

ORIGINAL

(S E R V E D)
(October 31, 2000)
(FEDERAL MARITIME -COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 99-24

CARGO ONE, INC.

v.

COSCO CONTAINER LINES COMPANY, LTD.

Allegations of violations of sections 10(b)(1) and 10(b)(3) (pre-1998 amendments) of the Shipping Act of 1984 brought before the Commission will normally be dismissed pursuant to section 8(c), unless complainant rebuts the presumption that those claims are merely coexistent with claims for breach of contract.

Allegations- of violations of sections 10(b)(6)(E), 10(b)(11), 10(b)(12) and 10(d)(1) (pre-1998 amendments) of the Shipping Act of 1984 brought before the Commission will be presumed actionable before the Commission, as those sections invoke considerations peculiar to Shipping Act concerns beyond the confines of breach of contract.

Carlos Rodriguez, Robert R. Herrell, and Sean McGowan for Complainant Cargo One, Inc.

Richard D. Gluck, Robert A. W. Boraks, Jeffrey W. Jacobs, and Michael I. Goulding for Respondent COSCO Container Lines Company, Ltd.

Vern W. Hill, Charles L. Haslup, and Julie L. Berestov for Intervenor Bureau of Enforcement.

ORDER VACATING THE ADMINISTRATIVE LAW JUDGE'S ORDER DENYING
RESPONDENT'S MOTION TO DISMISS AND REMANDING THE PROCEEDING TO
THE ADMINISTRATIVE LAW JUDGE

BY THE COMMISSION: (*Harold J. Creel, Chairman; Joseph E. Brennan, Antony M. Merck, John A. Moran, and Delmond J.H. Won, Commissioners*)

This proceeding was initiated by a Complaint filed by Cargo One, Inc. ("Complainant" or "Cargo One"), a non-vessel operating common carrier ("NVOCC"), against COSCO Container Lines Company, Ltd. ("Respondent" or "COSCO"), an ocean common carrier, on November 17, 1999. Cargo One alleges that COSCO violated several provisions of the Shipping Act of 1984 ("the Shipping Act"), 46 U.S.C. app. §1701, et seq. (1992).¹ Specifically, Cargo One alleges that COSCO violated sections 10(b)(1), by demanding payment of tariff rates in lieu of the agreed upon service contract rates; 10(b)(3), by denying containers and container space aboard vessels contrary to agreement under the service contract; 10(b)(6)(E), by denying Cargo One's claim with respect to the denial of space and equipment contrary to agreement under the service contract; 10(b)(11), by denying Cargo One cargo space in deference to larger shippers contrary to the agreement under the service contract; 10(b)(12), by denying container space aboard eastbound vessels in the Far East trade lanes contrary to the agreement under the

¹ The alleged violations in this Complaint occurred prior to the amendment of the Shipping Act by the Ocean Shipping Reform Act of 1998 ("OSRA"), P.L. 105-258, 112 Stat. 1902. All citations herein are to those sections of the Shipping Act in effect at the time of the alleged violations.

service contract; and 10(d)(1), by failing to receive containers tendered by Complainant at service contract rates, denying container space aboard eastbound vessels in the Far East trade lanes contrary to what was agreed under the service contract, and failing to respond to and rectify complaints from Cargo One regarding the problems with the use of the service contract.²

² The relevant provisions of the Shipping Act read as follows:

Section 10. Prohibited acts.

(b) Common carriers. No common carrier, either alone or in conjunction with any other person, directly or indirectly, may -

(1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts;

(3) extend or deny to any person any privilege, concession, equipment, or facility except in accordance with its tariffs or service contracts;

(6) except for service contracts, engage in any unfair or unjustly discriminatory practice in the matter of - -

(E) the adjustment and settlement of claims;

(11) except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever;

(12) subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever;

(d) Common carriers, ocean freight forwarders, and marine terminal operators.

(1) No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

On December 8, 1999, COSCO filed a motion to dismiss on the basis that section 8(c) of the Shipping Act, 46 U.S.C. app. §1707(c), provides that "[t]he exclusive remedy for breach of contract entered into under this subsection shall be an action in an appropriate court, unless the parties otherwise agree."³ Both Cargo One and the Commission's Bureau of Enforcement ("BOE"), as an intervenor, opposed the motion. On February 7, 2000, the Administrative Law Judge ("ALJ") denied the motion to dismiss. ALJ's Order Denying Respondent's Motion to Dismiss ("ALJ's Denial"). COSCO subsequently filed a motion for leave to appeal

³ Section 8(c) reads as follows:
(c) Service contracts.

An ocean common carrier or conference may enter into a service contract with a shipper or shippers' association subject to the requirements of this Act. Except for service contracts dealing with bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste, each contract entered into under this subsection shall be filed confidentially with the Commission, and at the same time, a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format, and those essential terms shall be available to all shippers similarly situated. The essential terms shall include

(1) the origin and destination port ranges in the case of port to port movements, and the origin and destination geographic areas in the case of through intermodal movements;

(2) the commodity or commodities involved;

(3) the minimum volume;

(4) the line-haul rate;

(5) the duration;

(6) service commitments; and

(7) the liquidated damages for nonperformance, if any.

The exclusive remedy for a breach of a contract entered into under this subsection shall be an action in an appropriate court, unless the parties otherwise agree.

the denial. The ALJ granted that motion and certified COSCO's interlocutory appeal to the Commission on March.21, 2000. In the same ruling, the ALJ granted a stay of discovery proceedings pending the Commission's decision on appeal.

For the reasons set forth below, the Commission vacates the ALJ's Order Denying Respondent's Motion to Dismiss and remands the proceeding to the ALJ for further consideration of dismissal of the alleged violations of sections 10(b)(1) and (3) consistent with this opinion, and with instructions to proceed as appropriate on the remaining allegations.

BACKGROUND

The Complaint alleges that on or about January 28, 1999, Cargo One and COSCO entered into a service contract providing for transportation between Far East ports and United States ports. Complaint at 2. Under the terms of the contract, Cargo One was to tender a minimum of 250 forty-foot equivalent units ("FEUs") between February 4, 1999 and April 30, 1999, and COSCO was to provide space for such cargo. Id. Cargo One alleges that its agent in the Far East subsequently and repeatedly attempted to book cargo pursuant to the service contract during the effective period, but was successful in having only 6.5 FEUs accepted for shipment at the rates agreed to in the service contract. Id. Cargo One further alleges that the reason stated by COSCO for not accepting cargo was

"that COSCO would not have space for Cargo One because it had to allocate cargo to other larger shippers." Id. at 3.

Cargo One subsequently demanded liquidated damages from COSCO pursuant to the formula established in the service contract, in the amount of \$121,750.00. Id. at 4. According to Cargo One, neither COSCO, nor its agent, has responded to its claim for damages. Id.

COSCO asserts that on November 17, 1999, the same date the subject Complaint was filed, it replied to a letter from Cargo One in which Cargo One threatened to file the subject Complaint. COSCO's Appeal of ALJ's Order Denying Motion to Dismiss ("COSCO Appeal") at 4. COSCO maintains that in that letter it stated that it would prefer to settle, but would need documentation to support the claim. Id. Cargo One allegedly refused to provide the requested information. Id. COSCO then reminded Cargo One that according to the service contract, all disputes are to be arbitrated in Beijing. Id.

ALJ'S DENIAL OF COSCO'S MOTION TO DISMISS

Applying the standard articulated in Federal Rule of Civil Procedure 12(b)(1), the ALJ concluded that the motion to dismiss must be denied. In order to dismiss a complaint, a court must find that "no relief may be granted under any set of circumstances that could be proved consistent with the allegations contained in a complaint," and all "doubts and inferences must be construed in favor of the non-moving party." ALJ's Denial at 32 (citing Hishon

v. King & Spaldins, 467 U.S. 69, 73 (1984), Conlev v. Gibson, 355 U.S. 41, 45-46, and A.P. Moller-Maersk Lines, P&O Nedlloyd Limited and Sea-Land Service, Inc., 28 S.R.R. 389, 392-93 (Motion for Summary Judgment or Partial Dismissal Denied 1998)).

The ALJ found that "the complaint alleges that COSCO violated the anti-discrimination provisions of the Shipping Act, as amended by OSRA, which have no parallel in contract law and for which there may be no remedy under contract law," and that the allegations of undue and unreasonable preference and prejudice "may be shown not to rest on contractual rights but rather upon a common carrier's duty to allocate vessel space on a reasonable and non-discriminatory basis." ALJ's Denial at 33. The ALJ also suggested that the parties could further address changes made by OSRA, as well as the applicability of the filed rate doctrine. In addition, he proposed revisiting Vinmar, Inc. v. China Ocean Shipping Co., 26 S.R.R. 420 (FMC 1992) ("Vinmar"), the case primarily relied upon by COSCO in its motion to dismiss.

POSITIONS OF THE PARTIES

In order to present the issues in a clearer manner, we have arranged the positions of the parties to reflect the three major issues in their pleadings: (A) whether section 8(c) precludes jurisdiction by the Commission over this Complaint; (B) whether the Vinmar case, interpreting section 8(c), should be revisited or overturned; and (C) whether section 8(c) prohibits arbitration in

Beijing as provided for in the service contract. The positions of the parties on each issue are presented seriatim.

A. Does Section 8(c) preclude jurisdiction?

1. cosco

COSCO first argues that section 8(c), as interpreted by Vinmar, precludes Commission consideration of this Complaint. COSCO opines that in Vinmar, "the Commission was confronted with the identical jurisdictional question presented by Cargo One's complaint." COSCO Appeal at 10. COSCO explains that the allegation in Vinmar was that the respondent carrier failed to effectuate its contract with its shipper, Vinmar, in violation of sections 8(c) and 10(b)(12). Vinmar at 420. According to COSCO, the question addressed in Vinmar was "can Vinmar obtain the same remedy for violations of sections 8(c) and 10(b)(12) of the Shipping Act that would be available to it in a breach of contract action in an appropriate court?" COSCO Appeal at 10 (quoting Vinmar at 424). In that case, notes COSCO, the Commission examined the legislative history and statutory construction of the Shipping Act and concluded that "Congress placed the limitation in section 8(c) in order to limit the Commission's jurisdiction to award remedies that would otherwise be available in a breach of contract action if the matter were brought before a court." COSCO Appeal at 10-11 (quoting Vinmar at 424). Further, the Commission determined that "[w]here, as here, the alleged conduct under a service

contract would constitute a breach of contract as well as a violation of one or more of the prohibited acts, the limitation in section 8(c) requires the aggrieved party to proceed in a breach of contract action." Id. at 11 (quoting Vinmar at 424) (emphasis in original).

In further support of its position, COSCO cites two cases which followed Vinmar, DSR Shipping Co., Inc. v. Great White Fleet, Ltd., 26 S.R.R. 627 (1992) ("DSR"), and Western Overseas Trade and Dev. Corp. v. ANERA, 26 S.R.R. 874 (1995) ("Western Overseas"). COSCO explains that in DSR, the administrative law judge dismissed DSR's allegations "which arose from breaches in the service contract." COSCO Appeal at 12. The ALJ's dismissal of DSR's complaint was affirmed because, COSCO relates, the Commission found that "[i]n order to adjudicate each of these claims under the Shipping Act it would be necessary for the Commission to determine whether there was a breach of contract," and Vinmar precludes use of the Shipping Act as a remedy for breach. COSCO Appeal at 12 (quoting DSR at 631).

In Western Overseas, none of the shipper parties to a service contract met its minimum quantity commitments and ANERA sought liquidated damages pursuant to the service contract. After refusing to pay the liquidated damages and refusing to enter into arbitration pursuant to the contract, the shippers filed a complaint alleging that no service contracts existed and that by

filing lower independent action rates during the course of the contracts and attempting to collect liquidated damages, ANERA had violated several provisions of the Shipping Act. COSCO Appeal at 13 (quoting Western Overseas at 875). COSCO reports that the Commission held in that case that while it had jurisdiction to determine whether a service contract existed, the Commission was "barred by section 8(c) of the 1984 Act from hearing those claims, which, although couched in terms of alleged violations of the 1984 Act, [sought] remedies that would otherwise be available in a breach of contract action if the matter were brought before a court." COSCO Appeal at 13 (quoting Western Overseas at 883-884).

COSCO next applies the Vinmar holding to the present situation and argues that the ALJ erred because Cargo One's discrimination claim, if proven, would also constitute a breach of contract, and therefore, the jurisdictional bar would apply. COSCO acknowledges that the standard on which the ALJ relied in denying the motion, namely that "a court may dismiss a complaint only if it is clear that no relief may be granted under any set of circumstances that could be proved consistent with the allegations contained in a complaint, "is correct, but argues that the resultant denial was in error. COSCO Appeal at 14 (citing ALJ's denial at 32). cosco concedes that violations of sections 10(b) (11) and(12) would also necessarily be breaches of the service contract. COSCO Appeal at 14, et seq. Similarly, COSCO later argues that if violations of

sections (10)(b)(1) and 10(b)(3) are proven, that would also constitute breach of the service contract. COSCO Appeal at 24.

COSCO supports this argument by pointing out that in Cargo One's Complaint, each allegation of a Shipping Act violation also maintains that COSCO was acting contrary to agreement under the service contract. Id. at 15. Further, COSCO points out that in two letters it received from Cargo One prior to the filing of the instant Complaint, attempting to collect liquidated damages, Cargo One used the term "breach." COSCO concludes that "if construed in the light most favorable to Cargo One and taken as true, the alleged conduct under the service contract would necessarily constitute a breach of contract as well as a violation of the anti-discrimination provisions of the Shipping Act." Id. at 17. Accordingly, asserts COSCO, Vinmar and its successors preclude Commission consideration of the instant Complaint. Id.

COSCO questions BOE's reliance on Universal Fixture Mfg. Co., Inc. v. ANERA, 26 S.R.R. 1461 (FMC 1994) ("Universal"), where the Commission dismissed a complaint alleging undue or unreasonable preference or prejudice in violation of section 10(b)(12), because, according to BOE's interpretation, the source of the alleged violations was individual member lines of ANERA, not ANERA itself which was the signatory to the service contract. COSCO Appeal at 19 (citing BOE's Reply to Motion to Dismiss at 6). Rebutting BOE's view, COSCO asserts that Universal was dismissed primarily on the

basis that "section 8(c) of the 1984 Act barred [the Commission] from hearing claims which, although couched in term of alleged violations of the Shipping Act, seek remedies that would otherwise be available in breach of contract actions." COSCO Appeal at 19 (citing Universal, 26 S.R.R. at 1466).

COSCO also rejects BOE's reliance on Atlantis Line, Ltd. v. Australia New Zealand Direct Lines, 24 S.R.R. 1494 (1988) (ALJ's Order Denying Motion to Dismiss) ("Atlantis"). In Atlantis, during the term of a service contract, the respondent published lower tariff rates for the same cargo but continued to charge complainant the higher service contract rate. COSCO Appeal at 21 (citing Atlantis at 1494-95). COSCO asserts that the administrative law judge determined that the exclusive remedy language of section 8(c) did not apply in that case, and denied the motion to dismiss, because "[t]he complaint [was] not predicated on breach of the terms of the service contract," but rather "adherence to those terms." Atlantis at 1495. COSCO contends that Atlantis is distinguishable from the instant Complaint because Atlantis did not concern the breach of a service contract, whereas each allegation here contains a causal nexus to breach of the contract. cosco Appeal at 22.

COSCO next takes issue with BOE's interjection of the filed rate doctrine as an issue to consider in this proceeding with regard to allegations of violations of sections 10(b)(1) and (3),

questioning how "the existence of the fixed [sic] rate doctrine gives the Commission jurisdiction over a private complaint case seeking breach of contract damages, in the face of the exclusive jurisdiction clause in section 8(c) of the Shipping Act." Id. at 24.

2. Cargo One

Cargo One distinguishes the instant Complaint from Vinmar and the cases that followed on the basis that the Vinmar line of cases involved primarily service contract disputes, and only incidentally, if at all, raised Shipping Act violations. Cargo One opines that "the salient differences [sic] between the case at hand and Vinmar and its progeny is that the activities which form the basis of the allegations in this case drip with facts which constitute violations of the Act, and only incidentally are couched in the context of a service contract," while Vinmar, et al. "are clearly garden variety breaches of service contracts." Cargo One's Reply to Appeal ("Cargo One Reply") at 8. Because the relief sought in Vinmar directed COSCO to sign, file, and make the contract available, "[t]he whole case hinged on contract issues and only incidentally on violations of the Act," Cargo One maintains. Id. at 12.

As to the dismissal in DSR, Cargo One asserts that the "allegations g[a]ve rise essentially to contract issues." Id. at 13. Cargo One opines that Western Overseas was "essentially a dead

freight collection case, and appears to be exactly the kind of claim over which the Commission lacks jurisdiction in that its essence is a breach of a service contract for failing to meet a quantity requirement." Id. at 13. Cargo One also distinguishes Transportation Service, Inc. v. COEX Coffee Int'l, Inc., 26 S.R.R. 646 (I.D. 1992), and Universal, on the basis that the claims were contract disputes. Id. at 14.

Cargo One next argues that each allegation in the instant Complaint arose from a breach of law and regulation, not duty under the service contract. Id. The allegation that COSCO violated section 10(b)(1) is connected with the service contract but "outside the contract obligation," according to Cargo One. Id. at 10. Cargo One asserts that "[d]enying space is a breach of contract. Denying space unless a higher price is paid is a violation of the Shipping Act." Id. Further, Cargo One supports BOE's position that a suit seeking to enforce the filed rate doctrine, as codified in section 10(b)(1), is "very different from a private action alleging simple breach of contract." Id. at 22. See discussion infra at 17-19. As to its allegation of a violation of section 10(b)(11), Cargo One points out that "[t]here is no obligation in the contract not to discriminate. That obligation comes straight from the Shipping Act itself." Cargo One Reply at 11. See also Id. at 23.

Cargo One takes issue with COSCO's attempt to distinguish this case from Atlantis, arguing first that contrary to COSCO's contention, the case should not be dismissed simply because "[r]eparations due to the complainant can only be determined by looking to the service contract." Id. at 12. In support of this, Cargo One points out that in Atlantis, reparations were sought based on the difference between the service contract rates and the lesser tariff rates. Further, Cargo One counters COSCO's argument that the complainant in Atlantis did not raise a breach of contract claim, by reiterating that the violations alleged in the instant case "stand alone from breach of contract actions." Id. at 12. Further, Cargo One points out that Atlantis establishes that the section 8(c) exclusion does not apply to all service contract cases, but rather, only when the "nexus of the complaint" is found in the service contract provisions. Id. at 9.

3. BOE

BOE, in support of Cargo One's position, first attempts to distinguish the instant Complaint from those dismissed in Vinmar and its progeny. BOE interprets Vinmar and section 8(c) as precluding the FMC as a forum only in those cases "where the conduct alleged would also constitute a breach of contract," and sets forth the following four-factor test for preclusion derived from Vinmar:

- (1) the complaint involves conduct under a service contract;
- (2) the complaint sounds in breach of that contract;
- (3) there

are no allegations of Shipping Act violations which would not also constitute a breach of contract; and (4) where the conduct may constitute both a violation of the Shipping Act and a breach of contract, contract law provides the same remedy for the harm alleged that would be available under the Shipping Act.

BOE's Reply to Appeal ("BOE Reply") at 6. See also Western Overseas, and supra at 8-9.

In contrast, BOE points out that the alleged violations of the anti-discrimination provisions' in the instant complaint "have no parallel in contract law" and no remedy is available under contract law. BOE Reply at 6. BOE agrees with Cargo One that the "allegations do not rest on contractual rights, but rather upon a common carrier's duty to allocate vessel space on a reasonable and non-discriminatory basis." Id. Furthermore, BOE suggests that contrary to COSCO's assertion, it is possible the allegations of discrimination may not be found to constitute breach of contract. Id. at 8. For example, BOE envisions a scenario in which "the facts . . . may show . . . that, while the contract did not guarantee space on any particular sailing, COSCO refused to accept cargo from Complainant on particular sailings on which bookings were accepted from other shippers solely on the basis of their

⁴ BOE does not specify which provisions it considers "anti-discrimination provisions"; however, it is likely BOE is referring to sections 10(b) (11) and (12), prohibiting undue and unreasonable preference or prejudice, as well as section 10(b)(6)(E), prohibiting unjustly discriminatory practices.

size."⁵ Id. Thus, BOE contends that the instant Complaint "is clearly sufficient to withstand a motion to dismiss." Id. at 10.

BOE next discusses the "filed rate doctrine," as implicated in section 10(b)(1) of the Shipping Act. BOE contends that the defenses, limitations, and remedies available in an action under the "filed rate doctrine" are different from those available under contract law, and thus concludes that allegations of a violation of section 10(b)(1) are not dependent upon proving a breach of contract. Id. at 17. In 1984, adherence to service contract rates was added to section 10(b)(1), thereby becoming a component of the filed rate doctrine, according to BOE. Id. at 12. BOE gives the example that in Universal the Commission confirmed that unless a service contract was found to be invalid, section 10(b)(1) requires collection of the charges and rates in the contract. Id. at 12.

BOE makes the point that Vinmar intends to preclude only private contractual disputes from Commission jurisdiction, and that an action to enforce the obligation to charge the filed rate is not a private contractual dispute and cannot be contested "by resorting

⁵ BOE argues that reference in the Complaint to the terms of a service contract should "not limit the facts which may be adduced on the issue of discrimination, preference or prejudice." BOE Reply at 8. BOE cites to two cases which stand for the proposition that pleadings need not contain detailed evidence, but can merely give notice of the claim at issue to be later developed through discovery and other means. Id. at 9 (citing to Sparks v. England, et. al., 113 F.2d 579, 582 (8th Cir. 1940), and International Association of NVOCCs v. Atlantic Container Lines, 24 S.R.R. 1079, 1086 (I.D. 1988)).

to common law claims or defenses such as estoppel or agreement to a different rate." Id. at 13. See also Total Fitness Ecruiip. v. Worldlink Logistics, Inc., 28 S.R.R. 45 (I.D. 1997).

In addition, BOE relies on American Tel. & Tel. Co. v. Central Office Tel., Inc., 524 U.S. 214 (1998) ("American Telephone"), to support the proposition that the alleged violation of section 10(b)(3) should not be dismissed, asserting that the case drew the connection between rates and services, proclaiming that rates "have meaning only when one knows the services to which they are attached." BOE Reply at 15 (quoting American Telephone at 223).

BOE also points out that there are limitations on the filed rate doctrine not found in contract law. Id. For one, filed rates are not enforceable if not reasonable. Id. (citing Maislin Industries v. Primary Steel, Inc., 497 U.S. 116 (1990)). Also BOE refers to the initial decision in Total Fitness, which held that the doctrine

does not protect a common carrier from its actions in charging a shipper twice for the same service, refusing to release the cargo until being paid again, carrying out an unjustly discriminatory policy of refusing to carry a particular commodity, and not providing a suitable commodity or per-container rate for that cargo.

BOE's Reply at 16 (citing Total Fitness at 65-66).

B. Should Vinmar be revisited or overturned?

While the preceding synopsis addressed, inter alia, whether Vinmar requires that COSCO's motion to dismiss be granted, a

related but independent issue is whether the Vinmar decision should be reconsidered.

1. Cargo One

Cargo One asserts that if Vinmar is construed to preclude all cases alleging violations involving a service contract, then it ought to be "overturned or revised." Cargo One Reply at 15. To begin, Cargo One cites to section 11(a) of the Shipping Act, 46 U.S.C. app. § 1710(a), which states: "Any person may file with the Commission a sworn complaint alleging a violation of this Act, other than section 6(g), and may seek reparation for any injury caused to the complainant by that violation." Cargo One argues that if section 8(c), as interpreted by Vinmar, is construed to prohibit FMC jurisdiction in service contract transactions, it "would emasculate Section 11 of the Act." Id. at 16. Moreover, Cargo One opines:

In the current shipping environment, the per se exclusion of complaints merely because the activities arose in a service contract context, would be particularly egregious as to shippers, since it is well established that under OSRA 80% or more of ocean transport of non-exempt general cargo moves on the basis of service contracts.

Id. Cargo One finds it more reasonable to conclude that the prohibition in section 8(c) "relates to those cases which are garden variety breach of contract cases as they were in Vinmar and the cases which followed," and analogizes this situation to freight collection cases where a complainant must demonstrate a violation beyond a simple freight collection case.

Cargo One asserts that

[i]t would be further ironic, and indeed, exasperating to shippers, if the Commission was to refuse jurisdiction over this matter considering the time and effort the Commission expended in Fact Finding Investigation No. 23 - Ocean Common Carrier Practices in the Transpacific Trades, which was discontinued by the Commission on the basis that, among other things, 'the response of the shipping public to requests for cooperation in the ongoing investigation was generally disappointing.'

Id. (citing Federal Maritime Commission Fact Finding Investigation No. 23 - Ocean Common Carrier Practices in the Transpacific Trade, Order Discontinuing Proceeding 28 S.R.R. 1213, 1214 (1999).

According to Cargo One, the activities complained of here are identical to those investigated in the fact finding proceeding.⁶

Id. at 17. Cargo One further argues that the Commission has a "public interest" responsibility to decide issues such as these.

Id. at 19. This responsibility purportedly stems from section 11(a) of the Shipping Act, its legislative history, and the recognition in Atlantis that the section 8(c) exclusion does not

⁶ Cargo One summarizes the activities investigated in Fact Finding No. 23 as follows:

1. refusing to provide vessel space or equipment to shippers under existing service contract rates . . . ;
2. demanding or charging rates higher than those set forth in applicable tariffs or service contracts . . . ;
3. subjecting any particular non-vessel-operating common carrier ("NVOCC") or NVOCC traffic generally, to any unreasonable refusal to deal, to any undue or unreasonable prejudice or disadvantage, or to unjustly discriminatory rates or charges

Cargo One Reply at 18.

apply to all service contract claims. In addition, Cargo One cites to a case in which the Commission defined "public interest" to include the "clear interest of the public in the just application and enforcement of those statutes enacted by Congress."⁷ Id. (citing Associated Latin Amer. Freight Conferences and the Ass'n of W. Coast Steamship Cos., Amended Tariff Rules Regarding Wharfage and Handling Charges, 12 S.R.R. 985, 991 (1972)).

2. BOE

BOE also encourages the Commission to revisit Vinmar, both in light of recent statutory amendments to section 8(c) and other cases. BOE Reply at 17. Concurring with Cargo One, BOE points out that three of the issues investigated in Fact Finding No. 23 are "substantially identical to those raised in the instant complaint." Id. Because of the similarity, and because of the disappointing response by shippers to requests for information and documents in that proceeding, BOE believes that dismissal of the instant Complaint "would further discourage other shippers from cooperating with the Commission in the future." Id. at 19. BOE believes this is important despite the fact that Vinmar does not preclude Commission investigation into such matters, pointing out that "there is little incentive for a shipper to participate in a public

⁷ The case cited was brought under section 15 of the Shipping Act of 1916, 46 U.S.C. § 814 (1992), repealed by Pub. L. No. 104-88, 109 Stat. 803 (1995), regarding agreement filing.

Commission proceeding unless that shipper has at least some possibility of compensation (normally in the form of reparation)."

Id.

3. COSCO

COSCO finds BOE's argument regarding shipper participation in investigations "a bit disingenuous and even a little cynical," and makes the point that shippers may bring complaints under section 11(a) for alleged violations, and are only precluded from doing so "if the complaint also constitutes a breach of contract claim." COSCO Appeal at 31. Further, COSCO opines that "it is far from clear that it is good policy to provide financial incentives to induce shippers to make allegations of misconduct against carriers, or that such policy promotes the search for truth." Id.

C. Does Section 8(c) prohibit arbitration in Beijing as provided for in the service contract?

1. Cargo One

The service contract at issue provides that "[i]n the event of any dispute arising out of this contract, the merchant and the carrier agree to binding arbitration in Beijing, PRC." Cargo One Reply, Exhibit 4, Term 105. Cargo One argues that the Complaint should not be dismissed because the clause is contrary to OSRA and congressional intent. Cargo One Reply at 25. Cargo One first describes H.R. 5564, which was introduced in the 102nd Congress (1992) and referred to the House Committee on Merchant Marine and

Fisheries but never voted upon. H.R. 5564 would have prohibited a "controlled carrier from entering into service contracts that require a shipper or shippers' association to resolve legal disputes in the country of the controlled carrier." Id. at 26. Cargo One maintains that in conversation with the senior minority counsel for that Committee, it ascertained that the Committee had taken up the legislation in response to Vinmar, hoping to clarify congressional intent with regard to controlled carriers selecting dispute resolution forums.* Id. Cargo One submits that soon thereafter the larger debate over deregulation of U.S. shipping began, and H.R. 5564 was abandoned. Id. at 27. However, Cargo One further opines that the same concerns were addressed in OSRA in amending section 8(c)(1),⁹ and were expressed by the Senate Commerce, Science, and Transportation Committee in the report accompanying S.414 as follows:

In no case may the dispute resolution occur in a forum controlled by, or affiliated with, one of the parties to the contract. For example, a common carrier that is owned or controlled by a government would be prohibited from mandating in its service contracts that a contract dispute be resolved in nationally run arbitration proceedings.

Id. (quoting S.Rept. 105-61, at 23, 105th Cong. (1997)).

⁸ The service contract at issue in Vinmar contained a forum' selection provision calling for arbitration of contract disputes in Beijing. Vinmar at 421.

⁹ The relevant language of section 8(c)(1), as amended by OSRA reads: "In no case may the contract dispute resolution forum be controlled by or in any way affiliated with a controlled carrier as defined in section 3(8) of this Act, or by the government which owns or controls the carrier."

With regard to the forum selection clause in the service contract at issue here, Cargo One submits that it is

a perfect example of why Congress decided to amend section 8(c)(1) of the Shipping Act of 1984 with regard to forum selection in service contracts. It is well documented by the Commission records that COSCO is under the control and influence of the P.R.C.'s Ministry of Communications ("MOC"), Water Transport Division.

Cargo One Reply at 28. In addition, Cargo One cautions that Chinese law allows for the establishment of arbitration "commissions" to address contract disputes. Id. at 29. Cargo One names two specific commissions before which maritime matters are heard, the Chinese Commission on the Promotion of International Trade ("CCPIT") and the Chinese Maritime Arbitration Commission ("CMPAC"), both "clearly 'controlled by' or 'affiliated with' the Government of the P.R.C." Id. Cargo One also cites to FMC proceedings which have examined restrictive trade practices and Chinese government involvement in private business transactions, and comes to the conclusion that

[t]o assume that 'private' arbitration in the P.R.C. may occur and would not be influenced by the Chinese government acting in its own interests and the interests of its state-controlled carrier, COSCO, would clearly ignore common industry knowledge of the situation in the P.R.C.

Id. at 29.

Cargo One asserts that the amendment to section 8(c) in OSRA prohibiting controlled forums should apply to this proceeding, notwithstanding that the alleged violations occurred prior to the

May 1, 1999 effective date of OSRA, because the savings provision does not, prohibit the Commission from applying the revision to section 8(c) to the instant Complaint, because "[t]he savings provision language is clearly drafted to apply to 'claims' and 'claimants,' not respondents in proceedings before the Commission." Id. at 31.

2. cosco

In its Appeal, COSCO objects to Cargo One's assertion that section 8(c) prohibits arbitration clauses such as that found in the service contract at issue. COSCO argues first that this new provision does not apply to the instant Complaint because OSRA does not apply "to claims arising out of conduct engaged in before the effective date of that Act filed within 1 year after the effective date of that Act." COSCO Appeal at 27 (citing 46 U.S.C. app. § 1719(e)(1998)). Further, COSCO avers that even if the new provision applies, this particular arbitration clause is not in violation thereof as it does not specify a forum, but merely a location. COSCO Appeal at 27.

With regard to H.R. 5564, COSCO asserts that "citation to legislative history at the beginning of the legislative process when a bill is first introduced and no one but its sponsors have adopted the legislation, provides little guidance" and furthermore, in passing OSRA, Congress "ultimately decided on a more tempered approach." Id. at 29.

3. BOE

BOE shares Cargo One's concern that the dispute in this case would be resolved in Beijing if the Complaint is dismissed. BOE notes that whether section 8(c), as amended by OSRA, applies in this case is a matter of first impression. Id. at 21. BOE opines that "at the very least, the new language of section 8(c) is an expression of Congressional dissatisfaction with the type of 'arbitration in Beijing' clauses found in the Vinmar case and in [the service contract at issue here]."¹⁰ Id. As such, according to BOE, the Commission might avoid application of the arbitration clause by ensuring that the instant Complaint is not dismissed. Id.

DISCUSSION

As stated by the ALJ, a complaint may be dismissed only if, construing all inferences in favor of the complainant, "no relief may be granted under any set of circumstances that could be proved consistent with the allegations contained in [the] complaint." See supra at 7.

As an initial matter, the Commission rejects Cargo One's and BOE's suggestion that the Commission consider whether the arbitration clause in the service contract violates section 8(c),

¹⁰ BOE interjects in a footnote the observation that the COSCO standard form bill of lading as found in its tariff includes a clause specifically calling for resolution of disputes before the Shanghai Maritime Court or other maritime courts of the People's Republic of China under Chinese law. BOE Reply at 22.

as amended by OSRA. No such allegation was pled in the Complaint and it cannot be raised at this stage of the proceeding. See James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal District, 27 S.R.R. 1123, 1132 (FMC 1997). Moreover, amendments made by OSRA do not govern in this proceeding because the conduct alleged took place prior to the effective date of OSRA. See 46 U.S.C. app. § 1719(e) (1998).

The key question in this proceeding is whether section 8(c) and the Vinmar line of cases require dismissing the Complaint or allowing the Complaint to go forward. Cargo One and BOE argue that the facts on which the instant Complaint is based can be distinguished from those underlying Vinmar and the cases that followed, and that the Complaint can be allowed to go forward. However, we agree with COSCO's position that the broad language in the line of cases beginning with Vinmar suggests that the Complaint should be dismissed. However, it is the Commission's experience under the Shipping Act that strict deference to some of the language in Vinmar may have eviscerated other statutory rights and remedies envisioned by that legislation. For that reason we ultimately concur with Cargo One and BOE that the sweeping pronouncements enunciated in Vinmar should be revisited and reconsidered.

Section 8(c) of the 1984 Act provides that "[t]he exclusive remedy for a breach of a contract entered into under this

subsection shall be an action in an appropriate court, unless the parties otherwise agree." In Vinmar, the Commission upheld an initial decision dismissing the complaint for lack of jurisdiction based on the language and construction of section (8)(c). The Commission framed the issue as whether the Vinmar complainant could "obtain the same remedy for violations of Sections 8(c) and 10(b)(12) of the 1984 Act that would be available to it in a breach of contract action in an appropriate court?" Vinmar at 424.

The Commission applied the principle of statutory construction which directs that where two sections in a statute would appear to conflict they should be construed to give meaning to each section, and determined that section 8(c) was intended to limit actions that might be brought under section 11(a). Id. (citing Office of Consumer's Counsel, State of Ohio v. FERC, 783 F.2d 206, 219-20 (D.C. Cir. 1986). Interpreting section 11(a), the Commission reasoned that

[t]o construe the 'exclusive remedy' provision in Section 8(c) as simply barring the Commission from adjudicating breach of contract actions would result in the Section having no substantive effect. The Commission would have no authority to adjudicate breach of contract actions even if the 'exclusive remedy' language did not appear in Section 8(c). . . . It is more reasonable to construe Section 8(c) to apply to actions alleging a violation of the 1984 Act.

Id. The Commission recognized, however, that as service contracts are referred to in section 10, Prohibited Acts, the limitation in section 8(c) does not prohibit the Commission, on its own

initiative, from investigating and adjudicating violations involving a service contract. Id.

The Commission concluded in Vinmar that "Congress placed the limitation in section 8(c) in order to limit the Commission's jurisdiction to award remedies that would otherwise be available in a breach of contract action if the matter were brought before a court," specifying that where an allegation points to both a breach of contract and a violation of the Shipping Act, "the limitation in section 8(c) requires the aggrieved party to proceed in a breach of contract action."¹¹

The Vinmar rationale has been applied to subsequent complaint cases involving potential breach actions, resulting in dismissals in the cases discussed by the parties. While the Commission in Vinmar was expressly concerned with giving meaning to each section of the Shipping Act, in effect, that decision and those that followed significantly narrowed the scope of the right to file

¹¹ The Commission decision continued:

While such a dispute might also raise issues under the 1984 Act, the remedy available to an aggrieved party in a case brought under the 1984 Act would be the same one that would be available in an action for breach of contract. The Commission believes that COSCO is correct when it contends that the limitation in section 8(c) prevents parties to a service contract from raising issues under the 1984 Act in order [to] give the Commission jurisdiction to adjudicate what, in essence, is a private contractual dispute. As COSCO observes, this assures that the Commission's limited resources are not wasted adjudicating cases that are contractual in nature and could be more efficiently handled by the courts or through arbitration.

Vinmar at 424.

complaints under section 11, and substantially limited an injured party's ability to obtain reparations for violations arising from service contract-related disputes.

Section 11(a) of the 1984 Act, unchanged by OSRA, states: "Any person may file with the Commission a sworn complaint alleging a violation of this Act, other than section 6(g), and may seek reparation for any injury caused to the complainant by that violation." Section 11(g), governing reparations, enumerates a number of section 10 Prohibited Acts which, if violated, entitle the complainant to double reparations. (Cargo One did not invoke any of those section 10 provisions in its Complaint.) Given the specificity the Shipping Act provides with respect to the types of complaints a person may not bring (i.e., only section 6(g)), and given the specificity as to types of relief available for various violations of the Prohibited Acts, we believe that Congress did not intend that the section 8(c) "exclusive remedy" language would nullify the sections 10 and 11 rights of complainants to bring suit on any matter tangentially or even substantially related to service contract obligations. Moreover, if parties were not meant to obtain reparations for violations of section 10 stemming from transportation under service contracts, it is likely that the statute would've clearly limited either the types of proceedings which can be initiated by private complainants, or the availability of reparations.

Another consequence arising from the language of Vinmar is that it puts the Commission in the position of conjecturing,, on the basis of the complaint language, whether the appropriate remedy for the alleged Shipping Act violation would be identical to the remedy available in a breach of contract action in a court proceeding. This is problematic on two counts. First, such a requirement places unduly heavy reliance on the language used in the complaint in characterizing the grievance. In the instant Complaint, Complainant unfortunately included phrases such as "contraryto the agreement under the service contract" for each of the counts. COSCO has seized on that language to charge that Cargo One is simply attempting to use the Commission's processes improperly to enforce its service contract, and that section 8(c) as interpreted by Vinmar precludes such an action. We believe that while it is important to place on the complainant the burden of invoking the proper authorities and proving one's case, the issue of jurisdiction should not necessarily hinge on superfluous language inserted in a complaint.

Second, it requires prognostication as to not only the realm of remedies that might be authorized by the Commission, but also those remedies that would prove appropriate in a contract action. Remedies in a breach of contract action could include compensatory damages, liquidated damages, restitution or specific performance -

a broader array of remedies than those provided by the Commission. See Dan B. Dobbs, Law of Remedies 747-819 (1993).

The broad Vinmar language creates other anomalies as well. For example, a party to a service contract who has not breached the contract could be subject to Shipping Act claims, while a party who has breached the contract would not be subject to a Shipping Act claim relating to the breach, or perhaps even tangentially related to the contract. Moreover, a party to a service contract may effectively lose its opportunity to bring a Shipping Act claim merely because that party chose to ship under a service contract. In effect, because any violation of a Prohibited Act while a contract is in effect is likely also to relate to a breach, this interpretation largely exempts contracting parties from liability under the Shipping Act during the course of a service contract's effectiveness. To the extent a breach of contract claim and a Shipping Act claim are coextensive, this would not necessarily be problematic. However, we find that in the Commission's discussion of section 8(c) in Vinmar, insufficient consideration was given to the fact that a number of Prohibited Acts enumerated in section 10 hinge primarily on elements and factors beyond those issues which overlap with a breach of contract allegation. There may, for example, be claims of undue discrimination, undue preference, undue prejudice or unreasonableness within the meaning of the Shipping

a

Act, which are distinctly within the sphere of expertise Congress expected the Commission to utilize.

The Commission has reconsidered its decision in Vinmar and is herein articulating a more precise and less expansive view of which causes of action seeking reparations are precluded by section 8(c). We are not overruling Vinmar or suggesting that the case was wrongly decided.¹² However, we find the broad language accompanying that decision to be troublesome, especially as it has been cited perfunctorily since that time, for the proposition that a complaint matter arising from transportation via a service contract is so akin to a breach of contract claim that it is necessarily barred by section 8(c). The practical effect of this application of the sweeping dicta in Vinmar conflicts with Congress' intention that the Commission is the appropriate forum for resolving allegations of violations of certain section 10 Prohibited Acts, even if they arise from transportation governed by a service contract. To find

¹² In fact, Vinmar appears to have been correctly resolved. As noted by the administrative law judge in that proceeding, the complainant there appears to have been seeking little more than enforcement of what it considered to be a contract dishonored by the carrier-respondent. 26 S.R.R. 134.

It is relevant to note that the administrative law judge clearly questioned Vinmar's ability to prove the violations of either section 8(c) or section 10(b)(12). As to section 8(c), he noted that the technical violation of not filing the contract with the Commission could only be redressed through Commission civil penalty procedures. He determined that Vinmar's claim that COSCO refused to deal in violation of section 10(b)(12) could not be proven, and that Vinmar's claim of unreasonable prejudice and disadvantage "merged with the injury it allegedly suffered on account of the breach of contract." Vinmar, I.D. at 136.

otherwise would give little or no meaning to those provisions of section 10, as well as to the right to file a complaint seeking reparations under section 11.¹³

To the extent our rearticulation of the applicability of section 8(c) reflects an overruling of the substantive holding in Vinmar, the Commission does not deviate from or overturn its precedents lightly or for transient reasons. It is an important responsibility of this agency to remain apprised of the impact of its regulatory functions and decisions. Our assessment of the impact of Vinmar since 1992, which limited the opportunity for potential complainants to seek redress for violations of their rights under the Shipping Act, renders necessary that it be reevaluated so as to give appropriate meaning to the various component provisions of the statute.¹⁴

For section 8(c) to have meaning, it must have been intended to preclude the filing of some complaints of Shipping Act violations, and not just breach of contract claims, as such claims would not be actionable before the Commission in any event. Thus, it is "reasonable to construe [s]ection 8(c) to apply to actions

¹³ It is not necessary to revisit each of the cases in which Vinmar was cited, to determine in retrospect whether each matter was correctly resolved.

¹⁴ An administrative agency is not bound by the doctrine of stare decisis. An agency may depart from established precedent if it sufficiently articulates its reasons for doing so, FTC v. Crowther, 430 F.2d 510, 514 (D.C. Cir. 1970), and is in line with statutory authority, SEC v. Sloan, 436 U.S. 103, 118 (1977).

alleging a violation of the 1984 [Shipping] Act." Vinmar at 424. However, we find it inappropriate and contrary to the intent of the statute that section 8(c) bar any Shipping Act claim which bears some similarity to, overlaps with, or is couched in terms suggesting that the remedy may be available in a breach of contract action. We believe the more appropriate test is whether a complainant's allegations are inherently a breach of contract claim, or whether they also involve elements peculiar to the Shipping Act. We find that as a general matter¹⁵, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is no more than a simple contract breach claim. In contrast, where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency.

Of the violations alleged in the instant Complaint, we find that the alleged violations of sections 10(b)(1) and (3)¹⁶ are substantially contract law claims. Sections 10(b)(1) and (3) are

¹⁵ While stating our general view of the applicability of section 8(c) to sections 10 and 11, we are not making specific denominations of section 10 allegations which may or may not be brought via a complaint other than those raised in the instant proceeding.

¹⁶ The Commission reiterates that the section 10 provisions cited herein are the pre-OSRA citations.

premised on the obligation to meet one's contract commitments, and are therefore essentially breach of contract actions which section 8(c) renders not properly before the Commission in the absence of evidence offered by complainant (as the party bearing the burden of proof) that some extraordinary aspects of the allegation distinguish it substantially from a breach claim.

On the other hand, we find that the alleged violations of sections 10(b)(6)(E), (b)(11), (b)(12), and 10(d)(1), involving unfair or unjustly discriminatory practices, undue or unreasonable preferences, undue or unreasonable prejudice or disadvantage, and just and reasonable regulations and practices, are inherently related to Shipping Act prohibitions and are therefore appropriately brought before the Commission. While section 8(c) reasonably precludes the Commission from adjudicating breach of contract claims, the courts more properly equipped to address those matters are not authorized to address Shipping Act matters exclusively within the Commission's jurisdiction. Such issues are not addressed in actions for breach of contract and no remedy for such violations would be provided in a breach of contract action. Moreover, as noted supra, reliance on the Commission to pursue such violations sua sponte in its investigatory role would eviscerate the reparations remedy afforded complainants by the statute.

Therefore, we find that the ALJ should proceed to consider those claims.¹⁷

The Commission is remanding this proceeding to the Administrative Law Judge for reconsideration of the Motion to Dismiss under the criteria and presumptions set forth herein. Unless the ALJ finds that the presumptions have been or can be rebutted, it is expected that the Complainant will proceed with its claims under sections 10(b)(6)(E), (b)(11), (b)(12) and (d)(1).

THEREFORE, IT IS ORDERED, That the Appeal of COSCO Container Lines Company, Ltd. is granted in part and denied in part;

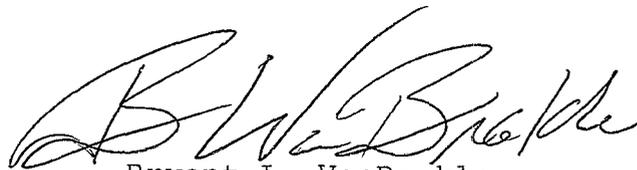
IT IS FURTHER ORDERED, That the ALJ's Order Denying Respondent's Motion to Dismiss be vacated and the proceeding be remanded to the ALJ for further action consistent with this Order;

IT IS FURTHER ORDERED, That, in light of the filing and consideration of the interlocutory appeal in this proceeding, the date for issuance of the initial decision in this proceeding be

¹⁷ While we establish here that a section 10(b)(12) complaint case may lie with the Commission, the Commission in Vinmar dismissed a section 10(b)(12) allegation. As discussed in fn. 12, the administrative law judge explicitly questioned Vinmar's ability to prove that violation, based on the facts presented. The presumption that a section 10(b)(6)(E), (11), (12), or (d)(1) violation complaint is appropriately brought before the Commission is a rebuttable one, subject to the assessment by the administrative law judge of the facts alleged.

extended to June 20, 2001, and the date for issuance of the final decision of the Commission be extended to October 18, 2001.

By the Commission.

A handwritten signature in cursive script, appearing to read "Bryant L. VanBrakle".

Bryant L. VanBrakle
Secretary