

# Forum selection clauses under the Hague (Visby) Rules

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## Abstract

*Contracts for the carriage of goods by sea are, by and large, shaped by an imbalance in the power of the parties. In order to avoid the most negative consequences of these disparities, the international regulatory framework establishes certain limitations on the parties' freedom of contract. The Hague (Visby) Rules, the most commonly applied set of norms for the carriage of goods by sea, ensure this protection of the weaker party by preventing the carrier from contracting out of its obligations and escaping liability. This is the purpose of Article 3(8) of the Rules, which makes any such agreement void and of no effect. Although the Hague (Visby) Rules do not regulate jurisdictional issues, some have suggested that Article 3(8) should also be used to determine whether a given forum selection clause should be upheld. Due to the effect that these clauses can have on the ability of the claimant to recover its losses (whether due to inconvenience, costs, or different applications of the norms), it has been suggested that some forum selection clauses actually lower the liability of the carrier beyond the limits that are allowed. A review of the way in which these clauses have been dealt with in the US and the UK (taking into consideration the European Brussels regime) shows that, in their treatment of forum selection clauses, courts have adopted a carrier-friendly approach, enforcing clauses that, in effect, might lower the protection established in favour of the claimants.*

## 1. Introduction

Due to the imbalanced relationship that is at play in a large number of contracts of carriage, the drafters of the Hague (Visby) Rules sought to prevent situations in which shippers might be left at the mercy of the carrier.<sup>1</sup> With this goal in mind, Article 3(8) of the Hague (Visby) Rules forbids the use of any clause or agreement that might lower the liability of the carrier. According to Article 3(8):

'Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.'

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1 D.C. Frederick, 'Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules', *Journal of Maritime Law and Commerce* (22) 1991, pp. 82-83.

Although this norm does not explicitly refer to forum selection clauses (hereafter 'FSCs'), since the Hague (Visby) Rules themselves are silent on jurisdictional matters, some have argued that Article 3(8) should nonetheless play a role in that regard. Indeed, a number of authors and courts have interpreted it as also being applicable to FSCs, arguing that these clauses might negatively impact the ability of the shipper to obtain redress.<sup>2</sup>

This article seeks to explore the reasons behind the expansive and restrictive interpretation of Article 3(8) with regard to FSCs. To this end, we focus our attention on the American and English (and European) systems. We conclude with an analysis of FSCs based on Article 3(8), and propose some mechanisms to address potentially unfair FSCs.

## 2. Forum selection and the carriage of goods

Since different forums might apply different rules to a given claim, the carriage of goods by sea requires a rapid and accurate determination of the forum.<sup>3</sup> Even among those countries where some degree of harmonization actually exists, their courts can apply the harmonized rules very differently.<sup>4</sup> In accordance with such importance, jurisdictional issues are often a key part of cargo claims, affecting the way in which the claimant will exercise its rights.<sup>5</sup> It is therefore no surprise that FSCs are often included in contracts of carriage.

As the US Court of Appeals for the Second Circuit stated in a 1993 decision, 'the choice of court may be more important than many of the express terms of the contract; may indeed be determinative of the outcome'.<sup>6</sup> The available evidence confirms this view. According to a survey among counsel of record on each side of every reported US case since 1995 (when the validity of FSCs was widely expanded), the enforcement of FSCs can have enormous consequences for the claimant. As the survey showed, cargo owners will often refrain from pursuing a claim abroad if they have not been successful in securing US jurisdiction. Most of the claimants who had unsuccessfully attempted to keep proceedings in the US had either accepted their loss, or settled for much lower amounts than those they would have otherwise pursued.<sup>7</sup>

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2 Y. Baatz, 'Jurisdiction and Arbitration', in: D.R. Thomas (ed.), *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, Devon: Lawtext Publishing Limited 2009, pp. 259-260.

3 A. Ziegler, 'Jurisdiction and Forum Selection Clauses in a Modern Law on Carriage of Goods by Sea', in: M. Davies (ed.), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, The Hague: Kluwer Law International 2005, p. 85.

4 Ibid., pp. 87-88. See also G.A. Yimer, 'Adjudicatory Jurisdiction in International Carriage of Goods by Sea: Would the Rotterdam Rules Settle the Controversy', *African Journal of International and Comparative Law* (21) 2013, p. 468. Ziegler 2005, p. 88 (*supra* note 3).

5 Yimer 2013, p. 468 (*supra* note 4).

6 *United States M. & S. Ins. Co. v. A/S Den Norske A. Og A. Line* [1933] 65 F.2d, 392-394, p. 393. See also Yimer 2013, pp. 468-469 (*supra* note 4).

7 M. Davies & R. Force, 'Forum Selection Clauses in International Maritime Contracts', in: M. Davies (ed.), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, The Hague: Kluwer Law International 2005, p. 11. For some of the statistical limitations of this survey, see *ibid.*, p. 8.

## 2.1 Advantages of FSCs

FSCs and choice of law clauses are ubiquitous in maritime contracts.<sup>8</sup> While, in principle, any international business will seek to limit uncertainties about the law governing the contract and the courts that will have jurisdiction over their disputes, this desire is particularly strong in maritime trade.<sup>9</sup> As it would be illogical to expect the parties to be familiar with all the legal systems with which the carriage might come into contact, FSCs allow them to limit their exposure by circumscribing the potential forums before which they might have to conduct proceedings.

Through the use of FSCs, the parties can ensure that the competent court will be one that has a proven track record of impartiality and expertise.<sup>10</sup> When used in conjunction with a choice of law provision, FSCs can also ensure that the chosen law will actually be applied by the court.<sup>11</sup> Finally, it has also been argued that FSCs result in a lowering of costs and a lessening of the burden placed on the courts.<sup>12</sup>

## 2.2 Disadvantages of FSCs

In spite of the benefits that they report, FSCs can also have significant downsides. Some argue that these clauses do not actually increase predictability, nor do they lower the burden on the courts, since the proceedings on the validity of the clause have simply taken the place of what would have been proceedings on the substance.<sup>13</sup> More importantly, it has also been argued that since contracts of carriage are often shaped by serious imbalances in bargaining power, the carrier will be able to dictate the terms of the agreement in a way in which it obtains most of the benefits.<sup>14</sup> This imbalance between the interests that shape the contract will also manifest itself in the FSCs, as the carrier will be able to demand that any potential claimant has to appear before courts that are only convenient to it.<sup>15</sup>

First, it has been argued that the difficulties involved in litigating in a distant and inconvenient forum can keep a claimant from even seeking any redress at all. Additionally, due to the various ways in which mandatory provisions might be interpreted and applied in a given court, the use of FSCs might allow carriers to escape their application. Since, with the aim of protecting the rights of the cargo claimant, the international rules on maritime carriage have

8 M. Davies, 'Forum Selection, Choice of Law and Mandatory Rules', *Lloyd's Maritime and Commercial Law Quarterly* 2011, p. 237.

9 F. Sparka, *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis*, Berlin: Springer Science & Business Media 2010, p. 6.

10 Ibid., p. 7.

11 Ibid., p. 7.

12 Ibid., pp. 6-7.

13 Ibid., p. 8.

14 Ibid., pp. 14-15.

15 C.I. Cordero Álvaro, 'La Cláusula Atributiva de Jurisdicción en el Conocimiento de Embarque', *Anuario Jurídico y Económico Escurialense* (41) 2008, p. 202. See also H.M.J. Smart, *United Nations Convention on the Carriage of Goods by Sea: 1978 (Hamburg Rules): Explanatory Documentation*, London: Commonwealth Secretariat 1989, p. 27.

established fixed minimum liability limits, FSCs might actually result in indirectly lowering such liability even further, leaving the potential claimant unprotected.<sup>16</sup>

### 3. The regulation of maritime forum selection

By the late 19th century, well before the Hague Rules were enacted, there was already an awareness of the risks associated with FSCs in contracts of carriage.<sup>17</sup> As a result, domestic maritime carriage rules often took an unfavourable view of such terms. In the United States, despite no express provision forbidding their use, the courts quickly noted that FSCs could be used to avoid the application of mandatory rules, and held them to be void and contrary to public policy.<sup>18</sup> Other countries also adopted this approach, expressly invalidating FSCs in their domestic rules. In Australia, for example, the Sea-Carriage of Goods Act of 1904 expressly outlawed the use of FSCs. Since these clauses were seen as possible loopholes to escape the liability provisions of the Act, the Australian legislator had sought to ensure that such use would be prevented.<sup>19</sup> Following a similar criterion in their reluctance to accept jurisdiction clauses in bills of lading, similar provisions could also be found in the laws of Morocco, Canada and New Zealand which predated the Hague Rules.<sup>20</sup>

These considerations notwithstanding, and despite the desire of regulators to ensure that carriers could not escape liability, the Hague (Visby) Rules contain no express provision regarding FSCs.<sup>21</sup> While recent attempts at revamping the existing regulatory framework, including the Hamburg Rules and the Rotterdam Rules, have both included express jurisdictional provisions, the acceptance of these regulations has been underwhelming.<sup>22</sup> While the Rotterdam Rules still lack enough ratifications to come into force, the Hamburg Rules have only been ratified by countries that represent only a small fraction of the maritime trade and, therefore, have a rather limited application.<sup>23</sup>

The absence of jurisdictional norms in the Hague (Visby) Rules was a deliberate decision by their drafters, who expressly rejected regulating the topic.<sup>24</sup> As the Rules were already the result of a difficult compromise between diverse interests, the delegates were confident that establishing liability rules and principles would be enough of a first step, leaving the issue of

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- 16 A.N. Yiannopoulos, 'Conflicts Problems in International Bills of Lading: Validity of Negligence Clauses', *Louisiana Law Review* (18) 1957, p. 620 and Sparka 2010, p. 12 (*supra* note 9).
- 17 B.L. Milhorn, 'Vimar Seguros y Reaseguros v. M/V Sky Reefer: Arbitration Clauses in Bills of Lading under the Carriage of Goods by Sea Act', *Cornell International Law Journal* (30) 1997, p. 191.
- 18 *Ibid.*, p. 191 and I.L. Evans, 'The Harter Act and Its Limitations', *Michigan Law Review* (8) 1910, p. 647.
- 19 S. Allison, 'Choice of Law and Forum Clauses in Shipping Documents – Revising Section 11 of the Carriage of Goods by Sea Act 1991 (CTH)', *Monash University Law Review* (40) 2014, p. 641.
- 20 Milhorn 1997, p. 191 (*supra* note 17).
- 21 *Ibid.*, p. 192.
- 22 P.A. Buhler, 'Forum Selection and Choice of Law Clauses in International Contracts: A United States Viewpoint with Particular Reference to Maritime Contracts and Bills of Lading', *The University of Miami Inter-American Law Review* (27) 1995, p. 16.
- 23 L.S. Pallares, 'Brief Approach to the Rotterdam Rules: Between Hope and Disappointment', *Journal of Maritime Law and Commerce* (42) 2011, pp. 454-455.
- 24 M.F. Sturley, 'Jurisdiction and Arbitration under the Rotterdam Rules', *Uniform Law Review* (14) 2009, pp. 947-948 and Milhorn 1997, p. 192 (*supra* note 17).

FSCs to be determined on the basis of the respective national laws (and/or the international instruments that were in force in the contracting states).<sup>25</sup>

At first, the goal of a harmonious interpretation of the Rules seemed to have been fulfilled, as their application was rather uniform.<sup>26</sup> The consequences of not regulating jurisdictional matters only became evident once this uniformity in their application ceased to exist. These disparities, particularly with regard to the liability limits, quickly transformed the way in which FSCs were being used, as carriers were then actively seeking forums that would hold them to a lower liability standard.<sup>27</sup> Thus, through the use of FSCs, contract drafters were able to avoid the application of the norms against the lessening of the carrier's liability, granting exclusive jurisdiction to courts that would not apply the Rules at all, or by selecting courts that would apply them in a much more carrier-friendly manner.<sup>28</sup>

To better understand the way in which the approach to FSCs has changed, it can be useful to analyze the way they have been dealt with by courts in the United States and the UK. Besides their importance as economic powers, reviewing how these courts have dealt with FSCs can be illuminating, as both nations have traditionally represented opposing interests when dealing with the regulation of maritime carriage. Indeed, while the United States has often been seen as protecting the interest of shippers, the UK is perceived as looking after the interest of carriers and owners.

### 3.1 *Forum selection under US COGSA*

The United States incorporated the Hague Rules into its domestic system through the Carriage of Goods by Sea Act of 1936 (hereafter US COGSA), supplemented by the provisions of the Harter Act. Due to the US COGSA's provisions, as well as common practices in contract drafting, it governs virtually all shipping operations in the United States, applying to both outbound and inbound shipments (going beyond the Hague Rules, which only applied to outbound shipments).<sup>29</sup>

Although not identical to the Hague Rules, the US COGSA maintained most of their original text. With regard to FSCs, and staying true to the original, it did not address jurisdictional matters. In the absence of express provisions, the debate surrounding the enforcement of FSCs by American courts centred around whether they should be understood as lowering the liability of the carrier, in contravention of US COGSA §3(8) (analogous to the same provision in the Hague Rules).<sup>30</sup>

25 Ziegler 2005, p. 89 (*supra* note 3) and A. Gehringer, 'After Carnival Cruise and Sky Reefer: An Analysis of Forum Selection Clauses in Maritime and Aviation Transactions', *Journal of Air Law and Commerce* (66) 2000, p. 675.

26 Ziegler 2005, p. 89 (*supra* note 3).

27 Ibid., p. 89 and C.W.H. Goldie, 'Effect of the Hamburg Rules on Shipowners' Liability Insurance', *Journal of Maritime Law and Commerce* (24) 1993, pp. 111-112.

28 Yiannopoulos 1957, p. 618 (*supra* note 16) and R. Asariotis, 'Contracts for the Carriage of Goods by Sea and Conflict of Laws: Some Questions regarding the Contracts (Applicable Law) Act 1990', *Journal of Maritime Law and Commerce* (26) 1995, p. 297.

29 Sparka 2010, p. 24 (*supra* note 9).

30 Ibid., p. 154.

There is ‘substantial support’ in the legislative history of the US COGSA to argue that it was not the legislator’s intention to use the minimum liability limit of Section 3(8) to also cover FSCs.<sup>31</sup> The 1955 decision of the Court of Appeals for the Second Circuit in *Muller v. Swedish American Line*<sup>32</sup> confirmed this view, arguing that ‘if Congress had intended to invalidate such agreements, it would have done so in a forthright manner’, as had been done by Canada and Australia when they incorporated the Hague Rules.<sup>33</sup>

To determine whether an FSC would lower the liability of the carrier, the *Muller* decision established a ‘reasonableness’ test.<sup>34</sup> In this case, since the vessel had been built in Sweden, had Swedish owners, the majority of the evidence was available in Sweden, and all of the crew resided in Sweden, the Court considered that it would not be unreasonable to enforce such FSCs.<sup>35</sup>

The *ad hoc* ‘reasonableness’ approach established by the *Muller* decision took place within the context of a general disapproval of FSCs in the American courts, appearing as more flexible than the otherwise hostile approach that existed in other areas of the laws.<sup>36</sup> *Muller* would continue as valid law until 1967, when the Second Circuit once again reviewed the matter and adopted a more hostile approach to FSCs.<sup>37</sup>

In the 1937 decision of *Indussa Corporation v. SS. Ranborg*,<sup>38</sup> the Second Circuit reversed its previous stance, finding that FSCs did actually go against the minimum liability limits established under US COGSA.<sup>39</sup> The Court reached its conclusion by referring to the enormous difficulties that a court would have to endure in order to either ‘forecast the result of litigation in a foreign court or attempt other expedients to prevent a lessening of the plaintiff’s rights’.<sup>40</sup> It was found that the ‘reasonableness’ test of *Muller* carried the risk of being too complex or cumbersome to be useful in practice, and that FSCs could open a door for carriers to avoid or lessen their mandatory liability:

‘From a practical standpoint, to require an American plaintiff to assert his claim only in a distant court lessens the liability of the carrier quite substantially, particularly when the claim is small. Such a clause puts “a high hurdle” in the way of enforcing liability [...] and thus is an effective means for carriers to secure settlements lower than if cargo could sue in a convenient forum. [...] A clause making a claim

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31 M.F. Sturley, ‘Proposed Amendments to the Carriage of Goods by Sea Act’, *Houston Journal of International Law* 1996, p. 657.

32 *Wm. H. Muller & Co. v. Swedish American Line Ltd.* [1955] 224 F. 2d, 806-808.

33 *Ibid.*, p. 807.

34 *Ibid.*, p. 807.

35 *Ibid.*, p. 808. See also C.C. Fahrenback, ‘Vimar Seguros y Reaseguros v. M/V Sky Reefer: A Change in Course: COGSA Does Not Invalidate Foreign Arbitration Clauses in Maritime’, *Akron Law Review* (29) 1995, p. 379.

36 S.M. Denning, ‘Choice of Forum Clauses in Bills of Lading’, *Journal of Maritime Law and Commerce* (2) 1970, p. 29.

37 Although there were several US COGSA decisions that denied the enforcement of FSCs before 1967, they generally did so by finding that the selected forum was unreasonable (see *Sociedad Brasileira de Intercambio Comercial e Industrial, Ltda. v. S.S. Punta Del Este* [1955] 135 F. Supp., 394-397), or applying the doctrine of *forum non conveniens* (see *Carbon Black Export Inc. v. The SS Monrosa* [1958] 254 F. 2d, 297).

38 *Indussa Corporation v. S.S. Ranborg* [1967] 377 F. 2d, 200-205.

39 Sparka 2010, p. 154 (*supra* note 9). See also Denning 1970, p. 33 (*supra* note 36).

40 *Indussa Corporation v. S.S. Ranborg*, p. 202.

triable only in a foreign court could almost certainly lessen liability if the law which the court would apply was neither the Carriage of Goods by Sea Act nor the Hague Rules. Even when the foreign court would apply one or the other of these regimes, requiring trial abroad might lessen the carrier's liability since there could be no assurance that it would apply them in the same way as would an American tribunal subject to the uniform control of the Supreme Court, and § 3(8) can well be read as covering a potential and not simply a demonstrable lessening of liability.<sup>41</sup>

According to this ruling, enforcing an FSC would go against the spirit of the US COGSA, as it would effectively allow shipments to fall outside the scope of the Act.<sup>42</sup> As the critics of *Muller* had argued, the US COGSA made 'no exception based upon reasonableness or availability of evidence' (the basis of the *Muller* decision) nor had its applicability been 'made subject to defeat by contractual agreement'.<sup>43</sup> In line with this criticism, the Court deemed that FSCs in bills of lading governed by the US COGSA were of no effect.<sup>44</sup>

Although *Indussa* remained the law of the land for almost three decades, it was the subject of serious criticisms.<sup>45</sup> Key among them was that, in its interpretation of the US COGSA, *Indussa* had ignored the way in which the analogous provisions of the Hague Rules had actually been applied or implemented in other jurisdictions, particularly those in which FSCs had been expressly disallowed. By interpreting Article 3(8) as covering jurisdictional matters, the Court had set the United States apart, and thus gone against the Rules' express goal of having a consistent application in different countries.<sup>46</sup> Additionally, *Indussa* was portrayed as a rather shortsighted decision, arguing that the Court's failure to distinguish between legitimate and illegitimate FSCs ignored the many valid reasons for which a carrier might want to rely on such provisions.<sup>47</sup>

Although it remained in force, by 1995 *Indussa* appeared anachronistic. By then the Supreme Court had already recognized the presumptive validity of FSCs in international commercial contracts in *The Bremen*,<sup>48</sup> and then expanded such understanding in *Carnival Cruise*.<sup>49</sup> The refusal to enforce FSCs in bills of lading governed by the US COGSA therefore appeared out

41 Ibid., p. 203.

42 St. John's Law Review, 'Enforcement and Effect of the Jurisdiction Clause in Admiralty', *St. John Law Review* (34) 1959 (article 8), pp. 76-77.

43 Ibid., pp. 76-77.

44 Denning 1970, p. 33 (*supra* note 36).

45 C.M. Davis, 'Sky Reefer: Foreign Arbitration & Litigation under COGSA', *University of San Francisco Maritime Law Journal* (8) 1995, p. 75. Sparka 2010, p. 154 (*supra* note 9).

46 D.E. Gershenson, 'Conflict of Laws – Choice of Forum Clause – Invalidity of a Clause in an Ocean Bill of Lading Restricting Litigation to a Foreign Forum', *Wayne Law Review* (14) 1967, p. 615.

47 Denning 1970, p. 37 (*supra* note 36).

48 *The Bremen v. Zapata Off-Shore Co.* [June 12, 1972] 407 US, 1.

49 *Carnival Cruise Inc. v. Shute* [1991] 499 Supreme Court Reporter, 585-605. R.M. Jarvis, 'Sending Disputes Overseas: Does a Foreign-Forum Arbitration Clause Violate the Carriage of Goods by Sea Act?', *Preview of United States Supreme Court Cases* 1995, no. 6, pp. 269-270. See also W. Tetley, 'Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea', in: M. Davies (ed.), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, The Hague: Kluwer Law International 2005, p. 208 and Davies & Force 2005, p. 6 (*supra* note 7).



of place within the American legal system.<sup>50</sup> It was within this context that the US Supreme Court delivered a decision on the matter.

*Sky Reefer*<sup>51</sup> dealt with a cargo claim in which the importer ('Bacchus') and its insurer ('Vimar') filed a claim in a federal District Court. The defendant sought to obtain a stay of proceedings, in an attempt to enforce an arbitration clause that submitted all disputes to an arbitral tribunal in Tokyo. Both the District Court and the Court of Appeals for the First Circuit sided with the defendants. Vimar then filed a petition for *certiorari* with the Supreme Court, which was granted.<sup>52</sup> The Supreme Court then ruled that FSCs contained in a bill of lading were to be presumed valid.<sup>53</sup>

It is worth noting that although the clause in *Sky Reefer* was for an arbitration, the Supreme Court made it expressly applicable to FSCs. First, the Court argued that arbitration clauses are 'but a subset of foreign forum selection clauses in general' then adding that since *Indussa* had also been applied to arbitration clauses (and that such an 'extension would be quite defensible'), the principles laid out in *Sky Reefer* could also be applied, *mutatis mutandis*, to FSCs.<sup>54</sup>

With regard to whether enforcing an FSC would represent a violation of US COGSA 3(8), the Supreme Court made a clear separation between, on the one hand, the liability of a party and, on the other, the costs and difficulties that might be associated with pursuing a claim. Under *Sky Reefer*, the liability which Article 3(8) refers to is only 'the specific liability imposed by the Act, without addressing the separate question of the means and costs of pursuing such liability'.<sup>55</sup> In other words, what matters is that once the parties are before the selected court, the liability bar is not lowered beyond what the US COGSA would allow. Whether or not the claimant can effectively get to that tribunal and effectively pursue the claim is, in principle, of no relevance.<sup>56</sup>

*Sky Reefer* changed the face of the American legal system with regard to bills of lading.<sup>57</sup> This development has, in itself, given way to criticism from those who see *Sky Reefer* as having created a means for carriers to lower or avoid their liability by using FSCs to make recovery more cumbersome for claimants.<sup>58</sup> As a result, some segments of the US maritime industry have unsuccessfully attempted to overturn it.<sup>59</sup>

Although it is true that *Sky Reefer* did not establish the complete and absolute validity of FSCs in bills of lading, a party seeking to resist their enforcement must meet a very high burden. Under *Sky Reefer*, the only way to avoid the enforcement of FSCs is by proving that

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50 M.F. Sturley, 'Overruling Sky Reefer in the International Arena: A Preliminary Assessment of Forum Selection and Arbitration Clauses in the New UNCITRAL Transport Law Convention', *Journal of Maritime Law and Commerce* (37) 2006, p. 2.

51 *Vimar Seguros y Reaseguros, SA v. M/V Sky Reefer* [1995] 515 US, 528-556.

52 Jarvis 1995, pp. 268-269 (*supra* note 49).

53 Sparka 2010, p. 155 (*supra* note 9).

54 *Vimar Seguros y Reaseguros, SA v. M/V Sky Reefer*, p. 542. See also Gehringer 2000, pp. 656-657 (*supra* note 25).

55 *Vimar Seguros y Reaseguros, SA v. M/V Sky Reefer*, pp. 542-543.

56 Davis 1995, p. 78 (*supra* note 45).

57 Davies & Force 2005, pp. 5-6 (*supra* note 7).

58 Davies 2011, p. 247 (*supra* note 8).

59 Sturley 2006, p. 3 (*supra* note 50).



the alternative would lead to the application of a foreign law establishing a lower liability limit than the US COGSA.<sup>60</sup> As subsequent decisions have confirmed, other criteria, such as the difficulties that enforcing the FSCs might represent for claimants, are irrelevant.<sup>61</sup> Despite a historical amicability towards the interests of shippers, the current situation concerning FSCs in the United States is one that benefits carriers, as it gives them a way to insulate themselves from liability.<sup>62</sup>

### 3.2 *Forum selection under the UK COGSA and the Brussels I Regulation*

The draft convention of what would later become the Hague Rules was given statutory effect in the UK through the Carriage of Goods by Sea Act of 1924 ('UK COGSA24'). Although the draft convention would eventually be ratified after some further amendments, these were not incorporated into this Act.<sup>63</sup> In 1971, after the adoption of the Visby Protocol to the Hague Rules, Parliament passed the Carriage of Goods by Sea Act of 1971 ('UK COGSA71'), repealing the 1924 Act, and incorporating the Hague-Visby Rules into English law.<sup>64</sup>

The UK had enacted regulations on the maritime trade as a result of mounting pressure from countries, including several British Dominions, that were adopting protective provisions to combat what they perceived as abusive practices by British carriers.<sup>65</sup> The UK's pro-carrier approach was also evident in the English rules on FSCs, which were much more liberal than those that existed at the time in countries like the United States and Canada. As early as 1927, in the *Maharani* case,<sup>66</sup> the English courts had already rejected the argument that these clauses, by themselves, could lower the liability of the carrier, and had recognized their validity.<sup>67</sup>

The *Maharani* case involved a shipment from Liverpool to Bombay, under a bill of lading with an FSC stating that 'all claims arising [from or in connection to this contract] shall be determined at the port of destination according to British laws'.<sup>68</sup> Since the claim was brought in England, the defendants sought to stay the proceedings on the basis of the FSC. The plaintiffs argued that the clause was invalid on the basis of Article 3(8) of the UK COGSA24, as it placed the shipowner 'in a much more favourable position than the cargo owner'.<sup>69</sup> The FSC was upheld by the trial court, with a later appeal by the plaintiff being dismissed.

Although, in principle, the English courts will deny the enforcement of an FSC that would lead to the application of a foreign law establishing a lower minimum liability than that estab-

60 Sparka 2010, p. 155 (*supra* note 9) and Tetley 2005, p. 217 (*supra* note 49).

61 M. Davies, 'Forum Selection Clauses in Maritime Cases', *Tulane Maritime Law Journal* (27) 2002, p. 378.

62 Davies 2011, p. 248 (*supra* note 8).

63 M. Dockray & K. Thomas, *Cases and Materials on the Carriage of Goods by Sea*, London: Cavendish 2004, p. 151.

64 *Ibid.*, p. 151.

65 L. Franck, 'A New Law for the Seas – An Instance of International Legislation', *Law Quarterly Review* (42) 1926, p. 30.

66 *Maharani Wool Mills Co v. Anchor Line* [1927-1928] 29 Lloyd's Law Reports, 169.

67 Denning 1970, p. 38 (*supra* note 36) and Sparka 2010, p. 157 (*supra* note 9).

68 *Maharani Wool Mills Co v. Anchor Line*, p. 169.

69 *Ibid.*, p. 169.

lished under the UK COGSA, such a denial is rare.<sup>70</sup> The resisting party will have a high bar to meet, having to prove not only that the foreign court applying a foreign law would be less favorable, but also that the result of the application of that foreign law would be prohibited by the UK COGSA.<sup>71</sup> Furthermore, on the basis of the Brussels I (Recast) Regulation,<sup>72</sup> there is an even stronger presumption of validity in favour of FSCs in certain circumstances. As established by Article 25 of the Regulation:

‘If the parties, regardless of their domicile, have agreed that a court or courts of a Member state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction [...]. Such jurisdiction shall be exclusive unless the parties have agreed otherwise...’

In principle, this norm creates a two-tiered approach to FSCs, preventing European courts from exercising their discretion with regard to FSCs granting jurisdiction to courts in a Regulation state.<sup>73</sup> At the same time, the courts will be empowered to exercise their discretion with regard to FSCs that grant jurisdiction to non-European courts.

An example of the exercise of the court’s discretion appears in the *The Hollandia*.<sup>74</sup> In this case, decided before the Brussels regime had come into effect, the FSC would have submitted the dispute to Dutch courts under Dutch law, which would have resulted in the liability limitation going from approximately £11,500 in England (applying the Hague-Visby limits) to £250 in the Netherlands (applying the Hague limits).<sup>75</sup>

Although the effects of *The Hollandia* are limited to FSCs outside of the Brussels regime, its power is reduced even within that scope.<sup>76</sup> Indeed, ‘only in the rare situation where it is clear that the foreign court is certain to reach a result that is not only less favourable to the plaintiff but also prohibited by the British COGSA’ will discretion be exercised.<sup>77</sup> In *The Benarty*,<sup>78</sup> for example, an FSC designating Indonesia was upheld, even though Indonesia applied the Hague Rules, and that even if the defendant lost in Indonesia, it would still retain the right to rely on Indonesia’s much lower rules on tonnage limitations. Since Article 3(8) only prohibits a lessening of liability ‘otherwise than as provided’, and tonnage limitations are allowed under Article 8

70 M.F. Sturley, ‘International Uniform Laws in National Courts: The Influence of Domestic Laws in Conflicts of Interpretation’, *Virginia Journal of International Law* (27) 1986, p. 785. See also Sparka 2010, p. 158 (*supra* note 9).

71 *Ibid.*, p. 158.

72 EU Regulation No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ* 2012, L 351/1.

73 R. Aikens et al., *Bills of Lading*, 2nd edn., Abingdon: Taylor & Francis 2016, 14.50.

74 *The Hollandia* [1983] 1 AC, 565.

75 Sturley 1986, p. 785 (*supra* note 70).

76 M. Özdel, ‘Enforcement of Arbitration Clauses in Bills of Lading: Where Are We Now?’, *Journal of International Arbitration* (33) 2016, p. 165.

77 M.F. Sturley, ‘Bill of Lading Choice of Forum Clauses: Comparisons Between United States and English law’, *Lloyd’s Maritime and Commercial Law Quarterly* 1992, p. 252. See also S. Baughen, *Shipping Law*, 6th edn., London: Taylor and Francis 2015, p. 102.

78 *The Benarty* [1985] Q.B. 325.

of the Rules, the Court saw no problem in allowing the FSC to be enforced.<sup>79</sup> Recent decisions confirm this carrier-friendly approach, as the courts generally refuse to exercise their discretion against FSCs granting jurisdiction to courts outside of the Brussels regime.<sup>80</sup>

#### 4. Conclusion: do FSCs violate Article 3(8)?

The rules that govern the carriage of goods by sea have traditionally sought to prevent abusive clauses imposed by carriers.<sup>81</sup> The need for this protection is the result of these being contracts of adhesion where the only freedom enjoyed by the adhering party is no more than ‘the freedom to ship or not to ship’.<sup>82</sup> This often imbalanced situation has forced courts to carefully analyze the terms of the contracts, ensuring that their clauses are not, directly or indirectly, lowering the protection established in favour of the cargo interest. This is the protective goal of Article 3(8) of the Hague (Visby) Rules, and which expressly invalidates attempts at lowering the carrier’s liability.<sup>83</sup>

Those who see FSCs in bills of lading as potentially abusive argue that the procedural aspects of a claim can be just as important as its substance, and can mean the difference between whether or not a party will be able to recover its losses. Against the courts that view FSCs as not playing a role in the substance of a claim, it has been argued that they demonstrate short sightedness and tone-deafness, as they fail to acknowledge the difficulties associated with litigating in distant forums. Particularly in the case of relatively small claims, a claimant might not be able to justify the expense of litigating in a distant forum, considering the actually recoverable amounts.<sup>84</sup> As it has been pointed out, in those situations enforcing an FSC could be seen as being in contravention of Article 3(8). The Belgian courts, among others, have echoed this concern, using a rather robust interpretation of Article 3(8), arguing that FSCs impose ‘practical barriers’ against a claimant’s ability to recover.<sup>85</sup>

Those in favour of the prima facie validity of FSCs argue that among developed countries it makes no sense to maintain their jingoistic view of jurisdiction, as the world has moved past the anarchic system of carriage that existed in the early 20th century.<sup>86</sup> They argue that nowadays there are no real differences between nations with regard to the law that governs bills of lading, as the Hague (Visby) Rules managed to fulfil their goal of standardizing the rules, with only marginal differences remaining among signatory states.<sup>87</sup>

The current view in the United States and the UK is that FSCs do not themselves affect the liability of the carrier. As Scrutton made clear in his ruling in *Maharani*, he did not see ‘any

79 Sturley 1992, p. 252 (*supra* note 77).

80 Ibid., p. 260. See, e.g. *Horn Linie v. Panamericana Formas* [2006] 2 Lloyd’s Rep. 44.

81 Evans 1910, pp. 638-639 (*supra* note 18).

82 A.I. Mendelsohn, ‘Liberalism, Choice of Forum Clauses and the Hague Rules’, *Journal of Maritime Law and Commerce* (2) 1970, p. 664 and H. Watson, ‘Forum Selection Clauses in Maritime Contracts’, *Louisiana Law Review* (33) 1973, p. 484.

83 Sturley 1986, p. 776 (*supra* note 70).

84 Davis 1995, p. 79 (*supra* note 45).

85 Sturley 2009, p. 948 (*supra* note 24).

86 Denning 1970, p. 35 (*supra* note 36).

87 Ibid., pp. 35-36.

clause as to procedure as lessening liability'.<sup>88</sup> Similarly, in the aforementioned *Sky Reefer*, the Court also rejected this idea stating that it would be incorrect 'to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier'.<sup>89</sup>

While it is true that FSCs refer to a procedural matter, it is incorrect to assume that they only influence procedural aspects of the case. As some authors have actually argued, jurisdiction is often 'the only issue worth litigating'.<sup>90</sup> After all, an FSC does more than merely affecting the location of the court, also playing a role in the procedural rules that will come into play, and which will affect the outcome of the case.<sup>91</sup>

The caution regarding FSCs also appears to be justified by the way in which more recent regulatory attempts have dealt with them. It is no coincidence that both the Hamburg Rules and the proposed Rotterdam Rules both expressly regulate jurisdictional matters, greatly restricting the ability of the carrier to rely on FSCs. Indeed, these conventions start from the assumption that FSCs are a potential threat to the weaker parties, and therefore limit the carrier's ability to freely choose the forum.<sup>92</sup> At face value, this situation seems paradoxical, as the drafting of norms that seek to minimize the risks of FSCs coexists with courts in the US and the UK not willing to adequately acknowledge that the problem exists.

While it is undeniable that the maritime market has changed since the first regulations were enacted, this should not be enough of an argument to leave merchants unprotected or to adopt a *laissez-faire* approach. A virtually indiscriminate enforcement of FSCs will often result in insulating the carrier from liability and, as such, should not be the way in which courts react to them.<sup>93</sup> The goal of preventing contractual abuses should not be undermined by courts merely rubber stamping carriers' efforts to make recovery more difficult for merchants.

The steps towards adapting the current approach to FSCs are manifold. In the United States, an *ad hoc* approach that actually takes into consideration the burden that FSCs place on the shipper might lead to fairer results, analyzing what the claimant might really be likely to recover. In the UK, a more robust use of the courts' discretion should exist with regard to FSCs that fall outside of the Brussels regime. When it comes to FSCs that do fall within the scope of the Brussels regime, the situation becomes more complex. A case could be made that, due to the principles behind the Brussels regime, no forum located within its borders could be considered too cumbersome, as a way to find a middle point between achieving the goals of the Brussels I Regulation while, at the same time, protecting the interests of claimants. Although the adoption of international rules on jurisdiction clauses in bills of lading might appear here as a panacea, attempts to achieve such a hefty goal have, so far, been unsuccessful.<sup>94</sup>

88 *Maharani Wool Mills Co v. Anchor Line*, p. 169.

89 *Vimar Seguros y Reaseguros, SA v. M/V Sky Reefer*, p. 536.

90 Sturley 2009, pp. 945-946 (*supra* note 24).

91 Yimer 2013, pp. 468-469 (*supra* note 4).

92 On the Hamburg Rules, see P. Mukherjee et al., *Farthing on International Shipping*, 4th edn., Berlin: Springer 2013, p. 334. On the Rotterdam Rules, see *ibid.*, p. 336.

93 Davies 2011, p. 248 (*supra* note 8).

94 See generally, Z. Tarman, 'Jurisdiction and Arbitration Under the Rotterdam Rules', in: M.D. Güner-Özbek (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An appraisal of the 'Rotterdam Rules'*, Berlin, New York: Springer 2011.