OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: VIMAR SEGUROS Y REASEGUROS, S.A., Petitioner

v. M/V SKY REEFER, HER ENGINES, ETC., ET AL.

CASE NO: No. 94-623

PLACE: Washington, D.C.

DATE: Monday, March 20, 1995

PAGES: 1-41

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - -X

VIMAR SEGUROS Y REASEGUROS, S.A., Petitioner : v. : No. 94-623

M/V SKY REEFER, HER ENGINES, ETC., ET AL. :

- - - - - - - - - - - - - - - - - - -X

Washington, D.C.

Monday, March 20, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

STANLEY McDERMOTT, III, ESQ., New York, New York; on behalf of the Petitioner.

THOMAS H. WALSH, JR., ESQ., Boston, Massachusetts; on behalf of the Respondents.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 94-623, Vimar Seguros v. Reaseguros -- no, Vimar Seguros Y Reaseguros v. M/V Sky Reefer -- the spectators are admonished to remain quiet until you get out of the courtroom. The Court is still in session.

Mr. McDermott.

ORAL ARGUMENT OF STANLEY McDERMOTT, III

ON BEHALF OF THE PETITIONER

MR. McDERMOTT: Thank you, Mr. Chief Justice, and may it please the Court:

This case is before the Court on a writ of certiorari to the First Circuit Court of Appeals and concerns a perceived conflict between the Carriage of Goods by Sea Act and the Federal Arbitration Act. The case arises from the sale of a cargo of oranges which was shipped from Morocco to Massachusetts.

Petitioners subrogated underwriter of the purchaser of the cargo, and respondents are the vessel owner and the ship in rem.

Among the commercial documents that the purchaser received from the shipper when it purchased the cargo was an ocean bill of lading that the vessel's agents had issued to the shipper in Morocco. Included in the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

fine print boilerplate clauses of the bill of lading was a Japanese law clause and a Tokyo arbitration clause. The purchaser first had notice of these clauses when it received the bill of lading from its bank, after it had paid for the goods. By that time, the bill of lading terms were fait accompli.

When the cargo arrived damaged in Massachusetts, petitioner filed suit in the district of Massachusetts. Respondents moved under Chapter 1 of the FAA to stay the case pending arbitration in Tokyo. Petitioner opposed the motion on the grounds that the foreign arbitration clause was invalid as a prohibited lessening of the carrier's liability under the Carriage of Goods by Sea Act.

QUESTION: Mr. McDermott, is Japan a signatory to the Hague Rule?

MR. McDERMOTT: Yes, it is.

QUESTION: And do we know whether Japan's law differs significantly from U.S. law with regard to liability?

MR. McDERMOTT: As -- in this case, we believe it does, because we do not believe that the Japanese Hague Rules impose on the vessel owner the nondelegable obligation to load and stow the cargo carefully.

QUESTION: But wasn't that issue expressly reserved by the First Circuit? They don't have it --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

their opinion -- one of their footnotes I thought indicated that they didn't reach that issue, and that issue wasn't before them, so there was no -- they were not ruling based on the state of Japanese law, and they were assuming that of course, if they were correct, that would be reached in the first instance by the arbitrator, but we don' have that before us to review in any case, do we?

MR. McDERMOTT: No. That's exactly right.

QUESTION: Okay.

QUESTION: And in any event, even if it were arbitrated in Japan, would the case remain in the district court for purposes of ultimate review under whatever the standard is of review for arbitration?

MR. McDERMOTT: Well, the district court would retain jurisdiction of the case, not least because it has in rem jurisdiction over the ship, so there is always the opportunity, after the arbitration in Japan were concluded, to come back to the court here and, for one reason or another, if there had been manifest disregard of the law, for example, to seek vacation of the award.

What the First Circuit did, in answer to Justice Souter's question, was simply defer the issue of what choice of law the arbitrators would apply. However, it is petitioners' position that there is simply no choice of law issue in this case, because COGSA itself applies to

all bills of lading in United States trade, and this Court decided almost 100 years ago in the Knott case that choice of law clause in bills of lading are invalid, because they are directly in contravention of the express enacting provisions then of the Harter Act, today of the Carriage of Goods by Sea Act.

The enacting clause of COGSA, section 1300, says, the American COGSA, this act shall apply to all bills of lading in United States trade, and given that congressional directive, that Japanese law clause in this bill of lading was null and void, and what petitioner --

QUESTION: And might be so determined by the arbitrator if it gets to arbitration.

MR. McDERMOTT: Yes.

QUESTION: I mean, that's not foreclosed by the reference to arbitration. That may, in fact, be exactly the result.

MR. McDERMOTT: That may be the result, but here, respondents' own expert, a Japanese lawyer, has stated in an affidavit that the Japanese Hague Rules would be applied in this arbitration if conducted in Japan.

QUESTION: Is it clear that the application of foreign law is prohibited by COGSA, if foreign law is the same as COGSA itself? Do we have a case that involves that, where the foreign law is identical?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. McDERMOTT: No, we do not have a case where it is identical, but we do have in this case a statute which says that COGSA, this COGSA applies as a matter of law.

QUESTION: Mr. McDermott, isn't it an anomaly that in COGSA we are modeling our domestic law on an international model -- the whole purpose of it, wasn't it, of the Hague Rules, was to achieve greater uniformity in these bills of lading -- and then to say we, on the substantive side we're trying to get greater uniformity within the international community, and then say, but we don't trust foreign fora?

MR. McDERMOTT: It's not so much an issue of trust, Justice Ginsburg.

The -- what Congress did when it enacted COGSA was yes, to model our COGSA to the American COGSA on the Hague Rules, but it nevertheless said that our statute shall apply to bills of lading in United States trade, and yes, it is true that it brought uniformity to international commerce, but that did not give the courts here in the United States license to disregard what is our statute, and all of the jurisprudence which has been developed over the last 60 years which supports what our interpretation of COGSA is.

QUESTION: What's your authority for saying that

this would necessarily lessen the liability of a carrier?

MR. McDERMOTT: Well, lessening -- lessening has multiple aspects.

QUESTION: Well, what's your authority for it? What case do you rely on?

MR. McDERMOTT: Well, first of all the Wesermunde decision in the Eleventh Circuit.

QUESTION: Any case from this Court?

MR. McDERMOTT: Not from the Supreme Court, no, Your Honor.

QUESTION: In fact the Bremen v. Zapata case suggests quite a different approach, doesn't it?

MR. McDERMOTT: Yes, but only in the context of a freely negotiated --

QUESTION: Well, a much more tolerant approach to arbitration clauses, and a less distrust of foreign forum and foreign laws.

MR. McDERMOTT: Yes, provided, however, that you do not have what this Court decided in Knott almost 100 years ago, which was an express declaration that foreign law cannot be applied in a case dealing with a bill of lading governed then by the Harter Act.

QUESTION: Which talked about relieving, or -- was it relieving or lessening?

MR. McDERMOTT: Relieving in the Harter Act.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Today in COGSA it's relieving or lessening.

All of the courts of appeals which have addressed the analogous provision, which is a foreign jurisdiction clause, which inevitably is tied to a foreign law clause, have concluded that it is a prohibited lessening of the carrier's liability to force the cargo owner to go to a remote jurisdiction in a venue that almost always is entirely unrelated to the voyage, and often under color of a foreign law.

QUESTION: Is this venue entirely unrelated to the voyage? It was Japanese interests that owned and operated the ship, was it not?

MR. McDERMOTT: Yes, but the cargo was lifted in Morocco; it was shipped and discharged in Massachusetts.

QUESTION: Would your position be different if the place for arbitration was, say, Morocco?

MR. McDERMOTT: Depending upon the law, it would be different.

QUESTION: Well, how would it be -- let's take -- I thought your position was, any place other than the United States is no good.

MR. McDERMOTT: That is correct. That is our position.

QUESTION: So, then why are you responding differently to Morocco versus Tokyo, or, say, Spain, where

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the insurer is from, versus the United States?

MR. McDERMOTT: Well, I didn't intend to respond differently. The petitioners' position is, any forum which is outside the United States is invalid under COGSA, because it imposes burdens, it imposes hardships, and it creates unacceptable risks that the law which will be applied will not be the controlling United States law.

QUESTION: Assuming that lessening can mean something other than the application of a rule which imposes a lower standard of liability, assuming that in your favor, isn't there something a little bit antique about the argument that by having to go to Tokyo or Morocco or what-not, the injured party is being dragged around the world? I mean, isn't virtually every situation going to be exactly like this?

It isn't the injured party. Bacchus isn't running around the world, a marine insurer is, and I assume you, as a marine insurer, have some sense of your exposure to appear in various forums of arbitration around the world, so isn't there something a little bit outdated about the argument that liability in fact is being lessened by having to go to Tokyo or Morocco?

MR. McDERMOTT: We don't believe so, because the burdens of going half-way around the world, dragging your witnesses half-way around the world, are very formidable

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

and they still remain quite significant.

It is one thing to have what we've traditionally had in the United States, namely 60 years of cargo practice where, in a case such as this, where the cargo is damaged in Massachusetts, where all the witnesses are located, where all the evidence can be readily assembled, where the case can be handled quickly and expeditiously --

QUESTION: Then why wouldn't you make the same argument if the arbitration was going to be in Los Angeles? Is it that you just want a bright line rule?

MR. McDERMOTT: We --

QUESTION: It would be just as tough for you to go there as it would be to go to Lisbon.

MR. McDERMOTT: No, we don't -- arbitration in the United States is materially different from arbitration abroad. I mean, there is a body of arbitrators, for example, here in the United States, who are familiar --

QUESTION: Well, but isn't that -- aren't you now talking about substantive rules of arbitration as opposed to the cost of having to go somewhere? I mean, those are -- I understand the two different arguments, but aren't they two different arguments, and the reason that you might like Los Angeles better than Lisbon is because of the rules, but so far as the cost argument is concerned, it doesn't make any difference, does it?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. McDERMOTT: Not a gross difference, but there are transaction costs abroad which will inevitably be greater than the cost of presenting a claim here in the United States. There are witnesses who will have greater difficulty traveling abroad to give testimony than they would here in the United States.

QUESTION: Why? Why is it harder to go to -- I've been saying Lisbon, than to go to Los Angeles?

MR. McDERMOTT: Because of the deterrent effect of a foreign arbitration, or a foreign litigation, or any --

QUESTION: You mean they don't like the law when they get there, but that's -- you know, that's an argument, but it's a different argument, isn't it?

MR. McDERMOTT: There are -- it is a different argument. On one hand there are what I call the transaction costs. That deals with the burdens that are placed on a claimant to produce the witnesses and the evidence necessary to support it's claim.

There is also the risks that when you get to that foreign forum, there will be a different law that will be applied, not the law which Congress says shall govern any claim brought under this bill of lading, and in combination, that amounts to a lessening.

All of the courts of appeal which have looked

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

into this issue have concluded that in fact it is, from a practical perspective, a lessening to force someone --

QUESTION: But these all build from the Indussa case that was in 1967. The world commercially has become smaller. We have become less provincial with regard to arbitration, and even judicial proceedings in other places.

MR. McDERMOTT: That is true, but what is also equally provincial, if not more so, what is equally parochial, if not more so, is the insistence of foreign carriers that they be sued only in their home jurisdictions, under color of their laws.

What these bill of ladings clause represents is the carrier's insistence, without negotiation --

QUESTION: Like the cruise line in --

QUESTION: Exactly.

QUESTION: -- what's the name of the case?

QUESTION: Carnival Cruise.

QUESTION: Right.

MR. McDERMOTT: Well, Carnival Cruise Lines first of all did not deal with a statute such as COGSA, which governs the substantive rights of the parties to the contract, in this instance to the bill of lading.

QUESTION: Did Congress --

QUESTION: I thought it did. I thought it

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

involved the limitation on Vessel Owners' Liability Act.

MR. McDERMOTT: Well, that act applied to the measure of damages, and it prohibited any --

QUESTION: Lessening of that liability.

MR. McDERMOTT: No, their right to a court of competent jurisdiction. The lessening language in the second section of the Limitation of Liability Act which was at issue in Carnival Cruise Line simply prohibited a clause in a ticket contract that reduced or lessened access to a Federal court.

QUESTION: No, no, no, I think it prohibited lessening of a vessel's liability, and the conclusion of the case that making you go to another court did not constitute a lessening of the vessel's liability, which is I think exactly what's going on here, except that it's another State instead of a foreign country, but you have to travel a long way.

I guess we'd have to say it's okay so long as it's a foreign country that's no further away than Florida was from -- where did he buy the ticket?

QUESTION: Oregon.

QUESTION: Washington.

QUESTION: It was the West Coast somewhere. That's a long distance.

MR. McDERMOTT: Without, of course, adding to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the problem we have here of a provision which would change the law that applies, and which would remove all guarantees that the COGSA, which is the American enactment that requires it be applied to this bill of lading, be enforced.

If you go -- if a Japanese carrier, as in this case, puts a Japanese law and arbitration clause, it removes all guarantees, apart from the additional transaction costs.

QUESTION: Well, you said that -- you had a witness to say that the Japanese law, which is, or at least purports to be modeled on the Hague Rules just like COGSA, you had a witness on your side saying the Japanese law is different. Was there a witness on the other side saying the Japanese law is the same?

MR. McDERMOTT: The Japanese lawyer whose affidavit is in the record simply said that the Japanese Hague Rules would be applied to the arbitration.

It is our position, when you compare the Japanese Hague Rules as a matter of substantive law, to COGSA, when you focus on section 3(2), which is the provision which pertains to the vessel owner's obligation to load and stow the cargo, there is a manifest difference between the two, and there would be a lessening of the substantive liability under the Japanese Hague Rules.s

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: But no finding was made to that effect.

MR. McDERMOTT: No, absolutely not. The merits were never addressed in the courts below.

QUESTION: What is your response to the point made in footnote 25 of the respondents' brief, which says the COGSA contains the same kind of an exemption, namely it says that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (i) act or omission of the shipper or owner of the goods, his agent or representative.

Why wouldn't that cover the exact situation here?

MR. McDERMOTT: That deals with the interplay of sections 3 and 4 of COGSA and the Hague Rules. The authorities that were cited demonstrate in the United States the carrier has the nondelegable obligation to load and stow the cargo even if that cargo is loaded and stowed, as in this case, by stevedores hired by the shipper.

In other words, the carrier simply can't delegate entirely to the shipper, or to the stevedores hired by the shipper, the responsibility for the safety of the cargo.

In contrast, the Japanese Hague Rules impose the

obligation to load only on the carrier and on those hired by him, which would exclude the stevedores in this case hired by the shipper, so the construction of Article 3, which is independent of the exception which Justice Scalia mentions in section 4, does create a significant difference between the Japanese law and the United States law, and if not proven as a matter of fact, as Judge Friendly mentioned in Indussa, in order to determine if, in fact, there would be any potential change in the law, you would simply have experts forecasting what a court might or might not do.

That itself, we believe, is unacceptable lessening of liability, because it removes the glue from what is otherwise a bona fide claim assertable here in the United States, and what the First Circuit did not do on the merits, if you conclude that in fact a bill of lading clause providing for foreign jurisdiction is invalid under COGSA, is a lessening of liability, it did not seek to reconcile the two statutes.

In particular, it did not determine whether or not COGSA, which is a Federal law, would have been a basis under the savings clause in section 2 of the FAA for finding that the bill of lading clause was revocable, and what it was the obligation, we believe, of the First Circuit to do, is attempt to reconcile those two statutes,

not simply conclude, as the First Circuit did, that the two statutes were irreconcilably in conflict and then just pick one over the other, in this case the FAA.

If -- if a bill of lading clause is invalid under COGSA, if it's a prohibited lessening of liability under section 3(8), it is then revocable at law within the meaning of the savings clause of section 2.

Furthermore, apart from the literal terms of the savings clause, which makes these two statutes textually reconcilable, the policies which have animated this Court in its decisions on the Federal Arbitration Act don't come into play in this case, because there is no meaningful consent in bills of lading to any of the bill of lading terms.

QUESTION: Do you say the FAA does not apply to any boilerplate provisions in contracts, only to hammered out negotiated arbitration provisions?

MR. McDERMOTT: No, that is not our position at all.

QUESTION: I thought that's what you just said, that this was not negotiated.

MR. McDERMOTT: That's true, but the FAA applies technically, but in terms of reconciling the two statutes to see whether there is room for COGSA to remove this foreign arbitration clause from the grasp of the FAA, to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

reverse the analogy which the First Circuit used, which said that the FAA removed the foreign arbitration clause from the grasp of COGSA, you'd have to examine the policies, we believe, in the two statutes, and the policy of informed consent, which has animated most of this Court's decisions concerning arbitration, doesn't exist in a case --

QUESTION: Well, but we're not talking about a guilty plea here. We're talking about an engagement that sophisticated businesspeople enter into. If they sign it, why isn't that enough?

MR. McDERMOTT: Well, it's not -- a bill of lading essentially is not a sophisticated document which informed businessmen enter into.

QUESTION: Oh, I didn't say the bill of lading was a sophisticated document. I said, sophisticated businessmen enter into it.

MR. McDERMOTT: Well, it's a form bill of lading which is -- which the carrier issues at ports around the world to shippers who may or may not be informed of what that bill of lading represents. That document is then transferred incident to the contract of sale.

QUESTION: So then there must be a case-specific inquiry every time there's a bill of lading as to whether the shipper read it or not, or knew of its contents?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. McDERMOTT: No.

QUESTION: That's a strange doctrine.

MR. McDERMOTT: Well, we're not advocating that doctrine.

QUESTION: Well, what are you advocating?

MR. McDERMOTT: That in terms of reconciling the two statutes COGSA acquires much greater force in weight in a situation where the foreign arbitration clause wasn't negotiated in any sense, and where the --

QUESTION: You're saying that. Why should that be? I mean, why aren't grown people bound by the agreements that they enter into?

MR. McDERMOTT: Because in the case of bills of lading, ocean bills of lading governed by COGSA, freedom of contract is not the controlling doctrine. COGSA is a statutory overlay which is imposed on the bills of lading because it is a given, and it has been assumed by the precedents of this Court for 50 years, that bills of lading are contracts of adhesion, and because they are contracts of adhesion, it is not a private contract which should regulate the rights of the parties. Rather, it is the statute that overrides the terms in the con --

QUESTION: So every time we get a consent agreement to arbitrate under the FAA, we -- a court must look at it to make sure that the parties had what you

called informed consent that they had read the terms of it?

MR. McDERMOTT: That is not in -- it is not our position that that is indispensable to the application of the FAA to a form contract. In this case, however, it demonstrates that COGSA and the policies that animate COGSA have far greater weight than any policy that would support the application of the Federal Arbitration Act.

QUESTION: Well, but if -- unless we think that holding the arbitration in another country lessens the liability, COGSA just doesn't invalidate, isn't that right?

MR. McDERMOTT: That is true. The premise --

QUESTION: So the question is whether the mere location of the arbitration -- setting aside any choice of law question to be applied, the mere holding of the arbitration in Japan somehow lessens the liability of the carrier?

MR. McDERMOTT: That's correct. That is petitioner's position, and that is the position that the lower courts of appeals have reached unanimously in examining the very same types of clauses which are forum selection clauses, foreign litigation clauses.

QUESTION: But why should we take a different view of the bill of lading than, say, for example the

contract ticket that the passenger certainly had no say in negotiating, as far as the relevance of this being a one-sided contract, a take-it-or-leave-it contract?

MR. McDERMOTT: We're not suggesting that the FAA is entirely displaced because there was not notice and opportunity to negotiate.

The FAA in sections 1 and 2 applied to bills of lading, but in terms of demonstrating whether or not a particular bill of lading clause should be enforceable, as the Court held in Mitsubishi, the Court has to look not to the policies behind the FAA, but rather to the policies behind the other statute.

And the other statute in this case is COGSA, and it's the congressional intentions in the other competing statutes which determine whether or not a bill of lading clause should be enforced, and the purpose of COGSA is to invalidate adhesionary clauses that override bill of lading rights, and if those bill of lading rights have not been negotiated, then there is no reason for COGSA not to apply in full force, and that is petitioner's position.

The -- what the First Circuit did was simply say, the FAA controls, period.

QUESTION: Well, they said we'll assume that arguendo. They first went through a discussion of why they thought Indussa was probably passe. Didn't they do

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that first? And then they said, but we'll just assume, and then go on with the -- put the two in conflict, but didn't they give a pretty strong signal that they didn't think that COGSA was in conflict? Wasn't that the thrust of the whole first part of their opinion?

MR. McDERMOTT: I don't believe so. I believe they assumed that the two were irreconcilably in conflict, and therefore they applied maxims of construction to choose one or the other. They went on to -- the first record went on to say that it was the less specific statute, COGSA was the less specific statute, which we think is wrong --

QUESTION: But everything preceding, notwithstanding the arguably tremulous ground on which Indussa and its progeny currently sit, and we had pages referring to Carnival Cruise and to Bremen -- isn't the First Circuit saying, we think that the way is paved by Carnival Cruise and Bremen, but even if we're wrong about that --

MR. McDERMOTT: With the proviso of footnote 5, which is on page 10a, in which the First Circuit says, we recognize, however, that absent the FAA, COGSA might operate to nullify foreign arbitration clauses and bills of lading.

QUESTION: Might.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. McDERMOTT: Might, certainly, but what the First Circuit was clearly recognizing was that it was only the FAA which salvaged this foreign arbitration clause, and that conflict between the two statutes was, we think, resolved incorrectly, because COGSA is clearly the more specific statute. It pertains to bills of lading that are negotiable title documents, which are the documents indispensable to the international sales of goods.

The FAA applies virtually to every maritime contract. In contrast, Congress enacted COGSA for the specific purposes of regulating the rights of parties to bills of lading, and COGSA was also not, as the First Circuit found, the earliest statute, which was superseded by the enactment of the FAA as positive law of 1947.

That 1947 enactment was never intended to have substantive effect, and for that reason, we think the First Circuit was clearly wrong in applying an early or later maxim of statutory construction. The controlling maxim, we believe, was which was a specific statute, whether there was an implied repeal of COGSA, and clearly, in both instances we think the First Circuit came out the wrong way.

QUESTION: Does the 1970 change to ratify the convention on enforcement of foreign arbitral awards?

MR. McDERMOTT: Well, we think not. It wasn't

raised below, and for that reason we don't think the issue is before the Court, but the 1970 convention has a savings clause just like chapter 1 of the FAA does in section 2.

It specifically says, in article 3(2), that if an arbitration agreement is null and void, then it need not be enforced, and an arbitration clause rendered null and void by COGSA would not be enforceable even under the convention as enacted in 1970.

QUESTION: Do you think that that means that an arbitration clause that is null and void under a rule prohibiting arbitration is unaffected by the FAA? That would sort of make the FAA useless.

MR. McDERMOTT: Well, the COGSA is not a statute that is targeted at arbitration. It is simply a statute that is targeted at clauses that reduce a carrier's liability, but what the First Circuit essentially did here was to elevate an arbitration clause above any other provision in the bill of lading that might violate COGSA.

What Congress said in 1925, when it enacted the FAA, was that arbitration clauses should not be on any higher footing than any other contract clause, but to say, as the First Circuit did here, that the only bill of lading clause which can be enforceable, even if it violates COGSA, is an arbitration clause, is to give an arbitration agreement a superiority to every other

contract clause in the bill of lading.

QUESTION: It's not arbitration per se. If the arbitration were in the United States, what would your position be?

MR. McDERMOTT: We do not contend that that lessening of liability would be so extreme as to validate the clause. It's not the petitioner's position that arbitration per se is contrary to COGSA, nor do we contend that COGSA claims can't be arbitrated. They certainly can be.

QUESTION: This must be in the United States.

MR. McDERMOTT: Yes, Your Honor.

QUESTION: Thank you, Mr. McDermott.

Mr. Walsh, we'll hear from you.

ORAL ARGUMENT OF THOMAS H. WALSH, JR.

ON BEHALF OF THE RESPONDENTS

MR. WALSH: Mr. Chief Justice, and may it please the Court:

As is apparent, I believe, we strongly believe the FAA is the dominant statute here and overrides any provisions in COGSA.

When this transaction commenced, Bacchus Associates, the assured of Vimar, entered a contract with Galaxie, a Moroccan supplier, and they purchased a shipload of oranges.

In that transaction, they obtained a bill of lading, a negotiable bill of lading, which was issued by the shipowner --

QUESTION: You mean negotiable in the bills and notes sense --

MR. WALSH: Yes.

QUESTION: -- not as a subject of the word "negotiated."

MR. WALSH: It as delivered to Galaxie, Your Honor, and in turn Galaxie, as part of the sale contract with Bacchus, delivered the bill of lading to Bacchus.

Bacchus and their assurance company were never, in reality, in direct contact on the bill of lading with the shipowner. They took that bill of lading as part of the purchase contract for the oranges from Galaxie.

The shipowner did what he is supposed to under the Carriage of Goods by Sea Act. He issued a bill of lading and he delivered it to the shipper, Galaxie. In the context of its transaction with Galaxie, we believe that Bacchus could have negotiated for any bill of lading it wished.

Galaxie -- strike that. Bacchus also entered a contract for the use of the vessel. Bacchus was not simply the purchaser of the fruit. Bacchus also arranged for a vessel, the Sky Reefer, to perform a single voyage

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

charter from Agadir, Morocco, to New Bedford, Massachusetts.

That contract with the time charter of the vessel assumedly made a profit for Bacchus, was economically more desirable than simply having Galaxie deliver the fruit to New Bedford, and that clause which -- that contract, voyage charter which Bacchus negotiated with the time charter of the vessel, contained an arbitration clause. Bacchus contends -- complains about arbitration clauses, and yet in that instance they negotiated and accepted one.

We believe those are relevant factors, and that the bill of lading which was used here, a negotiable bill of lading in essentially a normal commercial sense, would be exactly the type of ocean bill of lading which is referred to in the Federal Arbitration Act, which says ocean bills of lading are valid and enforceable when they contain arbitration clauses.

QUESTION: May I ask a hypothetical question? Supposing the bill of lading contained an arbitration clause, and the clause said that there shall be no liability without proof of wilful and wanton misconduct on the part of the carrier, and the arbitrator shall decide whether there is or not, would that be enforceable?

MR. WALSH: I believe it would, Your Honor, it

would before the arbitrators.

QUESTION: What is left of COGSA, then? If you put an arbitration clause in and it says in it, none of the provisions of COGSA shall apply to this transaction, and the arbitrator shall do it under some -- and they set out a set of rules that would govern this arbitration. That would be perfectly all right, I guess.

MR. WALSH: At some point, Your Honor, I believe you reach a stage of what has been called fundamental unfairness, or is not fundamentally fair.

QUESTION: Well, what's unfair about it? The parties can read the agreement before they sign it. I mean, I don't understand fundamental unfairness if the terms are explicit in the arbitration agreement.

MR. WALSH: Your Honor, if you assume the --

QUESTION: Maximum liability, $100 for each ton of goods, or something.

MR. WALSH: If you assume -- Your Honor, if you assume sophisticated traders, and you assume knowledge and negotiation, it is difficult --

QUESTION: The whole premise of COGSA is that you don't have time for knowledge and negotiation in advance, because you have these transactions taking place with time considerations and all the rest, and there's some interest in uniformity that COGSA was intended to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

serve.

MR. WALSH: Well, Your Honor, there is a great deal of COGSA that does not have to do with the arbitration clause, and does, in the normal course of events, reflecting the Hague Convention, which is what it is --

QUESTION: Yes, but under your view, all of that could be agreed to not be followed in a particular shipping situation.

MR. WALSH: Between sophisticated individuals, Your Honor --

QUESTION: You assume all people who own -- make million dollar purchases of oranges are pretty sophisticated.

MR. WALSH: Yes, Your Honor, I believe that is the case. They are --

QUESTION: Are you saying that every time the arbitration clause also contains a kind of specific choice of law clause, that the arbitration clause carries the choice of law clause with it, as it did in Justice Stevens' example?

MR. WALSH: No, Your Honor. I think they're --

QUESTION: Well, when do you get to the point of fundamental unfairness, because you were arguing it was okay in his example, because they had negotiated and

accepted it. Where do you get to the point of fundamental unfairness on your theory?

MR. WALSH: Your Honor, I believe you can get to fundamental unfairness in the sense of geography, in the sense of foreign law statutes -- for example, if you assume there was a country where we were sending someone to arbitrate and the law in that country provided that anyone awarding a judgment in favor of an American would be disenfranchised, that would be fundamentally unfair. There is no reasonable -- there is no reason to believe that the arbitration would be done in a fair fashion.

QUESTION: Yes, but that would be unfair because in effect there would be no fair arbitral forum. The example that Justice Stevens was giving was assuming, I think, that there was a perfectly reasonable arbitration process that just happened to be a rule that displaced the liability rule.

MR. WALSH: And I believe --

QUESTION: And so I guess what you're saying is, it may get to the point of fundamental unfairness if there's something fundamentally wrong with the arbitration process, but it never gets to the point of fundamental unfairness if it simply substitutes different rules of liability.

MR. WALSH: That's correct, Your Honor.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Mr. Walsh, I have some difficulty, frankly, with your approach, and I wonder why we shouldn't just look at COGSA and see what it prohibits and what it doesn't prohibit, and ask whether COGSA prohibits the holding of the arbitration proceeding in Japan, does it lessen the liability of the carrier to have the arbitration held in Japan, without looking at the moment at the choice of law issue.

MR. WALSH: We would submit, Your Honor, that it does not lessen if you reach that issue. We submit that it is difficult to believe that Congress would intend that we be, in the context of lessening, measuring air fares and hotel bills in arbitrations. We do not believe that is reasonable. We don't believe that's what anyone meant.

QUESTION: Well, that was certainly the thrust of Judge Friendly's approach in that Indussa case, but you say that's been somehow changed over the course of the intervening years.

MR. WALSH: I think in large part, Your Honor, it's simply the passage of time and the changes in air fares and transportations and faxes, and things that we deal with in the commercial world, that has resulted in a different attitude, and perhaps that was appropriate then, and perhaps it is not now.

In respect to the law that was applied, we do

believe that the Hague Rules would be applied in this arbitration either by Japanese law or by COGSA, they being -- both statutes being essentially incorporations of the same convention.

Now, they do differ, we believe, in somewhat minor words, and one obviously has been translated from English to Japanese and back to English, so there is some --

QUESTION: But presumably COGSA was adopted in conformance with the Hague Rules.

MR. WALSH: That is true, Your Honor, but we understand that the Japanese Hague Rules, Japanese equivalent, was also done in that fashion.

There are some differences, in part cultural differences. Our statute, for example, refers to act of God. The Japanese refers to supervening incidents of, something of that nature. In any translation, if you will, of a convention I would submit that there will be some minor changes, and that is, we believe, what you see in this situation and not a major change in the liability.

QUESTION: Suppose --

MR. WALSH: The structure is the same.

QUESTION: Suppose the parties agree by a separate bill of lading simply to supersede and ignore the

provisions of COGSA, and then that contract is sought to be enforced in a court, in the United States district court. It take it then COGSA operates to revoke that superseding contract.

MR. WALSH: I believe that's true, Your Honor. the district court --

QUESTION: Well then, under the Federal Arbitration Act, although under section 2, referring to the arbitrability of maritime contracts, the last clause says that you cannot arbitrate -- that you must arbitrate save upon such grounds as exists at law and equity for the revocation of any contract, can you argue here that what the petitioners are asserting, that there's grounds to revoke the provision in the bill of lading that superseded COGSA? Isn't that a ground that exists at law and equity for the revocation of the contract under section 2 of the Arbitration Act?

MR. WALSH: I believe that was intended, Your Honor, to deal with fraud, duress, and things of that nature. To the extent -- excuse me. Is it not circular, Your Honor? To the extent it violates -- it does not violate COGSA because the FAA dominates, then it is acceptable.

QUESTION: Well, but the FAA has a specific exception: save upon such grounds as exist at law or

equity for the revocation of any contract, and I assume that would be the revocation of any part of a contract.

MR. WALSH: I would assume that's correct, Your Honor.

QUESTION: Well, why doesn't that operate to restore COGSA, then?

MR. WALSH: I don't -- at the moment I can't think of the answer, Your Honor, although I had it earlier. The --

QUESTION: Then perhaps we should --

MR. WALSH: The -- excuse me, Your Honor.

QUESTION: -- concentrate on the question that Justice O'Connor asked. I have the same concern. Usually we try to avoid conflict, not to make conflict, and the First Circuit seemed to be going down the line that there's nothing inconsistent about this bill of lading provision with COGSA, and then it switched gears and said, well, we'll assume conflict.

But why should we assume conflict? Why shouldn't we first see if there really is any conflict with COGSA, and on that score, is Judge Friendly still -- is he really off for modern times? It does cost something to ship everybody to Japan when the relevant evidence is in the United States.

MR. WALSH: Your Honor, that is correct, it does

cost something, but in this case it is not as if your entire evidence is in the United States.

You have crew members from the vessel whose home is in Japan. You have a vessel owner who has contact with Japan. You have evidence you would expect from Morocco as to the packaging of the goods. That will undoubtedly be an issue. You have evidence from Morocco as to the stowage of the goods --

QUESTION: Yes, but your case would be -- your legal position would be exactly the same if nobody ever was within 400,000 miles of Japan. That's an exaggeration. Your case would be the same if all the witnesses were local people in Boston.

MR. WALSH: That is true, Your Honor.

QUESTION: Some of whom might not really want to go to Tokyo to testify for 15 minutes in some kind of an arbitration.

MR. WALSH: That is true, Your Honor, and they might decide not to go, and there might be a change in the agreement at that point.

QUESTION: So it may well be, as a practical matter, much more difficult to prove the liability if you have to go 10,000 miles to a distant forum than if you do it right where everybody's right at home.

MR. WALSH: I cannot quickly tell you whether

it's further from Morocco to Tokyo than Morocco to New York.

QUESTION: No, I'm just assuming -- my hypothetical is everybody lives in --

MR. WALSH: No --

QUESTION: -- in Boston in my case.

MR. WALSH: If everyone lives in Boston, Your Honor, no one will want to travel.

QUESTION: Yes, and they still, under your view they still --

(Laughter.)

QUESTION: -- have to go to Tokyo, and even if the law is radically different, there's still no -- the arbitration agreement is still enforceable.

MR. WALSH: That's true, Your Honor.

QUESTION: I know you will argue it's not different because of the international convention, but I don't think that's essential to your position.

MR. WALSH: No, and I think it's important to keep in mind, Your Honor, that what we're talking about is arbitration, a totally different vehicle than litigation. It has benefits. It is more efficient in some ways than litigation. It is prompt. It is -- there are some good things about it, but there are also some detriments.

The law may not be applied in as meticulous a

fashion. The review may not be as detailed. It is a tradeoff, and what we believe is that arbitration in this day and age should be encouraged, and that under the Federal Arbitration Act, referring to bills of lading, this is what they meant.

QUESTION: But I'm not sure how you get around Justice Kennedy's concern that the COGSA says, in so many words, if you have different terms in a bill of lading than those the statute requires, that bill of lading is null and void, and you're saying well, we can write a different bill of lading as long as we have an arbitration clause. That to me is hard to --

MR. WALSH: My belief is that there's nothing in COGSA, Your Honor, which says I cannot put an arbitration clause in a bill of lading. It says I cannot, if you read it that way, lessen the liability.

We don't believe that arbitration lessens the liability. To lessen liability, Your Honor, we would have to take a standard, cost and other things, which we would say is litigation, deduct from that the cost which would be arbitration --

QUESTION: But you'd also say --

MR. WALSH: -- and also say it's greater or lesser.

QUESTION: -- that applying a different nation's

law does not lessen liability, either. You say that, as I understand you.

MR. WALSH: Yes, Your Honor. While that is probably not necessary for this case in its present status, yes, I -- that's true.

QUESTION: But you could lose on that point entirely, and still you would maintain -- I assume you would maintain the position that the mere existence of the arbitration clause is not what the statute means by lessening liability.

MR. WALSH: That is correct, Your Honor, absolutely.

QUESTION: Okay.

QUESTION: What about this law question? There's a square disagreement between you and counsel on the other side as to whether Japanese law is, indeed, different from COGSA. What did the lower court assume about that?

MR. WALSH: the lower court, my recollection is, Your Honor, simply said that issue's not before us.

QUESTION: Yes, but by doing that it said we can assume arguendo that it's different, and we still will require arbitration, and if your position depends on them being the same, then there is not a necessary finding that they are the same.

MR. WALSH: Our position does not depend on it being the same.

QUESTION: You're -- and under the court of appeals rationale, you're entitled to win, even if they're different.

MR. WALSH: Yes, Your Honor.

QUESTION: Because they said, we don't have to decide it.

MR. WALSH: Yes.

QUESTION: But you're making the argument here that you're a fortiori entitled to win if they are the same, and in order to sustain that argument, we have to make a finding about whether they're different or the same, which hasn't been made.

MR. WALSH: Correct, Your Honor.

QUESTION: And I guess -- am I correct that what the court of appeals was ultimately assuming was that the question of their resemblance would be decided in the first instance by the arbitrator, the district court would retain jurisdiction, and subject to whatever rules for review of arbitration might exist, the issue could ultimately come back to the district court.

MR. WALSH: Yes, Your Honor. The district court --

QUESTION: It simply would be resolved by arbitration in the first instance, is that --

MR. WALSH: Yes, Your Honor.

QUESTION: -- what was assumed?

MR. WALSH: And the district court here with the security posted retains jurisdiction until this matter is finally ended.

I believe that we have covered most of the matters which were relevant this morning. If there are no further questions, I will simply forego the rest of my time.

CHIEF JUSTICE REHNQUIST: Very well. Thank you, Mr. Walsh. The case is submitted.

(Whereupon, at 11:51 a.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

VIMAR SEGUROS Y REASEGUROS, S.A., Petitioner v. M/V SKY REEFER, HER ENGINES, ETC., ET AL.

CASE NO.: No. 94-623

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)