Maritime Contracts

*Robert Force and Martin Davies**

1. INTRODUCTION

As a rule, business entities negotiating commercial contracts may include terms on which they have reached agreement, so long as those terms are not prohibited by applicable law or public policy. This rule is based on several factors including the doctrine of 'freedom of contract' and the assumption that business entities are regarded as 'sophisticated' parties[1] who do not need special legal protections accorded to more vulnerable groups such as consumers and employees. Although we know as a fact that not all business entities are in all cases 'sophisticated', especially in regard to the legal implications of the terms they have agreed upon, nevertheless courts treat them as such. Perhaps this conclusion is based on an assumption that business people, even if they do not completely understand the legal implications of the terms of their agreements, have access to counsel who can provide that expertise during negotiations before a contract has become a legally binding instrument. It is convenient for courts to assume such sophistication in order to prevent every business person from asking a court to rewrite a contract to which he or she is a party with terms more favorable to his or her interests when, through hindsight, he or she has come to the realization that the bargain is a bad one. In extreme cases, fraud, mistake or overreaching the law does provide relief. More often than not,

* The authors gratefully acknowledge the research assistance of Richard Preston, Julie Batt, Matthew Guy, Benjamin Misko and Meghan Bishop, and the helpful advice of Adrian Briggs on some esoteric questions of English conflicts of laws.

[1] Courts will give substantial deference to arbitration clauses where forum selection was made in an arm's-length negotiation by experienced and sophisticated business people. *J B Harris Inc* v. *Razei Bar Industries Ltd*, 181 F 3d 82 (2d Cir 1999).

Davies (ed.), *Jurisdiction and Forum Selection in International Maritime Law*, 1–58

however, courts leave the parties with the benefits and burdens of their agreement. Thus, this paper accepts the fact that courts will regard business people who enter into commercial agreements as 'sophisticated' parties.

2. THE FOCUS OF THIS PAPER

The doctrine of freedom of contract permits business people to stipulate in their agreements their respective rights and liabilities as they see fit, even to the point of permitting a party to excuse non-performance or imperfect performance if the contract clearly so provides. Assume that a contract purports to absolve a manufacturer or supplier of goods from any liability to a business purchaser of the goods for any defect in those goods, whether attributable to negligence or otherwise. Why would any business purchaser agree to such terms? There may be many reasons, such as acquiring the goods or services at a lower cost and hedging against any defect with insurance, or, perhaps, the goods or services are in short supply and the manufacturer or provider can insist on such terms, etc. In the absence of public policy to the contrary, freedom of contract in a transaction where all parties are business people should allow such agreements.

This paper is not about freedom of contract as an abstract or general doctrine. It deals specifically with the use of forum selection and arbitration clauses in contracts. For purposes of this paper, we have treated forum selection clauses and arbitration clauses in much the same way.[2] The efficacy of such clauses will be discussed in regard to their applicability to third parties, their relation to substantive rights and adjudication of the merits of a dispute, the methods of asserting a forum selection or arbitration clause defense, and the appropriate legal basis for enforcing such clauses.

In international commercial agreements, forum selection and arbitration clauses have another dimension beyond the notion of freedom of contract. When parties from different countries enter into an agreement, there may be an inherent ambiguity as to the substantive law to be applied and the appropriate forum for resolving disputes. Choice of law and choice of forum clauses may eliminate this ambiguity so that the parties can know from the outset the rules that will be applied in resolving their disputes and the forum in which those disputes will be heard. Arbitration clauses provide parties with additional advantages, such as privacy, expertise, autonomy, reduction of expense, expedited resolution, etc. This paper accepts, in general, the validity and the utility of both forum selection and arbitration clauses.

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[2] However, in relation to terminology, we maintain a scrupulous distinction. In this paper, the expression 'forum selection clause' is used to refer only to choice-of-court clauses; the expression 'arbitration clause' is used for clauses choosing arbitration as the method of dispute resolution.

At the outset, however, we submit that there is a difference between a party's willingness to submit the resolution of disputes that arise under a contract to a specified decision maker and a party's willingness to surrender all rights to seek redress against another party. An agreement to submit a dispute to a specified decision maker directly contradicts any inference that the parties have agreed to give up all rights to relief, because they have specifically agreed that relief may be granted by a specified tribunal. The presence of a forum selection clause or arbitration clause in the contract implies that the parties recognize that one or the other may perform or fail to perform in a manner that the other party deems to be a breach of the agreement, that the aggrieved party, under these circumstances, may be entitled to redress, and, finally, that the aggrieved party will seek redress in the designated forum. Forum selection clauses should not be construed as a surrender of the right to redress. When parties include a forum selection clause in their agreement, this should be regarded as an *affirmation* of their right to seek redress. It is our position that forum selection clauses should never be manipulated or applied so as to deny an allegedly aggrieved party a remedy otherwise provided by law or worse yet to deny any remedy whatsoever.

When a shipowner or other carrier such as a charterer inserts a forum selection or arbitration clause into a contract for the carriage of goods by sea, what advantages might it seek? The objective may be to secure a neutral or experienced forum, a convenient forum, a familiar tribunal, a tribunal that will apply familiar law, a tribunal that will apply a law that precludes the assertion of certain claims against it, or, in the case of a clause that selects a tribunal based in the shipowner's or carrier's domicile, perhaps, more favorable treatment. On the other hand, when a forum selection or arbitration clause is part of a form document or contract of adhesion, to what does the other party agree? Should acceptance of the clause be regarded as anything more than an agreement to litigate or arbitrate before a selected tribunal in a selected forum? Should a forum selection clause be viewed as a waiver of substantive rights? For example, a third party indorsee of a bill of lading has usually not agreed to anything, so far as forum selection is concerned. It is bound by the bill of lading because it is the instrument under which it must sue. When a forum selection or arbitration clause is inserted in the bill of lading, the third party indorsee has yet to acquire any rights under the bill of lading. When a buyer and seller agree that the seller will arrange for transport of the goods, the buyer often does not know on which vessel the goods will be shipped. Even if, as a 'sophisticated' business person, the buyer should know that the transportation agreement between the seller and the carrier will probably contain a forum selection or arbitration clause because such clauses are so frequently employed, should that knowledge be tantamount to a waiver of substantive rights if it turns out that the selected forum does not recognize certain claims against certain parties? The consignee has no way of knowing whether the forum selection or arbitration clause will select Korea, Japan or China as the forum, or London or New York arbitration.

We submit that it is one thing to conclude that a third party indorsee must initiate proceedings in the selected forum, but it is another thing to say that it has thereby waived any rights not recognized in that forum. This places too much of a burden on the so-called 'sophisticated' business person.

3. THE POSITION OF THE UNITED STATES SUPREME COURT ON FORUM SELECTION AND ARBITRATION CLAUSES

There are three decisions by the United States Supreme Court that have a direct bearing on the validity and enforceability of forum selection and arbitration clauses in US courts. The first case is *M/S Bremen* v. *Zapata Off-Shore Co,*[3] where the Court upheld the validity of a forum selection clause and placed the burden of demonstrating the unreasonableness or unjustness of the clause on the party resisting its enforcement. The lower federal courts apply the *The Bremen* as follows: '[Forum selection] clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances'.[4] Furthermore, the lower federal courts have interpreted the reference to 'unreasonableness' in *The Bremen* as follows:

> Unreasonableness potentially exists where (1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching; (2) the party seeking to escape enforcement will, for all practical purposes, be deprived of his day in court because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state.[5]

The second case is *Vimar Seguros y Reaseguras SA* v. *M/V Sky Reefer.*[6] Prior to that decision, a majority of federal courts followed the then leading decision in *Indussa Corp* v. *SS Ranborg,*[7] which refused to enforce a *foreign* forum selection clause in cases to which the US Carriage of Goods by Sea Act (COGSA)[8] applied. It was believed that such clauses placed a barrier to enforcing liability by imposing the costs of litigating in a foreign forum, thereby enabling carriers to settle cases

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[3] 407 US 1, 92 SCt 1907, 32 L Ed 2d 513 (1972).

[4] *Union Steel of America Co* v. *M/V Sanko Spruce*, 14 F Supp 2d 682 (DNJ 1998), quoting from *Foster* v. *Chesapeake Insurance Co*, 933 F 2d 1207 (3d Cir 1991).

[5] *Union Steel America Co* v. *M/V Sanko Spruce*, 14 F Supp 2d 682 (DNJ 1998), quoting from *Haynsworth* v. *The Corporation*, 121 F 3d 956 (5th Cir 1997).

[6] 515 US 528, 115 SCt 2322, 132 L Ed 2d 462 (1995).

[7] 377 F 2d 200 (2d Cir 1967).

[8] 46 app USC §1300 *et seq.*

at a lower amount than if the shipper could sue in a convenient US forum. Such clauses also made it uncertain as to whether or not a foreign court would apply law that would lower the carrier's liability to less than COGSA limits. Even where a foreign court was willing to apply COGSA, there was no certainty that it would apply COGSA in the way an American court would, subject to the ultimate control of the Supreme Court.

Sky Reefer dealt with the enforceability of an arbitration clause, not a forum selection clause.[9] Nevertheless, in upholding the arbitration clause, the Court undermined the bases of *Indussa*, which had dealt with forum selection clauses. Although COGSA renders null and void any clause that purports to deprive a shipper of rights conferred by COGSA or that lowers a carrier's liability to a shipper under COGSA,[10] an arbitration clause does not prescribe the applicable substantive law. Because arbitration clauses merely prescribe the tribunal that will resolve the dispute and not the substantive law that the tribunal will apply, such clauses do not violate COGSA's prohibition of exculpatory clauses. The prohibition against exculpatory clauses relates to the substantive rights and liabilities established by COGSA and not to the expense and inconvenience encountered in seeking a remedy. The question in such cases 'is whether the substantive law to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees'.[11] In this respect, the Court found that it would be premature to conclude that the arbitral tribunal would apply a law less favorable to the shipper than COGSA. The Court also found that skepticism of foreign tribunals 'must give way to contemporary principles of international comity and commercial practice'.[12]

It is important to note that in *Sky Reefer*, the district court had not dismissed plaintiff's suit, but had merely stayed it pending arbitration. In this regard, the Supreme Court noted: '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 rights to pursue statutory remedies ..., we would have little hesitation in condemning the agreement as against public policy'.[13]

Although the Supreme Court's decision in *Sky Reefer* dealt with an arbitration clause, virtually every federal court that has considered the issue has concluded that its reasoning has either overruled *Indussa* or so weakened its authority that the

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9 For an examination of the US provisions governing enforcement of forum selection clauses and arbitration clauses, see Davies, 'Forum Selection Clauses in Maritime Cases' (2003) 27 Tul Mar LJ 367, 369-76 (forum selection clauses); Davies, 'Litigation Fights Back: Avoiding the Effect of Arbitration Clauses in Charterparty Bills of Lading' (2004) 35 JMLC 617, 630-37 (arbitration clauses).

10 46 app USC §1303(8), the equivalent of the Hague Rules, Art. 3, r 8.

11 *Sky Reefer*, 515 US 528, 539 (1995).

12 *Id.* at 537.

13 *Id.* at 540.

decision is now irrelevant.[14] There are several reasons for this, the most important being that the Supreme Court characterized 'foreign arbitration clauses' as being 'but a subset of foreign forum selection clauses'.[15] Justice O'Connor, in her concurring opinion, and Justice Stevens clearly understood the majority decision as reaching forum selection clauses in general.[16]

The third case, *Carnival Cruise Lines Inc* v. *Shute*,[17] held that a forum selection clause contained in the ticket of a cruise passenger was enforceable despite the fact that the clause was contained in an adhesion contract that had not been bargained for and was not subject to bargaining. The holding in this case has even more significance in the commercial context. As one court has stated: 'Where the agreement is "an arms'-length deal, between sophisticated entities", the lack of "actual negotiations over the [forum selection] clause does not affect its validity"'.[18]

4. APPLICATION OF THE RELEVANT PRINCIPLES BY LOWER FEDERAL COURTS

Many federal courts resolve pleas of dismissal based on forum selection clauses in a cut and dried manner. They reason that the parties agreed to present their disputes to a selected tribunal; plaintiff brought this action in a non-selected tribunal and has attempted to circumvent the agreement; therefore the action must be dismissed. To most US courts, it matters not that enforcement of a forum selection clause will not only send a case away, but that it may have a profound effect on a party's rights. For example, the overwhelming majority of US courts have extended the holding of the United States Supreme Court in the *Sky Reefer* case, in which the Court enforced an arbitration clause, to the enforcement of forum selection clauses despite the fact that the foreign forum will not permit recovery *in rem* and that, ultimately, it may dismiss plaintiff's claim as being time-barred, despite the fact that the original claim was timely filed.[19] There is also a possibility that the

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[14] *Sky Reefer* analysis 'almost universally' applies to foreign forum selection clauses. *Nippon Fire & Marine Insurance Co* v. *M/V Coral Halo*, 2000 WL 174894, 2004 AMC 273 (ED La 2000).

[15] *Sky Reefer*, 515 US 528, 534 (1995).

[16] *Firemen's Fund Insurance Co* v. *MV DSR Atlantic*, 131 F 3d 1336 (9th Cir 1997); *Mitsui & Co (USA)* v. *Mira M/V*, 111 F 3d 33 (5th Cir 1997).

[17] 499 US 585, 111 SCt 1522, 113 L Ed 2d 622 (1991).

[18] *Union Steel of America Co* v. *M/V Sanko Spruce*, 14 F Supp 2d 682 (DNJ 1998), quoting from *Foster* v. *Chesapeake Insurance Co*, 933 F 2d 1207 (3d Cir 1991). A forum selection clause will be enforced even if part of an adhesion contract which does not undermine the presumption of validity. *Firemen's Fund Insurance Co* v. *MV DSR Atlantic*, 131 F 3d 1336 (9th Cir 1997); *Mitsui & Co (USA)* v. *Mira M/V*, 111 F 3d 33 (5th Cir 1997).

[19] In some cases the *in rem* action has been reduced to mere procedural device to provide security. *Thyssen Inc* v. *Calypso Shipping Corp*, 310 F 3d 102, 2002 AMC 2332 (2d Cir 2002). In *Kukje Hwajae Insurance Co Ltd* v. *M/V Hyundai Liberty*, 294 F 3d 1171 (9th Cir 2002), the court reiterated the conclusion it