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Union Insurance Society of Canton, Ltd. v. S.S. Elikon - the Carriage of Goods by Sea Act and Forum Selection Clauses

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Union Insurance Society of Canton, Ltd. v. S.S. Elikon—the Carriage of Goods by Sea Act and Forum Selection Clauses

In its recent decision in *Union Insurance Society of Canton, Ltd. v. S.S. Elikon*,[1] the Court of Appeals for the Fourth Circuit held that a forum selection clause in a bill of lading for marine shipment of goods from the United States to Kuwait was overridden by the provisions of the Carriage of Goods by Sea Act (COGSA).[2] The court reasoned that Congress specifically intended for COGSA to protect the rights of shippers by preventing forum selection clauses that unfairly relieved or lessened the liability of ocean carriers. The holding in *Elikon* thus creates new authority for an exception to the general rule that forum selection clauses in contracts should be upheld.

The United States Supreme Court's decision in 1972 in *Bremen v. Zapata Off-Shore Co.*[3] established the general rule and changed the traditional negative attitude of U.S. courts toward forum selection clauses. *Bremen* involved a forum selection clause stipulated in a contract between Zapata, a U.S. corporation, and Unterweser, the *Bremen*'s German owner, to tow a mobile offshore drilling rig from Texas to Italy. The forum selection clause required any dispute arising under the contract to be submitted to the High Court of Justice in London. When a storm in the Gulf of Mexico damaged the rig, Zapata sued the *Bremen* and her owner in U.S. district court in Tampa, Florida. The Supreme Court upheld the forum selection clause, approving of "a more hospitable attitude"[4] toward forum selection clauses and emphasizing the need to give effect to the legitimate expectations of the parties. The Court established the rule that forum selection clauses are to be prima facie valid[5] and should be enforced unless the resisting party can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."[6]

The Court of Appeals for the Fourth Circuit attempted to reconcile its decision in *Elikon* with *Bremen* by distinguishing the two cases on

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1. 642 F.2d 721 (4th Cir. 1981).

2. 46 U.S.C. §§ 1300-1315 (1976). The Carriage of Goods by Sea Act represents the American enactment of the Hague rules. These rules, which are an attempt at international regulation of bills of lading used in international sea trade, have been given full or partial effect by some 80 states. *See* O'Keefe, *The Contract of Carriage of Goods by Sea: International Regulation*, 8 SYDNEY L. REV. 68 (1977).

3. 407 U.S. 1 (1972).

4. 407 U.S. at 10.

5. *Id.*

6. *Id.* at 15.

their facts.[7] *Elikon* arose out of a shipment of General Electric air conditioners from Newport News, Virginia, to the Port of Kuwait on board the S.S. *Elikon*, a German Freighter owned by the Deutsche Dampfschiffahrts-Gesellschaft (Hansa). Hansa executed and delivered two clean bills of lading for the cargo to General Electric. When the cargo was discovered to be damaged on delivery in Kuwait, the Union Insurance Society of Canton, Ltd., as marine insurer, was forced to pay a large claim to the Middle Eastern consignee of the cargo. The Society sued Hansa to recover its loss.

The suit was brought in admiralty in the U.S. District Court for the Eastern District of Virginia, despite a clause in the bills of lading requiring such actions to be brought exclusively in the Court of Bremen in West Germany. The district court refused to accept jurisdiction, ruling that the forum selection clause should be controlling as long as the Society could maintain its action in the German court. The Court of Appeals reversed, holding that COGSA applied to the bills of lading and superseded the unfair forum selection clause.

The forum selection clause in *Elikon* was part of the preprinted form bills of lading and was not the product of hard bargaining; instead, it represented "the form clauses of an adhesion contract."[8] In contrast, *Bremen* involved a drilling rig owner who requested bids from towing companies and negotiated the terms of the contract with the eventual winner. *Elikon* also dealt with a forum (the Court of Bremen) that was possibly an unfair and unreasonable choice, since Hansa's headquarters are located in Bremen. *Bremen v. Zapata* involved a forum (the High Court of Justice of London) which was a reasonable compromise between the wishes of the American rig owner and the German tug operator.

The greatest distinction between *Elikon* and *Bremen* is that *Elikon* involved bills of lading which specifically stated in Clause 1 that COGSA's provisions would apply to the bills, while the Supreme Court in *Bremen* found that COGSA was inapplicable to the towage contract before it.[9] The *Elikon* opinion relied heavily on the authority of *Indussa Corp. v. S.S. Ranborg*,[10] which involved a bill of lading governed by COGSA; that case was distinguished in the *Bremen* decision.[11]

In *Indussa*, the Court of Appeals for the Second Circuit invalidated a

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7. 642 F.2d at 724.

8. *Id.*

9. *Bremen* did not arise out of a contract of carriage, and is more an expression of general public policy than a comment on the validity of forum clauses governed by the Carriage of Goods by Sea Act. *See* O'Hare, *Cargo Dispute Resolution and the Hamburg Rules*, 29 INT'L & COMP. L.Q. 213, 219 (1980).

10. 377 F.2d 200 (2nd Cir. 1967). *Indussa* involved a bill of lading with only a forum selection clause; the court in *Elikon* also relied on Knott v. Botany Worsted Mills, 179 U.S. 69 (1900), which, like *Elikon*, involved a bill of lading with both a forum selection clause and a choice of law clause. 642 F.2d at 724 n.2.

11. 407 U.S. at 10.

forum selection clause in a Norwegian carrier's bill of lading which required suit to be brought in Norway for damages to a cargo shipped from Antwerp to San Francisco. The court held that the lessening of liability provision of COGSA, section 3(8), overrode the conflicting forum selection clause:

> A clause making a claim triable only in a foreign court would 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* lesson 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 a simply a demonstrable lessening of liability. . . . We think that Congress meant to invalidate any contractual provision in a bill of lading for a shipment to or from the United States that would prevent cargo able to obtain jurisdiction over a carrier in an American court from having that court entertain the suit and apply the substantive rules Congress had prescribed.[12]

Cases since *Indussa* and *Bremen* have been decided primarily on the basis of whether COGSA does or does not apply on its face to a particular contract. In *Roach v. Napag-Lloyd*[13] and *Zima Corp. v. M.V. Roman Pazinski*,[14] as in *Bremen*, the facts precluded the application of COGSA and section 3(8) of that act. Other cases which have involved contracts governed by the provisions of COGSA have followed *Indussa* and have upheld the paramountcy of section 3(8).[15]

The First Circuit Court of Appeals has suggested in its opinion in *Fireman's Fund Insurance Co. v. Puerto Rican Forwarding Co.*[16] that *Bremen* casts some doubt on the validity of *Indussa*'s underlying rationale, because the Supreme Curt in *Bremen* disapproved of the "parochial concept that all disputes must be resolved under our laws and in our courts."[17] However, the *Indussa* opinion alleviated this concern by stating that the holding did not "outlaw any other tribunal than our own."[18] *Elikon* goes further toward eliminating this problem by allowing the district court to apply on remand the principles of forum non conveniens[19] and thereby determine the proper forum for hearing the case. The district court was instructed to apply the principles of forum non conveniens laid

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12. 377 F.2d at 203-04.
13. 358 F. Supp. 481 (N.D. Cal. 1973).
14. 493 F. Supp. 268 (S.D.N.Y. 1980).
15. *See* Pacific Lumber & Shipping Co. v. Star Shipping A/S, 464 F. Supp. 1314 (W.D. Wash. 1979); Mitsui & Co. v. M/V Glory River, 464 F. Supp. 1004 (W.D. Wash. 1978); Northern Assurance Co. v. M/V Caspian Career, 1977 A.M.C. 421 (N.D. Cal. 1977).
16. 492 F.2d 1294 (1st Cir. 1974).
17. 407 U.S. at 9.
18. 377 F.2d at 204.
19. 642 F.2d at 725.

down in *Gulf Oil Corp. v. Gilbert*,[20] and to take into consideration the nationalities of the parties, the law to be applied, the fact that the bills of lading were written in English, and the availability and location of possible witnesses.

The *Elikon* decision is significant because it provides new authority for the *Indussa* approach to the disputed issue of forum selection clauses. Although this approach is an exception to the general rule of upholding the validity of forum selection clauses, it is consistent with the provisions of *Restatement (Second) of the Conflict of Laws*[21] and the *Model Choice of Forum Act*.[22] Both the Restatement and the Model Choice of Forum Act allow the courts to declare forum selection clauses invalid when there is a violation of public policy, or when the transaction is otherwise unfair, unjust, or unreasonable.[23] While *Bremen* recognized this exception, *Indussa* and *Elikon* have gone further by directly applying the exception to bills of lading governed by COGSA and invalidating forum selection clauses which relieve or lessen the liability of ocean carriers.

Wade H. Gateley

Eain v. Wilkes: Establishing the Parameters of the Political Offense Exception in Extradition Treaties

The Court of Appeals for the Seventh Circuit recently upheld the extradition of a member of the Palestine Liberation Organization (PLO) accused by Israel of exploding a bomb that killed and injured over thirty people.[1] After fleeing to this country, the PLO member had sought a writ of habeas corpus to prevent the Secretary of State from extraditing him to Israel. The court, in a strongly worded opinion, rejected the petitioner's argument that the bombing constituted a political offense—a determination which would have blocked his extradition to Israel. *Eain v. Wilkes* is noteworthy for several reasons. First, the court reiterated the traditionally important role the judiciary plays in extradition proceed-

20. 330 U.S. 501 (1947).

21. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971).

22. MODEL CHOICE OF FORUM ACT (National Conference of Commissioners on Uniform State Laws, 1968).

23. *See* Nanda, *Forum Selection and Choice-of-Law Agreements in International Contracts*, THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS § 8 (V. Nanda ed. 1981).

1. Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).