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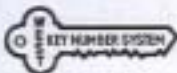
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gations that are recognized as actionable under Louisiana law. As such, the Court finds no fraudulent joinder and, therefore, lacks diversity jurisdiction.

III. *Costs, Expenses, and Attorney Fees*

[6,7] Plaintiff asks this Court to award attorney fees and costs incurred as a result of defendants' improvident removal. Under 28 U.S.C. § 1447(c) "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." This Court has the discretion to make such an award. *Miranti v. Lee*, 3 F.3d 925, 929 (5th Cir.1993). However, in order to award attorney fees the Court must find that the defendant acted improperly, taking into account such things as the state of the law and defendants' tactics. *Id.* at 928. Because defendants' removal rests on a colorable claim for the extension of law, indeed, a conflicting claim about what is the law, the Court denies the request for attorney fees. However, § 1447(c) instructs that a defendant may also be made responsible for only the costs associated with removal.

Accordingly, plaintiff's motion to remand is GRANTED and defendants are ordered to bear the costs of this proceeding.



JAPAN SUN OIL CO., LTD.

v.

The M/V MAASDIJK, its engines, tackle, apparel, furniture, etc. in rem, and K/S Lisbet, Bergen Ship Management AS, Univan Management Services AS, Vulcanus, Nedlloyd Tankers, B.V. Seachem Tankers (USA), Inc. and Iino Kaiun Kaisha Ltd. (Tokyo).

Civ. A. No. 94-1383.

United States District Court,
E.D. Louisiana.

Sept. 29, 1994.

Action was brought against vessel in rem and alleged owners, operators, charter-

ers and/or managers of vessel for damages to cargo of rubber process oil. Defendant moved to compel and to stay litigation pending arbitration. The District Court, Berrigan, J., held that: (1) there was agreement in writing to arbitrate dispute and written agreement was enforceable; (2) Carriage of Goods by Sea Act (COGSA) did not preclude enforcement of foreign arbitration clause contained in bills of lading; and (3) action would be stayed pending outcome of arbitration in London.

Motion granted.

1. Arbitration ⇄ 1.2

Agreements to arbitrate are heavily favored and rigorously enforced by the courts.

2. Arbitration ⇄ 7.1

Commerce ⇄ 80.5

As matter of federal law, any doubts concerning scope of arbitrable issues should be resolved in favor of arbitration and this is especially true in agreements affecting interstate and foreign commerce.

3. Shipping ⇄ 39(7)

Federal Arbitration Act (FAA) provided district court with general authority to order compulsory arbitration in London pursuant to the applicable bills of lading and charter parties requiring compulsory arbitration in London and to stay, pending disposition of London arbitration, action brought against the vessel in rem and alleged owners, operators and charterers of vessel for damage to cargo of rubber process oil. 9 U.S.C.A. §§ 3, 4.

4. Treaties ⇄ 8

Convention on Recognition and Enforcement of Foreign Arbitral Awards requires courts to enforce any written agreement which provides arbitration as mechanism to resolve international commercial disputes. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. I et seq., 9 U.S.C.A. § 201 note.

5. Arbitration \Rightarrow 1.1, 3.1

Whether parties should generally be compelled to arbitrate involves two-step inquiry; court must determine whether parties agreed to arbitrate the dispute and must then consider whether any federal statute or policy renders claims nonarbitrable.

6. Treaties \Rightarrow 8

Limited inquiry into validity of arbitration is appropriate under Convention on Recognition and Enforcement of Foreign Arbitral Awards: is there agreement in writing to arbitrate dispute; does agreement provide for arbitration in territory of Convention signatory; does agreement to arbitrate arise out of commercial legal relationship; and is party to agreement not an American citizen.

7. Shipping \Rightarrow 39(7)

Since tanker bills of lading expressly stated on their face that all terms whatsoever of the said contract of affreightment/charter party including arbitration clause apply and govern rights of the parties concerned in shipment of rubber process oil, there was agreement in writing to arbitrate dispute regarding rubber process oil which allegedly arrived at its destination short in quantity, contaminated and severely damaged and written agreement was enforceable because it provided for arbitration in territory of signatory to Convention on Recognition and Enforcement of Foreign Arbitral Awards, arose out of commercial legal relationship, and parties to agreement were not American citizens.

8. Shipping \Rightarrow 106(1)

Carriage of Goods by Sea Act (COGSA) applies to every bill of lading which is evidence of a contract for the carriage of goods by sea to or from parts of the United States in foreign trade. Carriage of Goods by Sea Act, 46 App.U.S.C.A. § 1300.

9. Shipping \Rightarrow 39(4)

Charter parties, without more, are excluded from Carriage of Goods by Sea Act (COGSA), but any bill of lading issued under or pursuant to charter party is included within term "contract of carriage" and if bills of lading are issued in case of ship under a charter party, they shall comply with terms

of Act. Carriage of Goods by Sea Act, §§ 1(b), 5, 46 App.U.S.C.A. §§ 1301(b), 1306.

10. Shipping \Rightarrow 39(4)

Carriage of Goods by Sea Act (COGSA) applied *ex proprio vigore* where bills of lading and charter parties expressly provided that they would be governed by Act. Carriage of Goods by Sea Act, 46 App.U.S.C.A. § 1300 et seq.

11. Shipping \Rightarrow 39(7)

Carriage of Goods by Sea Act (COGSA) did not preclude enforcement of foreign arbitration clause contained in bills of lading and action regarding damage to cargo of rubber process oil would be stayed pending outcome of arbitration in London and district court would retain its jurisdiction over dispute and its authority to address matters unresolved through arbitration, if any. Carriage of Goods by Sea Act, 46 App.U.S.C.A. § 1300.

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Robert Taylor Lemon, II, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, LA, for Iino Kaiun Kaisha, Ltd. Tokyo.

BERRIGAN, District Judge.

The defendant Iino Kaiun Kaisha Ltd. (Tokyo) ("IKK") filed a Motion to Compel and to Stay Litigation pending Arbitration which was submitted on briefs. Having considered the memoranda of counsel, the exhibits, the record, and the applicable law, the Court GRANTS the IKK motion for the following reasons:

BACKGROUND

Plaintiff's cargo of rubber process oil, which had been loaded aboard the M/V MAASDIJK at Burnside, Louisiana, allegedly arrived in Yokohama, Japan "short in quantity and contaminated and damaged severely." Document 1, p. 4. In this court, plaintiff, a corporation with its principal place of business in Japan, sued the vessel *in rem*, and six other defendants *in personam* who allegedly are the owners, operators, charterers and/or managers of the M/V MAASDIJK. The defendants are all corporations organized and existing under the laws of unspecified foreign nations.

ANALYSIS

In this motion, IKK contends that the applicable bills of lading and charter parties require compulsory arbitration in London. In opposition to IKK's motion, the plaintiff contends that the arbitration clauses in the bills of lading and charter parties are vague and unenforceable and that their enforcement, if any, will violate the Carriage of Goods By Sea Act ("COGSA").

[1, 2] Agreements to arbitrate are heavily favored and rigorously enforced by the courts. See e.g. 9 U.S.C. § 1 *et seq.*; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 185 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444 (1985); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765

1. 9 U.S.C. § 3 provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial on the action until such arbitration has been had in accordance with the terms of the agreement, providing that the applicant for the stay is not in default in proceeding with such arbitration.

2. 9 U.S.C. § 4 provides:

The Court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply

(1983); *Southern Constructors Group v. Dynalectric Co.*, 2 F.3d 606, 610, n. 15 (5th Cir.1993); *Hartford Lloyd's Insurance Co. v. Teachworth*, 898 F.2d 1058, 1061 (5th Cir. 1990). 9 U.S.C. § 2 provides:

A written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or inequity for the revocation of any contract.

"[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . ." *Moses H. Cone Memorial Hospital*, 460 U.S. at 24, 103 S.Ct. at 941. This is especially true in agreements affecting interstate and foreign commerce.

[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement [for foreign arbitration], even assuming that a contrary result would be forthcoming in a domestic context.

Mitsubishi Motors Corp. 473 U.S. at 629, 105 S.Ct. at 3355 (1985).

[3-6] The Federal Arbitration Act ("FAA"), specifically 9 U.S.C. § 3¹ and 9 U.S.C. § 4,² provides this Court with the general authority to order compulsory arbitration in London and to stay these proceedings pending the disposition of the London

therewith is not an issue, the Court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

This language requires an evidentiary hearing when there is a dispute over an agreement to arbitrate, but appellate courts have not held district courts to the letter of the law where "the parties were afforded the opportunity, of which they . . . took full advantage, exhaustively to brief the issues to the district court . . ." *Commerce Park at DFW Freeport v. Mardian Const. Co.*, 729 F.2d 334, 340 (5th Cir.1984); *Accord Mowbray v. Moseley, Hallgarten, Estabrook & Wooten, Inc.*, 795 F.2d 1111, 1115 n. 7 (1st Cir.1986). Such is the case here.

arbitration. The Convention on Recognition and Enforcement of Foreign Arbitral Awards ["Convention"] also requires Courts to enforce any written agreement which provides arbitration as the mechanism to resolve international commercial disputes. 9 U.S.C. § 201. Whether parties should generally be compelled to arbitrate involves a two-step inquiry. "First, the court must determine whether the parties agreed to arbitrate the dispute. [*Mitsubishi Motors Corp.*, 473 U.S. at 625, 105 S.Ct. at 3353.] ... [Then] it must consider whether any federal statute or policy renders the claims nonarbitrable. *Id.* at 628, 105 S.Ct. at 3355." *R.M. Perez & Assoc., Inc. v. Welch*, 960 F.2d 534, 538 (5th Cir.1992). A limited inquiry into the validity of arbitration is also appropriate under the Convention:

- (1) is there an agreement in writing to arbitrate the dispute ...;
- (2) does the agreement provide for arbitration in the territory of a Convention signatory;
- (3) does the agreement to arbitrate arise out of a commercial legal relationship; and
- (4) is a party to the agreement not an American citizen?

Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co. (Pemex), 767 F.2d 1140, 1144 (5th Cir.1985).

In the case at bar, the Tanker Bills of Lading between Ergon, Inc., as shipper, and Japan Sun Oil Company ("Japan Sun"), as consignee, two of which were dated at Burnside, Louisiana on March 24, 1993, and one of which was dated at Burnside, Louisiana on April 27, 1993, provide for arbitration:

3. ARBITRATION. *Any and all differences and disputes of whatsoever nature arising out of this Bill of Lading shall be put to Arbitration in the City of New York or in the City of London, whichever place is specified in the Charter Party and in accordance with the Arbitration clause therein.* (Emphasis added.)

Document 10, Exhibit A. The face of each Tanker Bill of Lading provides that

[t]he shipment is carried under and pursuant to the terms of the Contract of Af-

freightment/Charter Party dated FEB. 12, 1993 at AS PER CHARTER PARTY between SEACHEM TANKERS LTD, MONROVIA and IINO—KAIUN KAI-SHA as Charterer, and *all the terms whatsoever of the said Contract of Affreightment/Charter Party including the Arbitration clause, cargo lien clause, and the conditions appearing on both sides of this Bill of Lading to apply and to govern the rights of the parties concerned in this shipment.* A copy of a Contract of Affreightment/Charter Party may be obtained from the Shipper or the Charterer upon request. (Emphasis added.)

Id. The February 12, 1993, Tanker Voyage Charter Party between SEACHEM TANKERS LTD, MONROVIA, LIBERIA and IKK provides:

24. ARBITRATION *Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final....* (Emphasis added.)

Document 9, Exhibit B. The same language is contained in the February 12, 1993, Tanker Voyage Charter Party between IKK and Japan Sun. *Id.*, Exhibit C. In neither Charter Party is New York or London designated in Part I as the place of arbitration. However, a February 16, 1993, addendum to the February 12, 1993, Tanker Voyage Charter Party between SEACHEM TANKERS LTD, MONROVIA, LIBERIA and IKK, specifies that "[t]he place of General Average and arbitration shall be London in accordance with English law." *Id.*, Exhibit B. Plaintiff contends that it did not agree to and had no notice of the addendum, and therefore should not have to arbitrate this dispute in London.

"Arbitration should not be denied 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute

at issue....' Doubts as to arbitrability are to be resolved in favor of arbitration." (Citations omitted.) *Commerce Park at DFW Freeport v. Mardian Construction Co.*, 729 F.2d 334, 338 (5th Cir.1984).

[7] The February 12, 1993, Charter Party between Seaschem Tankers Ltd. and IKK is the only Charter Party expressly referenced on the face of the Tanker Bills of Lading of March 24, 1993 and April 27, 1993, to which Japan Sun is the consignee. Those Tanker Bills of Lading expressly state on their face that "all the terms whatsoever of the said Contract of Affreightment/Charter Party including the Arbitration clause ... apply and ... govern the rights of the parties concerned in this shipment." *Id.* That would include the addendum of February 16, 1993, which designates London as the place of arbitration. Accordingly, the Court finds that there is an agreement in writing to arbitrate the dispute, and that written agreement is enforceable because it provides for arbitration in the territory of a Convention signatory, it arises out of a commercial legal relationship, and the parties to the agreement are not American citizens.

Having found that an agreement to arbitrate exists, the Court now addresses the second inquiry: whether any federal statute or policy renders the claims nonarbitrable. In this case, the plaintiff particularly contends that compulsory arbitration in London will violate COGSA.

Under ... [the FAA], the party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute.

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483, 109 S.Ct. 1917, 1931, 104 L.Ed.2d 526 (1989).

[8-10] "COGSA was passed in 1936 as the American enactment of the Hague Rules, and was part of an international effort to achieve uniformity and simplicity in bills of lading used in foreign trade." (Citations omitted.) *Vimar Seguros Y Reaseguros, S.A. v. M/V SKY REEFER*, 29 F.3d 727, 728

(1st Cir.1994). COGSA applies to "[e]very bill of lading ... which is evidence of a contract for the carriage of goods by sea to or from parts of the United States in foreign trade...." 46 U.S.C. § 1300." *Id.* Charter parties, without more, are excluded from COGSA, but "any bill of lading ... issued under or pursuant to a charter party...." is included within the term "contract of carriage" and "if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter." 46 U.S.C. §§ 1301(b) and 1305. Accordingly, COGSA applies *ex proprio vigore*.

In this case, the particular bills of lading and the charter parties also expressly provide that they shall be governed by COGSA. The Paramount Clauses of the Tanker Bills of Lading state that the bills of lading

shall be governed by, and have effect subject to, the rules contained in the International Convention for the Unification of Certain Rules relating to Bills of Lading ... (hereafter the "Hague Rules") as amended ... (hereafter the Hague-Visby Rules). Nothing contained herein shall be deemed to be either a surrender by the carrier of any of his rights or immunities or any increase of any of his responsibilities or liabilities under the Hague-Visby Rules.

Document 10, Exhibit A, Paramount Clause. The Clauses Paramount of the charter parties relative to the "Issuance and Terms of Bills of Lading" state that the Bills of Lading "shall have effect subject to the provision of the Carriage of Goods by the Sea Act of the United States...." *Id.*, Exhibits B and C.

Plaintiff contends that enforcement of clauses in the Bills of Lading and Charter Parties which make arbitration compulsory in London will have the effect of diminishing the shippers' liability and therefore are null and void under 46 U.S.C. § 1303(8) ["Any clause, covenant, or agreement in a contract of carriage ... lessening such liability otherwise than as provided in this chapter shall be null and void and of no effect."] There are no Fifth Circuit cases on point. Both *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir.1988) and *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826

F.2d 1441 (5th Cir.1987), cited by the plaintiff, involve forum selection clauses, not arbitration clauses.² *M/V Luo Fu Shan* and *M/V Finnrose* also both relied on *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir.1967), a forum selection case from the Second Circuit which decided that a clause in the bill of lading, requiring suit to be brought in Norway, violated COGSA. Despite a footnote in *Indussa* to the contrary,⁴ a few dis-

3. In *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir.1988), the Fifth Circuit held that the forum selection clause in the bill of lading requiring suit to be brought in The People's Republic of China, the carrier's home forum, lessened the carrier's liability and violated COGSA. In *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441 (5th Cir.1987), the forum selection clause in a bill of lading for a merry-go-round shipped from England to Florida, which provided that all disputes were to be decided in Finland under Finnish law, violated COGSA.

4. Our ruling does not touch the question of arbitration clauses in bills of lading which require this to be held abroad. The validity of such a clause in a charter party, or in a bill of lading effectively incorporating such a clause in a charter party, has been frequently sustained. See *Leovy & Co. v. S.S. Le Moyne D'Iberville*, 253 F.Supp. 396 (S.D.N.Y.1966), appeal dismissed for want of jurisdiction, 372 F.2d 123 (2d Cir.1967), slip opinions 1103, and cases cited. Although the Federal Arbitration Act adopted in 1925, 43 Stat. 883, validated a written arbitration provision "in any maritime transaction", § 2, and defined that phrase to include "bills of lading of water carriers," § 3, COGSA, enacted in 1936, 49 Stat. 1207, made no reference to that form of procedure. If there be any inconsistency between the two acts, presumably the Arbitration Act would prevail by virtue of its reenactment as positive law in 1947, 61 Stat. 669.....

Indussa Corporation v. S.S. Ranborg, 377 F.2d 200, 204, n. 4 (2d Cir.1967).

5. *State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 838 F.2d 1576 (11th Cir.1988), is distinguishable on its facts. The *Wesermunde* bills of lading made no reference to arbitration. The *Wesermunde* court found that State Establishment had not been given actual notice of the arbitration provision in the charter party, and, while the parties had expressly agreed to COGSA's protections, they had never expressly agreed to foreign arbitration. 838 F.2d at 1582.

6. *Organes Enterprises, Inc. v. M/J Khalij Frost*, 1989 A.M.C. 1460, 1989 WL 37660 (S.D.N.Y. 1989), is distinguishable both on the facts and on the law. In *M/J Khalij Frost*, New Jersey corporations sued pursuant to a bill of lading which

provided for London arbitration. The bill of lading made no reference to any charter party but was only for common carriage. The bill of lading form to be used in the event of a chartering was not filled out. The New York district court found that COGSA applied and the foreign arbitration clause was null and void because it lessened the alleged liability of the defendants in this case. *Id.* at 1460. The New York district court in *Khalij Frost* provided a four-point rationale for its decision:

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First, a foreign arbitration clause, like a foreign jurisdictional clause, could limit an American plaintiff's ability to enforce effectively a carrier's liability and cause such plaintiff to agree to an otherwise unacceptable settlement. For example, in addition to travel expense, "[t]he expense alone of obtaining [foreign] counsel will assure that many smaller claims will be foregone." Second, "the cargo claimant will have little assurance that the arbitrators will enforce COGSA. Nor can he be confident that the U.S. court in which the action is brought will ensure that the arbitrator will enforce COGSA." Third, "arbitrators' decisions are rarely explained. And courts do not vacate the arbitrators' awards except on extreme grounds, such as misconduct or manifest disregard for the law." Fourth, an arbitrator is not required to apply the established rules of evidence, and may consider inadmissible evidence such as hearsay. (Citations omitted.)

Khalij Frost, 1989 A.M.C. at 1463.

7. *Siderius, Inc. v. M.V. "Ida Prima"*, 613 F.Supp. 916 (S.D.N.Y.1985), the district court found that the owner had relinquished whatever rights it had to arbitration by subsequent agreements that it made with the plaintiff. Notwithstanding that fact, the *Siderius* court appeared reluctant to order arbitration for a number of fact-specific reasons. Apart from its general concern that compulsory arbitration might deprive the cargo consignee of the right to bring the action in the United States courts, the court questioned whether the arbitration clause in the charter party applied to the bill of lading and whether the consignee had notice of the arbitration provision where no reference was made to arbitration in the bill of lading itself. In this case, the bill of lading clearly references arbitration.

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F.Supp. 1314 (W.D.Wash.1979).⁸ It is to these cases that the plaintiff looks for support in opposing the motion to compel arbitration. The Court does not find them persuasive.

In light of the subsequent United States Supreme Court decisions,⁹ other district courts have questioned¹⁰ or limited¹¹ many of the cases since *Indussa* which have voided foreign arbitration clauses because of COGSA. Most recently, the line of cases spawned by *Indussa* was expressly rejected by the First Circuit in favor of those federal decisions, including one from this Circuit, which have upheld foreign arbitration clauses in bills of lading subject to COGSA. *M/V SKY REEFER*, *supra*.¹² The First Circuit upheld a foreign arbitration clause against a COGSA challenge, based on its belief that "the FAA alone governs the validity of arbi-

tration clauses, both foreign and domestic, and consequently removes them from the grasp of COGSA." *M/V SKY REEFER*, 29 F.3d at 731. To reach that decision, the First Circuit first looked to general principles of statutory analysis: "a later enacted statute generally limits the scope of an earlier statute if the two statutes conflict ... [and] where two statutes conflict, regardless of the priority of enactment, the specific statute ordinarily controls the general." (Citations omitted.) *Id.*

With respect to the former canon, the FAA must be given priority over COGSA in light of the FAA's reenactment in 1947, eleven years after COGSA was passed. Similarly the latter canon suggests that the FAA be given effect. Section 3(8) of COGSA, which voids any clause in a bill of

8. In *Pacific Lumber & Shipping Company, Inc. v. Star Shipping A/S*, 464 F.Supp. 1314 (W.D.Wash. 1979), the Court denied a motion for stay of action pending arbitration because the bills of lading were contracts of adhesion. The evidence established that the shippers had not received the completed bills of lading until after the *Star Clipper* had sailed, that the "London arbitration clause" was inserted by the defendant without discussion, and that the shippers had no option to delete the clauses.

9. *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991) enforced a forum selection clause in a passenger contract of passage. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) upheld an arbitration clause in an international commercial agreement. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) enforced forum selection clauses in a maritime contract.

10. See e.g. *Citrus Marketing Bd. v. M/V Ecuadorian Reefer*, 754 F.Supp. 229, 233 (D.Mass.1990)

Of the four reasons set forth in the *M/V Khalij Frost* and *M/V Jda Prima* decisions, the first reason merely deals with the inconvenience of the foreign forum for an American plaintiff (a concern that is not even present in this case since neither of the plaintiffs is an American corporation), the next two reasons reflect mistrust of arbitrators and the last reason indicates mistrust of the arbitration process. Since the Supreme Court has clearly rejected such mistrust of arbitrators and the arbitration process as the basis for a court's refusal to enforce contractual arbitration clauses, I conclude that the above cases are inconsistent with the commands of the Court and do not

provide adequate support for plaintiffs' position.

Accord Fabrica De Tejidos La Bellota S.A. v. M/V MAR, 799 F.Supp. 546, 561 (D.V.I.1992) ("Carnival calls into question earlier judicial views that forum selection clauses invariably tend to lessen a carrier's liability so as to violate Article 3(8).")

11. See e.g. *Alicentro Div. Dell'Alunisse Italia S.P.A. v. M/V Hafnia*, 785 F.Supp. 155 (M.D.Fla. 1991)

The *Wesermunde* court held when a private contract of carriage incorporates COGSA, as in the case at bar, the parties may expressly agree to arbitrate disputes in a foreign country having no nexus to the transaction, and thus forgo COGSA's protection, only if the parties have actual notice of the arbitration provision.

As noted above, the parties made specific reference to the arbitration provision of the charter party in the hand-typed incorporating clause of the bill of lading.

Id. at 157.

12. See, e.g. *Nissho Iwai Amer. Corp. v. M/V Sea Bridge*, 1991 A.M.C. 2070, 1991 WL 182117 (D.Md.1991); *Citrus Mktg. Bd. v. M/V Ecuadorian Reefer*, 754 Supp. 229 (D.Mass.1990); *Travelers Indemn. Co. v. M/V Mediterranean Star*, 1988 A.M.C. 2483, 1988 WL 78363 (S.D.N.Y.1988); *Mid South Feeds, Inc. v. M/V Aqua Marine*, 1988 A.M.C. 437 (S.D.Ga.1986); *Midland Tar Distillers, Inc. v. M/T Lotos*, 362 F.Supp. 1311, 1315 (S.D.N.Y.1973); *Mitsubishi Shoji Kaisha Ltd. v. MS Galini*, 323 F.Supp. 79, 83-84 (S.D.Tex.1971); *Kurt Orban Co. v. S/S Clymenia*, 318 F.Supp. 1387, 1390 (S.D.N.Y.1970).

Vimar Seguros Y Reaseguros, S.A. v. M/V SKY REEFER, 29 F.3d 727, 731 (1st Cir.1994).

lading that "lessens" the carrier's liability, makes no reference to arbitration, or for that matter, forum selection clauses. Conversely, the FAA specifically validates arbitration clauses contained in maritime bills of lading. See 9 U.S.C. § 1, 2.

Id. The *M/V SKY REEFER* court then delineated a distinction between forum selection clauses and arbitration clauses:

"[T]here was no compelling congressional mandate [in forum selection cases] in favor of giving effect to agreements to litigate before foreign tribunals" (*Mitsubishi Shoji Kaisha Ltd. v. MS Galini*, 323 F.Supp. [79.] 83 [(S.D.Tex.1971)¹³] "... [and] unlike a foreign forum selection clause, an agreement to arbitrate does not deprive a federal court of its jurisdiction over the underlying dispute...." *MS Galini*, 323 F.Supp. at 83.

M/V SKY REEFER, 29 F.3d at 732. The First Circuit and earlier district courts also were mindful of the United States Supreme Court decisions validating the strong federal policy favoring arbitration.

American courts' mistrust of foreign courts is a driving force in the *Indussa* court's decision to invalidate foreign choice-of-forum clauses, is an inappropriate consideration in the context of arbitration. See *Mitsubishi Motors*, 473 U.S. at 626-27, 105 S.Ct. at 3354 (We are "well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.")....

M/V SKY REEFER, 29 F.3d at 732.

[11] Accordingly, this Court finds that COGSA does not preclude enforcement of

13. In *Mitsubishi Shoji Kaisha Ltd. v. MS Galini*, 323 F.Supp. 79 (S.D.Tex.1971), a shipment of Mexican maize, loaded at a Texas port, was allegedly contaminated when the cargo was discharged in Japan. The Charter Party provided for arbitration in London. Plaintiff, a Japanese concern, argued that the arbitration clause conflicted with COGSA, 46 U.S.C. § 1303(8) and relied heavily on *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2nd Cir.1967) and *Carbon Black Export v. The SS Monrosa*, 254 F.2d 297 (5th Cir.1958), cert. dismissed, 359 U.S. 180, 79 S.Ct. 710, 3 L.Ed.2d 723 (1959), cases in which the court "declined to enforce an agreement to litigate, in

the foreign arbitration clause contained in the Bills of Lading and that this action should be stayed pending the outcome of arbitration.

In the latter part of its memorandum in opposition to the motion to compel arbitration, plaintiff appeals to principles of fairness and equity because plaintiff alleges that the ocean carrier will raise a statute of limitations defense to the London arbitration. "[I]n passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate." *Commerce Park*, 729 F.2d at 338, quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 87 S.Ct. 1801, 1806, 18 L.Ed.2d 1270 (1967). "[M]atters of procedural arbitrability, such as, *inter alia*, whether the request for arbitration was timely under the arbitration agreement, are for the arbitrator to decide." *Commerce Park*, 729 F.2d at 339, n. 5. See also *Sedco*, 767 F.2d at 1151, n. 29; *Smith Barney Shearson, Inc. v. Boone*, 838 F.Supp. 1156, 1159 (N.D.Tex.1993). *Accord, Office of Supply Gov. of Rep. of Korea v. New York Navigation Co., Inc.*, 469 F.2d 377, 380 (2d Cir.1972) ("[I]t is for the arbitrators, not the court, to decide whether a claim is time-barred by their agreement"); *Lowry & Co. v. S.S. Le Moyne D'Iberville*, 253 F.Supp. 396, 399 (S.D.N.Y.1966) ("The court having found the existence of a valid arbitration provision, all other issues, including but not limited to interpretation and limitations, are for the arbitrators and not the court.")¹⁴

Notwithstanding, in granting the motion to stay, the Court retains its jurisdiction over

the event of a dispute, in the courts of a foreign country." 323 F.Supp. at 83. The *Mitsubishi Shoji Kaisha* court granted the charterer's motion to stay because forum selection clauses differed from arbitration clauses, the latter of which had been expressly endorsed by Congress and did "not deprive a federal court of its jurisdiction." *Id.*

14. See also *Mitsubishi Motors Corp.*, 473 U.S. at 636, 105 S.Ct. at 3359 ("There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism.")

the dispute and its authority to address matters unresolved through arbitration, if any, once the London proceedings are concluded.¹⁵

summary judgment based on statute of limitations.

Motion denied.

ORDER

Accordingly, IT IS ORDERED that the Motion of the defendant Iino Kaiun Kaisha Ltd. (Tokyo) ("IKK") to Compel and to Stay Litigation pending Arbitration IS hereby GRANTED.¹⁶

New Orleans, Louisiana, this 28 day of September, 1994.



Byron E. RAY

v.

ILLINOIS CENTRAL RAILROAD CO.

Civ. A. No. 94-0483.

United States District Court,
E.D. Louisiana.

Sept. 30, 1994.

Employee brought action against employer railroad under Federal Employers' Liability Act (FELA) arising out of Morton's neuroma, a foot condition. Railroad moved for summary judgment. The District Court, Livaudais, J., held that genuine issues of material fact as to when employee should have discovered his foot injury precluded

1. Limitation of Actions §95(4.1, 12)

When plaintiffs may be unaware that they have been injured, such as in cases involving medical malpractice, occupational disease, and other types of latent injuries, discovery rule applies.

2. Limitation of Actions §95(4.1, 14)

Discovery rule in FELA cases provides that statute of limitations does not run when plaintiff is not aware of and has no reasonable opportunity to discover critical facts of injury and its cause. Federal Employers' Liability Act, § 6, 45 U.S.C.A. § 56.

3. Federal Civil Procedure §2497.1

Genuine issues of material fact as to whether pain in railroad employee's feet should have caused him to seek medical attention sooner than he did such that he would have discovered that his injury, namely, Morton's neuroma, precluded summary judgment in employee's FELA action, based on statute of limitations, even though employee knew more than three years before filing action that his feet hurt due to walking on slag in railroad yard. Federal Employers' Liability Act, § 6, 45 U.S.C.A. § 56.

Blake G. Arata, Jr., Benjamin B. Saunders, C. Perrin Rome, III, Davis, Saunders, Arata & Rome, Metairie, LA, for plaintiff.

Douglas K. Williams, Gayla M. Moncia, Breazeale, Sachse & Wilson, Baton Rouge, LA, for defendant.

15. See generally *Mitsubishi Motors Corp.*, 473 U.S. at 638, 105 S.Ct. at 3359; *R.M. Perez & Associates, Inc. v. Welch*, 960 F.2d 534 (5th Cir. 1992); *Forsythe International, S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017 (5th Cir.1990); *Totem Marine Tug & Barge v. North American Towing*, 607 F.2d 649 (5th Cir.1979).

16. In a memorandum in support of IKK's motion, K/S Lisbet asks this Court to order consolidation of the arbitration proceedings. The Court

has no motion to consolidate before it. However, even if it had, the "district court is limited to enforcing arbitration agreements according to their terms." *Del E. Webb Const. v. Richardson Hospital Authority*, 823 F.2d 145, 150 (5th Cir. 1987). See e.g. 9 U.S.C. § 4. *Accord Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1194-95 (8th Cir.1990); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 636-37 (9th Cir. 1984). There is no provision in the Tanker Bills of Lading and Charter Parties submitted to the Court for consolidated arbitration.

JAPAN SUN OIL CO., LTD., *Plaintiff*

v.

THE M/V MAASDIJK, ET AL., *Defendants*

United States District Court, Eastern District of Louisiana, September 29, 1994
 Civ. A. No. 94-1383

ARBITRATION — 120. Foreign Arbitral Awards Conventions — 121. Federal Arbitration Act — BILLS OF LADING — 1972. Jurisdiction of Controversies.

The express incorporation of charter party terms in a B/L satisfies the requirement of a written agreement to arbitrate, and the terms and policy of the FAA and the New York Convention validate agreement to arbitrate a dispute under a B/L in London notwithstanding objection based on interpretation of COGSA.

Reported also at 864 F.Supp. 561

Francis A. Courtenay, Jr., Donald J. Volpi, Jr., and Philip S. Brooks, Jr. (Courtenay, Forstall, Guilbault, Hunter & Fontana) for Plaintiff
 Harvey Gardere Gleason (Wagner, Bagot & Gleason) for Lisbet K/S, AS 1st *canus*
 Maurie D. Yager (Terriberry, Carroll & Yancey) for Nedlloyd Tankers, B.V.
 Robert Taylor Lemon, II (Jones, Walker, Waechter, Poitersen, Citterer & Denegre) for Iino Kaiun Kaisha, Ltd.

HELEN G. BERRIGAN, D.J.:

The defendant Iino Kaiun Kaisha Ltd. (Tokyo) ("IKK") filed a Motion to Compel and to Stay Litigation pending Arbitration which was submitted on briefs. Having considered the memoranda of counsel, the exhibits, the record, and the applicable law, the Court grants the IKK motion for the following reasons:

Background

Plaintiff's cargo of rubber process oil, which had been loaded aboard the M/V *Maasdijk* at Burnside, Louisiana, allegedly arrived in Yokohama, Japan "short in quantity and contaminated and damaged severely." In this court, plaintiff, a corporation with its principal place of business in Japan, sued the vessel *in rem*, and six other defendants *in personam* who allegedly are the owners, operators, charterers and or managers of the *Maasdijk*. The defendants are all corporations organized and existing under the laws of unspecified foreign nations.

Analysis

In this motion, IKK contends that the applicable bills of lading and charter parties require compulsory arbitration in London. In opposition to IKK's motion, the plaintiff contends that the arbitration clauses in the bills of lading and charter parties are vague and unenforceable and that their enforcement, if any, will violate the Carriage of Goods By Sea Act ("COGSA").

Agreements to arbitrate are heavily favored and rigorously enforced by the courts. See e.g. 9 U.S.C. §1 *et seq.*; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983); *Southern Constructors Group v. Dynalectric Co.*, 2 F.3d 606, 610 n.15 (5 Cir. 1993); *Hartford Lloyd's Insurance Co. v. Teachworth*, 898 F.2d 1058, 1061 (5 Cir. 1990). 9 U.S.C. §2 provides:

A written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . ." *Moses H. Cone Memorial Hospital*, 460 U.S. at 24. This is especially true in agreements affecting interstate and foreign commerce.

[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement [for foreign arbitration], even assuming that a contrary result would be forthcoming in a domestic context.

Mitsubishi Motors Corp. 473 U.S. at 629 (1985).

The Federal Arbitration Act ("FAA"), specifically 9 U.S.C. §3¹ and 9 U.S.C. §4,² provides this Court with the general authority to order compulsory arbitration in London and to stay these proceedings pending the disposition of the London arbitration. The Convention on Recognition and Enforcement of Foreign Arbitral Awards ["Convention"] also requires Courts to enforce any written agreement which provides arbitration as the mechanism to resolve international commercial disputes. 9 U.S.C. §201. Whether parties should generally be compelled to arbitrate involves a two-step inquiry. "First, the court must determine whether the parties agreed to arbitrate the dispute. [*Mitsubishi Motors Corp.*, 473 U.S. at 625] . . . [Then] it must consider whether any federal statute or policy renders the claims nonarbitrable. *Id.* at 628." *R.M. Perez & Assoc., Inc. v. Welch*, 960 F.2d 534, 538 (5 Cir. 1992). A limited inquiry into the validity of arbitration is also appropriate under the Convention:

- (1) is there an agreement in writing to arbitrate the dispute . . . ;
- (2) does the agreement provide for arbitration in the territory of a Convention signatory;
- (3) does the agreement to arbitrate arise out of a commercial legal relationship; and

1. 9 U.S.C. §3 provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial on the action until such arbitration has been had in accordance with the terms of the agreement, providing that the applicant for the stay is not in default in proceeding with such arbitration.

2. 9 U.S.C. §4 provides:

The Court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue, the Court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

This language requires an evidentiary hearing when there is a dispute over an agreement to arbitrate, but appellate courts have not held district courts to the letter of the law where "the parties were afforded the opportunity, of which they . . . took full advantage, exhaustively to brief the issues to the district court . . ." *Commerce Park at DFW Freeport v. Mardian Const. Co.*, 729 F.2d 334, 340 (5 Cir. 1984); accord *Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 795 F.2d 1111, 1115 n. 7 (1 Cir. 1986). Such is the case here.

(4) is a party to the agreement not an American citizen?

Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co. (Pemex), 1986 AMC 706, 710-11, 767 F.2d 1140, 1144 (5 Cir. 1985).

In the case at bar, the Tanker Bills of Lading between Ergon, Inc., as shipper, and Japan Sun Oil Company ("Japan Sun"), as consignee, two of which were dated at Burnside, Louisiana on March 24, 1993, and one of which was dated at Burnside, Louisiana on April 27, 1993, provide for arbitration:

3. ARBITRATION. *Any and all differences and disputes of whatsoever nature arising out of this Bill of Lading shall be put to Arbitration in the City of New York or in the City of London, whichever place is specified in the Charter Party and in accordance with the Arbitration clause therein. (Emphasis added.)*

The face of each Tanker Bill of Lading provides that

[t]he shipment is carried under and pursuant to the terms of the Contract of Affreightment/Charter Party dated FEB. 12, 1993 at AS PER CHARTER PARTY between SEACHEM TANKERS LTD., MONROVIA and IINO—KAIUN KAISHA as Charterer and *all the terms whatsoever of the said Contract of Affreightment/Charter Party including the Arbitration clause*, cargo lien clause, and the conditions appearing on both sides of this Bill of Lading to apply and to govern the rights of the parties concerned in this shipment. A copy of a Contract of Affreightment/Charter Party may be obtained from the Shipper or the Charterer upon request (Emphasis added.)

Id. The February 12, 1993, Tanker Voyage Charter Party between SEACHEM TANKERS LTD. MONROVIA, LIBERIA and IKK provides:

24. ARBITRATION *Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. (Emphasis added.)*

The same language is contained in the February 12, 1993, Tanker Voyage Charter Party between IKK and Japan Sun. In neither Charter Party is New York or London designated in Part I as the place of arbitration. However, a February 16, 1993, addendum to the February 12, 1993, Tanker Voyage Charter Party between SEACHEM TANKERS LTD. MONROVIA, LIBERIA and IKK, specifies that "[t]he place of General Average and arbitration shall be London in accordance with English law." Plaintiff contends that it did not agree to and had no notice of the addendum, and therefore should not have to arbitrate this dispute in London.

"Arbitration should not be denied 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue. . . .' Doubts as to arbitrability are to be resolved in favor of arbitration." (Citations omitted.) *Commerce Park at DFW Freeport v. Mardian Construction Co.*, 729 F.2d 334, 338 (5 Cir. 1984).

The February 12, 1993, Charter Party between Seachem Tankers Ltd. and IKK is the only Charter Party expressly referenced on the face of the Tanker Bills of Lading of March 24, 1993 and April 27, 1993, to which Japan Sun is the consignee. Those Tanker Bills of Lading expressly state on their face that "all the terms whatsoever of the said Contract of Affreightment/Charter Party including the Arbitration clause . . . apply and . . . govern the rights of the parties concerned in this shipment." That would include the addendum of February 16, 1993, which designates London as the place of arbitration. Accordingly, the Court finds that there is an agreement in writing to arbitrate the dispute, and that written agreement is enforceable because it provides for arbitration in the territory of a Convention signatory, it arises out of a commercial legal relationship, and the parties to the agreement are not American citizens.

Having found that an agreement to arbitrate exists, the Court now addresses the second inquiry: whether any federal statute or policy renders the claims nonarbitrable. In this case, the plaintiff particularly contends that compulsory arbitration in London will violate COGSA.

Under . . . [the FAA], the party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute.

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483 (1989).

"COGSA was passed in 1936 as the American enactment of the Hague Rules, and was part of an international effort to achieve uniformity and simplicity in bills of lading used in foreign trade." (Citations omitted.) *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 1994 AMC 2513, 2515, 29 F.3d 727, 728 (1 Cir. 1994). COGSA applies to "[e]very bill of lading . . . which is evidence of a contract for the carriage of goods by sea to or from parts of the United States in foreign trade. . . ." 46 U.S.C. app. §1300. *Id.* Charter parties, without more, are excluded from COGSA, but "any bill of lading . . . issued under or pursuant to a charter party. . . ." is included within the term "contract of carriage" and "if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter." 46 U.S.C. app. §§1301(b) and 1305. Accordingly, COGSA applies *ex proprio vigore*.

In this case, the particular bills of lading and the charter parties also expressly provide that they shall be governed by COGSA. The Paramount Clauses of the Tanker Bills of Lading state that the bills of lading

shall be governed by, and have effect subject to, the rules contained in the International Convention for the Unification of Certain Rules relating to Bills of Lading . . . (hereafter the "Hague Rules") as amended . . . (hereafter the Hague-Visby Rules). Nothing contained herein shall be deemed to be either a surrender by the carrier of any of his rights or immunities or any increase of any of his responsibilities or liabilities under the Hague-Visby Rules.

The Clauses Paramount of the charter parties relative to the "Issuance and Terms of Bills of Lading" state that the Bills of Lading "shall have effect subject to the provision of the Carriage of Goods by the Sea Act of the United States. . . ."

Plaintiff contends that enforcement of clauses in the Bills of Lading and Charter Parties which make arbitration compulsory in London will have the effect of diminishing the shippers' liability and therefore are null and void under 46 U.S.C. app. §1303(8) ["Any clause, covenant, or agreement in a contract of carriage . . . lessening such liability otherwise than as provided in this chapter shall be null and void of no effect."] There are no Fifth Circuit cases on point. Both *United States Fluids v. M/V Luo Fu Shan*, 1988 AMC 2848, 852 F.2d 1201 (5 Cir. 1988), and *United States*

1988) and *Conklin & Garrett, Ltd. v. M/V Finnrose*, 1988 AMC 318, 826 F.2d 1441 (5 Cir. 1987), cited by the plaintiff, involve forum selection clauses, not arbitration clauses.³ *M/V Luo Fu Shan* and *M/V Finnrose* also both relied on *Indussa Corp. v. S.S. Ranborg*, 1967 AMC 589, 377 F.2d 200 (2 Cir. 1967), a forum selection case from the Second Circuit which decided that a clause in the bill of lading, requiring suit to be brought in Norway, violated COGSA. Despite a footnote in *Indussa* to the contrary,⁴ a few district courts and the Eleventh Circuit have extended *Indussa* to arbitration clauses. See generally *State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 1988 AMC 2328, 838 F.2d 1576 (11 Cir. 1988);⁵ *Organes Enterprises v. M/J Khalij Frost*, 1989 AMC 1460 (S.D.N.Y. 1989);⁶ *Siderius, Inc. v. M.V.*

3. In *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 1988 AMC 2848, 852 F.2d 840 (5 Cir. 1988), the Fifth Circuit held that the forum selection clause in the bill of lading requiring suit to be brought in The People's Republic of China, the carrier's home forum, lessened the carrier's liability and violated COGSA. In *Conklin & Garrett, Ltd. v. M/V Finnrose*, 1988 AMC 318, 826 F.2d 1441 (5 Cir. 1987), the forum selection clause in a bill of lading for a merry-go-round shipped from England to Florida, which provided that all disputes were to be decided in Finland under Finnish law, violated COGSA.
4. Our ruling does not touch the question of arbitration clauses in bills of lading which require this to be held abroad. The validity of such a clause in a charter party, or in a bill of lading effectively incorporating such a clause in a charter party, has been frequently sustained. See *Lowry & Co. v. S.S. Le Moyne D'Iserville*, 1966 AMC 2195, 253 F.Supp. 396 (S.D.N.Y. 1966), appeal dismissed for want of jurisdiction, 1967 AMC 729, 372 F.2d 123 (2 Cir. 1967), slip opinions 1103, and cases cited. Although the Federal Arbitration Act adopted in 1925, 43 Stat. 883, validated a written arbitration provision "in any maritime transaction", §2, and defined that phrase to include "bills of lading of water carriers," §, COGSA, enacted in 1936, 49 Stat. 1207, made no reference to that form of procedure. If there be any inconsistency between the two acts, presumably the Arbitration Act would prevail by virtue of its reenactment as positive law in 1947, 61 Stat. 669. . . . *Indussa Corporation v. S.S. Ranborg*, 1967 AMC 589, 595, 377 F.2d 200, 204, n. 4 (2 Cir. 1967).
5. *State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 1988 AMC 2328, 838 F.2d 1576 (11 Cir. 1988), is distinguishable on its facts. The *Wesermunde* bills of lading made no reference to arbitration. The *Wesermunde* court found that State Establishment had not been given actual notice of the arbitration provision in the charter party, and, while the parties had expressly agreed to COGSA's protections, they had never expressly agreed to foreign arbitration. 1988 AMC at 2336, 838 F.2d at 1582.
6. *Organes Enterprises, Inc. v. M/J Khalij Frost*, 1989 AMC 1460 (S.D.N.Y. 1989), is distinguishable both on the facts and on the law. In *M/J Khalij Frost*, New Jersey corporations sued pursuant to a bill of lading which provided for London arbitration. The bill of lading made no reference to any charter party but was only for common

Ida Prima, 613 F.Supp. 916 (S.D.N.Y. 1985);⁷ *Pacific Lumber & Shipping Co. v. Star Shipping A/S*, 1979 AMC 2137, 464 F.Supp. 1314 (W.D. Wash. 1979).⁸ It is to these cases that the plaintiff looks for support in opposing the motion to compel arbitration. The Court does not find them persuasive.

In light of the subsequent United States Supreme Court decisions,⁹

carriage. The bill of lading form to be used in the event of a chartering was not filled out. The New York district court found that COGSA applied and the foreign arbitration clause was null and void because it lessened the alleged liability of the defendants in this case. *Id.* at 1460. The New York district court in *Khalij Frost* provided a four-point rationale for its decision:

First, a foreign arbitration clause, like a foreign jurisdictional clause, could limit an American plaintiff's ability to enforce effectively a carrier's liability and cause such plaintiff to agree to an otherwise unacceptable settlement. For example, in addition to travel expense, "[t]he expense alone of obtaining [foreign] counsel will assure that many smaller claims will be foregone." Second, "the cargo claimant will have little assurance that the arbitrators will enforce COGSA. Nor can he be confident that the U.S. court in which the action is brought will ensure that the arbitrator will enforce COGSA." Third, "arbitrators' decisions are rarely explained. And courts do not vacate the arbitrators' awards except on extreme grounds, such as misconduct or manifest disregard for the law." Fourth, an arbitrator is not required to apply the established rules of evidence, and may consider inadmissible evidence such as hearsay. (Citations omitted.)

Khalij Frost, 1989 AMC at 1463.

7. In *Siderius, Inc. v. M/V Ida Prima*, 613 F.Supp. 916 (S.D.N.Y. 1985), the district court found that the owner had relinquished whatever rights it had to arbitration by subsequent agreements that it made with the plaintiff. Notwithstanding that fact, the *Siderius* court appeared reluctant to order arbitration for a number of fact-specific reasons. Apart from its general concern that compulsory arbitration might deprive the cargo consignee of the right to bring the action in the United States courts, the court questioned whether the arbitration clause in the charter party applied to the bill of lading and whether the consignee had notice of the arbitration provision where no reference was made to arbitration in the bill of lading itself. In this case, the bill of lading clearly references arbitration.
8. In *Pacific Lumber & Shipping Company, Inc. v. Star Shipping A/S*, 1979 AMC 2137, 464 F.Supp. 1314 (W.D. Wash. 1979), the Court denied a motion for stay of action pending arbitration because the bills of lading were contracts of adhesion. The evidence established that the shippers had not received the completed bills of lading until after the *Star Clipper* had sailed, that the "London arbitration clause" was inserted by the defendant without discussion, and that the shippers had no option to delete the clauses.
9. *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 1991 AMC 1697 (1991) enforced a forum selection clause in a passenger contract of passage. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) upheld an arbitration clause in an international commercial agreement. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 1972 AMC 1407 (1972) enforced forum selection clause in a charter party contract.

other district court have questioned¹⁰ or limited¹¹ many of the cases since *Indussa* which have voided foreign arbitration clauses because of COGSA. Most recently, the line of cases spawned by *Indussa* was expressly rejected by the First Circuit in favor of those federal decisions, including one from this Circuit, which have upheld foreign arbitration clauses in bills of lading subject to COGSA. *M/V Sky Reefer*, *supra*.¹² The First Circuit upheld a foreign arbitration clause against a COGSA challenge, based on its belief that "the FAA alone governs the validity of arbitration clauses, both foreign and domestic, and consequently removes them from the grasp of COGSA." *M/V Sky Reefer* 1994 AMC

10. See e.g. *Citrus Marketing Bd. v. M/V Ecuadorian Reefer*, 1991 AMC 1042, 1048, 754 F.Supp. 229, 233 (D.Mass. 1990)

Of the four reasons set forth in the *M/V Khalij Frost* and *M.V. Ida Prima* decisions, the first reason merely deals with the inconvenience of the foreign forum for an American plaintiff (a concern that is not even present in this case since neither of the plaintiffs is an American corporation), the next two reasons reflect mistrust of arbitrators and the last reason indicates mistrust of the arbitration process. Since the Supreme Court has clearly rejected such mistrust of arbitrators and the arbitration process as the basis for a court's refusal to enforce contractual arbitration clauses, I conclude that the above cases are inconsistent with the commands of the Court and do not provide adequate support for plaintiffs' position.

Accord Fabrica De Tejidos La Bellota S.A. v. M/V Mar, 1993 AMC 721, 736, 799 F.Supp. 546, 561 (D.V.I. 1992) ("Carnival calls into question earlier judicial views that forum selection clauses invariably tend to lessen a carrier's liability so as to violate Article 3(8).")

11. See e.g. *Alucentro Div. Dell'Alusuisse Italia S.P.A. v. M/V Hafnia*, 1992 AMC 267, 785 F.Supp. 155 (M.D.Fla. 1991).

[T]he *Wesermunde* court held when a private contract of carriage incorporates COGSA, as in the case at bar, the parties may expressly agree to arbitrate disputes in a foreign country having no nexus to the transaction, and thus forgo COGSA's protection, only if the parties have actual notice of the arbitration provision.

As noted above, the parties made specific reference to the arbitration provision of the charter party in the handwritten incorporating clause of the bill of lading. 1992 AMC at 270, 785 F.Supp. at 157.

12. See, e.g., *Nizho Inai Amer. Corp. v. M/V Sea Bridge*, 1991 AMC 2070 (D.Md. 1991); *Citrus Mktg. Bd. v. M/V Ecuadorian Reefer*, 1991 AMC 1042, 754 Supp. 229 (D.Mass. 1990); *Travelers Indemn. Co. v. M/V Mediterranean Star*, 1988 AMC 2483 (S.D.N.Y. 1988); *Mil South Feeds, Inc. v. M/V Aqua Marine*, 1988 AMC 437 (S.D.Ga. 1986); *Midland Tar Distillers, Inc. v. M/T Lotos*, 1973 AMC 1924, 1930, 362 F.Supp. 1311, 1315 (S.D.N.Y. 1973); *Mitsubishi Shoji Kaisha Ltd. v. MS Galini*, 1972 AMC 1298, 1303-04, 323 F.Supp. 79, 83-84 (S.D.Tex. 1971); *Kurt Urban Co. v. SIS Clymenia*, 1971 AMC 778, 782-83, 318 F.Supp. 1387, 1390 (S.D.N.Y. 1970).

Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 1994 AMC 2513, 2520, 29 F.3d 727, 731 (1 Cir. 1994).

at 2520, 29 F.3d at 731. To reach that decision, the First Circuit first looked to general principles of statutory analysis: "a later enacted statute generally limits the scope of an earlier statute if the two statutes conflict . . . [and] where two statutes conflict, regardless of the priority of enactment, the specific statute ordinarily controls the general." (Citations omitted.) *Id.*

With respect to the former canon, the FAA must be given priority over COGSA in light of the FAA's reenactment in 1947, eleven years after COGSA was passed. Similarly the latter canon suggests that the FAA be given effect. Section 3(8) of COGSA, which voids any clause in a bill of lading that "lessens" the carrier's liability, makes no reference to arbitration, or for that matter, forum selection clauses. Conversely, the FAA specifically validates arbitration clauses contained in maritime bills of lading. See 9 U.S.C. §1, 2.

Id. The *M/V Sky Reefer* court then delineated a distinction between forum selection clauses and arbitration clauses:

"[T]here was no compelling congressional mandate [in forum selection cases] in favor of giving effect to agreements to litigate before foreign tribunals." [*Mitsubishi Shoji Kaisha Ltd. v. MS Galini*, 1972 AMC [1298], 1303, 323 F.Supp. [79,] 83 [(S.D.Tex. 1971)] "... [and] unlike a foreign forum selection clause, an agreement to arbitrate does not deprive a federal court of its jurisdiction over the underlying dispute. . . ."

MS Galini, 1972 AMC at 1303, 323 F.Supp. at 83. *M/V Sky Reefer*, 1994 AMC at 2522, 29 F.3d at 732. The First Circuit and earlier district courts also were mindful of the United States Supreme Court decisions validating the strong federal policy favoring arbitration.

13. In *Mitsubishi Shoji Kaisha Ltd. v. MS Galini*, 1972 AMC 1298, 323 F.Supp. 79 (S.D.Tex. 1971), a shipment of Mexican maize, loaded at a Texas port, was allegedly contaminated when the cargo was discharged in Japan. The Charter Party provided for arbitration in London. Plaintiff, a Japanese concern, argued that the arbitration clause conflicted with COGSA, 46 U.S.C. §1303(8) and relied heavily on *Indussa Corp. v. S.S. Ranborg*, 1967 AMC 589, 377 F.2d 200 (2 Cir. 1967) and *Carbon Black Export v. The SS Montrosa*, 1958 AMC 1335, 254 F.2d 297 (5 Cir. 1958), *cert. dismissed*, 359 U.S. 180, 1959 AMC 1327 (1959), cases in which the court "declined to enforce an agreement to litigate, in the event of a dispute, in the courts of a foreign country." 1972 AMC at 1303, 323 F.Supp. at 83. The *Mitsubishi Shoji Kaisha* court granted the charterer's motion to stay because forum selection clauses differed from arbitration clauses, the latter of which had been expressly endorsed by Congress and did not deprive a federal court of its jurisdiction." *Id.*

American courts' mistrust of foreign courts, a driving force in the *Indussa* court's decision to invalidate foreign choice-of-forum clauses, is an inappropriate consideration in the context of arbitration. See *Mitsubishi Motors*, 473 U.S. at 626-27 (We are "well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."). . . .

Id.

Accordingly, this Court finds that COGSA does not preclude enforcement of the foreign arbitration clause contained in the Bills of Lading and that this action should be stayed pending the outcome of arbitration.

In the latter part of its memorandum in opposition to the motion to compel arbitration, plaintiff appeals to principles of fairness and equity because plaintiff alleges that the ocean carrier will raise a statute of limitations defense to the London arbitration. "[I]n passing upon a §3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate." *Commerce Park*, 729 F.2d at 338, quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). "[M]atters of procedural arbitrability, such as, *inter alia*, whether the request for arbitration was timely under the arbitration agreement, are for the arbitrator to decide." *Commerce Park*, 729 F.2d at 339, n.5. See also *Sedco*, 1986 AMC at 720, 767 F.2d at 1151, n.29; *Smith Barney Shearson, Inc. v. Boone*, 838 F.Supp. 1156, 1159 (N.D.Tex. 1993). *Accord*, *Office of Supply, Gov. of Rep. of Korea v. New York Navigation Co., Inc.*, 1973 AMC 1238, 1242, 469 F.2d 377, 380 (2 Cir. 1972) ("[I]t is for the arbitrators, not the court, to decide whether a claim is time-barred by their agreement"); *Lowry & Co. v. S.S. Le Moyne D'Iberville*, 1966 AMC 2195, 2199, 253 F.Supp. 396, 399 (S.D.N.Y. 1966) ("The court having found the existence of a valid arbitration provision, all other issues, including but not limited to interpretation and limitations, are for the arbitrators and not the court.")¹⁴

Notwithstanding, in granting the motion to stay, the Court retains its jurisdiction over the dispute and its authority to address matters

14. See also *Mitsubishi Motors Corp.*, 473 U.S. at 636 ("There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism.")

unresolved through arbitration, if any, once the London proceedings are concluded.¹⁵

Order

Accordingly, it is ordered that the Motion of the defendant Iino Kaiun Kaisha Ltd. (Tokyo) ("IKK") to Compel and to Stay Litigation pending Arbitration is hereby granted.¹⁶

WILFORD BURNETT AND MONICA BURNETT, HIS WIFE, Plaintiffs

v.

A. BOTTACCHI S.A. DE NAVEGACION, ET AL., Defendants

United States District Court, Southern District of Florida, December 7, 1994
No. 91-1625-CIV-Highsmith

CONTRACTS — 136. Warranty of Workmanlike Performance — INDEMNITY AND CONTRIBUTION — 13. Stevedore's Liability — LONGSHOREMEN'S ACT — 183. Indemnity and Contribution.

A stevedore owes no warranty of workmanlike service to company from whom it leased a crane, and thus must be dismissed from crane lessor's action for indemnity as to injured longshoreman's suit against lessor.

INDEMNITY AND CONTRIBUTION — 13. Stevedore's Liability — LONGSHOREMEN'S ACT — 183. Indemnity and Contribution — 1924. Violation of Government Safety Regulations — STEVEDORES — 17. Government Safety Regulations, OSHA.

A stevedore's duty under Occupational Safety and Health Act to provide a safe place to work applies only to its employees, and cannot serve as a

15. See generally *Mitsubishi Motors Corp.*, 473 U.S. at 638; *R.M. Perez & Associates, Inc. v. Welch*, 960 F.2d 534 (5 Cir. 1992); *Forythe International, S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017 (5 Cir. 1990); *Totem Marine Tug & Barge v. North American Towing*, 607 F.2d 649 (5 Cir. 1979).

16. In a memorandum in support of IKK's motion, K/S Lisbet asks this Court to order consolidation of the arbitration proceedings. The Court has no motion to consolidate before it. However, even if it had, the "district court is limited to enforcing arbitration agreements according to their terms." *Del E. Webb Const. v. Richardson Hospital Authority*, 823 F.2d 145, 150 (5 Cir. 1987). See e.g. 9 U.S.C. §4. *Accord* *Boesler v. Continental Grain Co.*, 900 F.2d 1193, 1194-95 (8 Cir. 1990); *Weyerhaeuser Co. v. Western Sear Shipping Co.*, 743 F.2d 635, 636-37 (9 Cir. 1984). The court in *Boesler* is the Tanker Bills of Lading and Charter Parties submitted to the court for consolidated arbitration.

493. UNITED STATES: DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA - 29 September 1994 - *Japan Sun Oil Co., Ltd., v. The M/V Maasdijk, et al.**

Effects of an arbitration agreement on judicial proceedings - Existence of an arbitration agreement - Arbitration agreement in writing - Reference from a bill of lading to the charter party - Application of the Carriage of Good by Sea Act (COGSA)

(See Part 1.B.2,3,4)

HELEN G. BERRIGAN, D.J.:

The defendant Jino Kaiun Kaisha Ltd. (Tokyo) ("IKK") filed a Motion to Compel and to Stay Litigation pending Arbitration which was submitted on briefs. Having considered the memoranda of counsel, the exhibits, the record, and the applicable law, the Court grants the IKK motion for the following reasons:

Background

^{Japan Sun} Plaintiff's cargo of rubber process oil, which had been loaded aboard the M/V *Maasdijk* at Burnside, Louisiana, allegedly arrived in Yokohama, Japan "short in quantity and contaminated and damaged severely." In this court, plaintiff, a corporation with its principal place of business in Japan, sued the vessel *in rem*, and six other defendants *in personam* who allegedly are the owners, operators, charterers and/or managers of the *Maasdijk*. The defendants are all corporations organized and existing under the laws of unspecified foreign nations.

Analysis

In this motion, IKK contends that the applicable bills of lading and charter parties require compulsory arbitration in London. In opposition to IKK's motion, the plaintiff contends that the arbitration clauses in the bills of lading and charter parties are vague and unenforceable and that their enforcement, if any, will violate the Carriage of Goods By Sea Act ("COGSA").

Agreements to arbitrate are heavily favored and rigorously enforced by the courts. See e.g. 9 U.S.C. §1 *et seq*; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motors Corp. v.*

* The text is reproduced from *American Maritime Cases*, p. 726 ff. (1995)