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## FOREIGN FORUM SELECTION CLAUSES UNDER COGSA: THE SUPREME COURT CHARTS NEW WATERS IN THE *SKY REEFER* CASE

In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* (“*Sky Reefer*”),<sup>1</sup> the United States Supreme Court held that the Carriage of Goods by Sea Act (“COGSA”)<sup>2</sup> does not nullify clauses contained in maritime bills of lading that require foreign arbitration of disputes.<sup>3</sup> The Court based its holding primarily on *Carnival Cruise Lines v. Shute*<sup>4</sup> and the “Hague Rules,”<sup>5</sup> and implicitly on the Federal Arbitration Act (“FAA”).<sup>6</sup> This questionable holding effectively overturned twenty-eight years of precedent, namely the *Indussa*<sup>7</sup> line of cases,<sup>8</sup> and opened up the globe for maritime litigation and arbitration. According to U.S. shippers<sup>9</sup> and Justice Stevens,<sup>10</sup> the Court’s holding places domestic shippers<sup>11</sup> at a severe disadvantage vis-à-vis international carriers in the context of dispute resolution and enforcement of awards. This

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1. 115 S. Ct. 2322 (1995).

2. 46 U.S.C. app. § 1300-1315 (1996).

3. *Sky Reefer*, 115 S. Ct. at 2330.

4. 499 U.S. 585 (1991).

5. Convention Internationale pour l’Unification de Certaines Règles en Matière de Connaissement [International Convention for the Unification of Certain Rules Relating to Bills of Lading], June 23, 1925, 51 Stat. 233, 120 L.N.T.S. 155 [hereinafter Hague Rules]. The author notes that the official title of the convention is often cited as the “*Brussels Convention*.” Because the official text of the treaty is in French, however, and is styled “*Convention Internationale*,” the author suggests that “*International Convention*” is more accurate. See ARNOLD W. KNAUTH, *THE AMERICAN LAW OF OCEAN BILLS OF LADING* 43 (1941). Regardless of the debate over the official title, the informal name, the Hague Rules, is well-accepted. See *id.* at 99. The name stems from the fact that the discussions leading up to the agreement were held at The Hague. See *id.* For further discussion of the Hague Rules, see *infra* notes 27-30 and accompanying text.

6. 9 U.S.C. §§ 1-307 (1970 & Supp. 1996).

7. *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967).

8. See *infra* notes 37-40 and accompanying text.

9. See Robert Mottley, *COGSA Case: A Bombshell Only for the Unwary*, AM. SHIPPER, Aug. 1995, at 56. For a definition of “shipper,” see *infra* note 11.

10. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322, 2333 (1995) (Stevens, J., dissenting).

11. “Shipowner” means the property owner of a vessel and his agents, including the ship’s “Master,” or captain. E.R. HARDY IVAMY, *DICTIONARY OF SHIPPING LAW* 153 (1984). “Charterer” means the party who leases the ship from the shipowner. See *id.* at 19-20 (describing the lease contract, known as a “charter-party”). “Carrier” defines the parties involved in the actual physical transport of passengers and cargo, and thus includes both the owners and/or the charterers. *Id.* at 16. “Shippers” contract with carriers to send goods, or “cargo,” by ship. See *id.* “Consignees,” in this context, are the parties at the port of destination who claim the cargo. See *id.* at 10 (described under the “Method of Transfer” section of the “bill of lading” definition).

disadvantage, they correctly argue, “lessens the liability” of carriers in contravention of COGSA section 3(8) because carriers are immunized from suit.<sup>12</sup>

The body of substantive law known as maritime law<sup>13</sup> developed over the centuries to govern ships and the passenger and cargo transport business in which they engage.<sup>14</sup> One of the principal objects of attention in maritime law is the shipping industry’s “bill of lading.”<sup>15</sup> A bill of lading is a negotiable instrument constituting title to cargo.<sup>16</sup> The bill of lading also serves as the contract<sup>17</sup> between the shipper and the carrier allocating the risk of loss of cargo during the voyage.<sup>18</sup>

Prior to the eighteenth century, the carrier assumed the risk of loss pursuant to maritime common law.<sup>19</sup> During the late 1700s, however, carriers

12. *Sky Reefer*, 115 S. Ct. at 2334-35 (Stevens, J., dissenting).

13. Maritime law refers to the “system of law which particularly relates . . . to marine affairs.” BLACKS LAW DICTIONARY. 969 (6th ed. 1990). Although “admiralty law” historically connoted the body of procedural law that governed disputes pertaining to ships, today the two terms, admiralty law and maritime law, are used interchangeably. ROBERT M. JARVIS, CAREERS IN ADMIRALTY AND MARITIME LAW I (1993).

14. The first recorded maritime law is found in the Code of Hammurabi, circa 1800 B.C., which codified even more ancient Sumerian law. JARVIS, *supra* note 13, at 1. Maritime law grew through the contributions of Mediterranean basin cultures such as the Egyptians, Mycenaean and Phoenicians and was further formalized in the codes of the Greek, Roman, and Byzantine empires. *Id.* at 1-2. The law was ultimately passed to modern culture via continental Europe and England. *Id.* at 2. For an in-depth discussion of the origins and development of shipping and maritime law, see EDGAR GOLD, MARITIME TRANSPORT: THE EVOLUTION OF INTERNATIONAL MARINE POLICY AND SHIPPING LAW (1981).

15. See generally GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 3-1 (2d ed. 1975).

16. *Id.*; see also 49 U.S.C. §§ 80101-80116 (1996) (“Federal Bills of Lading Act”). This statute, known in its first incarnation as the Pomerene Act, codifies common law and gives full negotiability to bills of lading issued in the United States in interstate and foreign commerce unless the bill states the goods are to be delivered to a consignee. *Id.* § 80103. It is customary for a negotiable bill of lading to be made out “to order of shipper,” while a bill made out to a single consignee, known as a “straight” bill, is not. *Id.*; see also C.F. POWERS, A PRACTICAL GUIDE TO BILLS OF LADING 3 (1966). Because the bill is fully negotiable, the shipper and/or the consignee may use it as collateral against which to borrow money or may transfer it to a third party for value. See *Sky Reefer*, 115 S. Ct. at 2335 (Stevens, J., dissenting). See generally ROBERT A. RIEGERT & ROBERT BRAUCHER, DOCUMENTS OF TITLE 73-132 (3d ed. 1978) (describing principles of negotiation and transfer).

17. Technically, the bill of lading is not the contract, but only “evidence that a contract has been made.” IVAMY, *supra* note 11, at 9. The actual “contract is the advertisements, the booking note, the freight tariff, and custom and usage of the carrier and the place of shipment all taken together.” WILLIAM TETLEY, MARINE CARGO CLAIMS 5 (2nd ed. 1978). Today, however, courts use the bill as the contract itself. IVAMY, *supra* note 11, at 9.

18. POWERS, *supra* note 16, at 3; IVAMY, *supra* note 11, at 9. In addition to serving as the contract between carrier and shipper, and as title to goods, the bill serves as the shipper’s receipt from the carrier for the delivered goods. IVAMY, *supra* note 11, at 9; see also *infra* note 19. This Recent Development is concerned only with the contractual nature of the bill of lading.

19. In medieval times, merchants accompanied their goods on voyages to foreign markets.

began to insert exculpatory clauses in their bills of lading that relieved them from liability to shippers and consignees.<sup>20</sup> Because American courts frowned on this use of the carriers' superior bargaining power,<sup>21</sup> these clauses were not enforced in the United States.<sup>22</sup> This put American merchant ships at a disadvantage in the world market, as they were forced to incur greater liabilities than their foreign competitors.<sup>23</sup> In 1893, Congress passed the Harter Act<sup>24</sup> to lessen this competitive disadvantage.<sup>25</sup> The Harter Act statutorily allocated the risks of the voyage between the shipper and the carrier.<sup>26</sup>

Realizing the benefits of express allocation of risk and of harmonization of global maritime law, sea-faring nations convened in 1921 to create a multilateral shipping treaty, based on the Harter Act, to govern bills of lading.<sup>27</sup> The code resulting from the convention is commonly referred to as

POWERS, *supra* note 16, at 2-3. As ocean trade volume increased, see GOLD, *supra* note 14, at 131, and European commercial law developed, this practice became disfavored, POWERS, *supra* note 16, at 2-3. Instead, the merchant entrusted his goods to the Master of the ship, who acted as bailee. *Id.* at 3. The Master signed a bill of lading to show that he had indeed received the goods, and thereby became strictly liable for them in order to prevent theft and collusion by the Master and the crew. *Id.* at 4; *New Jersey Steam Navigation Co. v. Merchants' Bank of Boston*, 47 U.S. (6 How.) 344, 381 (1848) (holding the carrier "chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of conveyance, unless arising from inevitable accident").

20. Jose R. Garcia-Pedrosa & Christian D. Keedy, *Carriage of Goods and Charters*, in MARITIME LAW AND PRACTICE § 4.2 (1980); see also *Sky Reefer*, 115 S. Ct. at 2327 (citing 2A MICHAEL F. STURLEY, BENEDICT ON ADMIRALTY § 11 at 2-2 to 2-3 (1995); THOMAS J. SHOENBAUM, ADMIRALTY AND MARITIME LAW §§ 8-19 (2d ed. 1994); Benjamin W. Yancey, *The Carriage of Goods: Hague, COGSA, Visby, and Hamburg*, 57 TULANE L. REV. 1238, 1239-40 (1983)). For an explanation of the terms "carrier," "shipper," "cargo" and "consignee," see *supra* note 11.

21. *Liverpool & Great W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 461 (1889) (refusing to enforce an exculpatory clause in a bill of lading as against public policy). The Supreme Court noted in 1889, prior to the enactment of the Harter Act, that "[t]he carrier and his customer do not stand upon a footing of equality" and that "[t]he individual customer has no real freedom of choice." *Id.* at 441.

22. See, e.g., *id.*; see also Garcia-Pedrosa & Keedy, *supra* note 20, § 4.2.

23. Garcia-Pedrosa & Keedy, *supra* note 20, § 4.2.

24. 46 U.S.C. §§ 190-196 (1952).

25. Garcia-Pedrosa & Keedy, *supra* note 20, § 4.3.

26. *Id.* The Harter Act represented a compromise between American cargo interests and shipowners. *Id.* In short, the compromise barred shipowners from using the bill of lading to relieve themselves of the duty to use due care in safeguarding cargo, but immunized shipowners who did use due care, even if damage to cargo resulted from the acts of the Master or charterer. *Id.*

27. *Id.* § 4.4. The convention lasted from 1921 to 1924. *Id.* Sixty-six nations are currently signatories of the treaty. U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1995, at 381 (1995). A few countries, though not signatories, have enacted local statutes similar to the Hague Rules. TETLEY, *supra* note 17, at 3. For a detailed discussion of the history of the Hague Rules, see KNAUTH, *supra* note 5, at 99-110.

the Hague Rules.<sup>28</sup> The signatories to the Hague Rules intended for the Rules to apply “to all bills of lading anywhere in the world.”<sup>29</sup> The Hague Rules provide standardized principles for bills of lading that preempt any unstandardized, added clauses that conflict with its ideals.<sup>30</sup>

To implement the Hague Rules in the United States, Congress enacted the Carriage of Goods by Sea Act (“COGSA”) in 1936.<sup>31</sup> COGSA applies to “[e]very bill of lading . . . which is evidence of a contract for the carriage of goods by sea to or from ports of the United States.”<sup>32</sup> Under COGSA, while the shipper is liable for damages arising from “insufficiency of packing,”<sup>33</sup> the carrier is liable in negligence for failure to “properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.”<sup>34</sup> COGSA also provides that “[a]ny clause . . . in a contract of carriage relieving the carrier or the ship from liability for loss or damage to . . . goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or *lessening such liability* . . . shall be null and void and of no

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28. See, e.g., KNAUTH, *supra* note 5, at 99; TETLEY, *supra* note 17, at 3. The Hague Rules were amended in 1968 pursuant to the “Visby Rules.” Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Signed at Brussels on 25th August 1924 (Feb. 23, 1968). Together, the amended text is referred to as the Hague-Visby Rules. Far fewer nations have signed on to the Hague-Visby Rules than signed the original Hague Rules. See TETLEY, *supra* note 17, at 14, 487-89, 498. The United States has not signed the Hague-Visby Rules. See *id.* at 16, 498.

In 1978, the United Nations Conference on the Carriage of Goods by Sea made further effort to update the Hague/Hague-Visby Rules. IVAMY, *supra* note 11, at 54. The convention adopted there, known as the Hamburg Rules, would completely replace the Hague/Hague-Visby Rules in the signatory nation. The United States has not adopted the Hamburg Rules. *Id.*; Samuel R. Mandelbaum, *Creating Uniform Worldwide Liability Standards for Sea Carnage of Goods Under the Hague, Cogsa, Visby and Hamburg Conventions*, 23 TRANSP. L.J. 471, 483 (1996). For a more complete discussion of the interplay between these conventions, see Yancey, *supra* note 20.

29. TETLEY, *supra* note 17, at 3.

30. KNAUTH, *supra* note 5, at 111.

31. 46 U.S.C. app. §§ 1300-1315 (1996).

32. 46 U.S.C. app. § 1300 (1975). While COGSA substantially supplants the Harter Act, it expressly preserves some specific sections. 46 U.S.C. app. § 1311 (1975); see also GILMORE & BLACK, *supra* note 15, § 3-25. Specifically, the Harter Act applies in the following situations where COGSA does not: it governs the periods of time before and after loading of goods onto the vessel; it applies to shipments in domestic commerce along inland waterways; and it applies to more general loading, storage, custody and delivery aspects of carriage. See 46 U.S.C. app. § 1311 (1975); GILMORE & BLACK, *supra* note 15, § 3-25. Further, as far as language is concerned, “Cogsa and Harter are at many points so much alike that the differences may be looked on as merely verbal or stylistic . . . Thus, . . . there is no reason to suppose the term ‘seaworthiness’ means anything different under Cogsa from what it did and does under Harter, and the older cases are freely used to establish its construction under the new Act.” *Id.* § 3-25.

33. 46 U.S.C. app. § 1304(2)(n) (1975).

34. *Id.* § 1303(2). Commentators note that these provisions eliminate the carrier’s common-law “insurer’s liability,” discussed *supra*, note 19. GILMORE & BLACK, *supra* note 15, § 3-26, at 128.

effect.”<sup>35</sup>

Foreign forum selection clauses have long been held to violate the “lessening of liability” language of COGSA.<sup>36</sup> In *Indussa Corp. v. S.S. Ranborg*,<sup>37</sup> a 1967 case, the Second Circuit Court of Appeals held that because a foreign forum selection clause “puts ‘a high hurdle’ in the way of enforcing liability,” it becomes “an effective means for carriers to secure settlements lower than if cargo could sue in a convenient forum.”<sup>38</sup> The carrier’s liability is thereby substantially lessened in contravention of section 3(8) of COGSA.<sup>39</sup> Subsequent cases followed the reasoning of *Indussa* without fail, creating a long line of precedent invalidating foreign forum selection clauses.<sup>40</sup>

Because foreign arbitration clauses are simply a subset of foreign forum selection clauses,<sup>41</sup> the *Indussa* reasoning has been extended to invalidate foreign arbitration clauses.<sup>42</sup> Recently, in *State Establishment for Agricultural Product Trading v. M/V Wesermunde*,<sup>43</sup> the Eleventh Circuit Court of Appeals refused to force the plaintiffs to resolve their dispute by arbitration in London, England.<sup>44</sup> The court held that because the bills of lading were adhesion contracts that did not provide actual notice to the plaintiffs that they were forfeiting their rights to an American forum, the clause requiring foreign arbitration was invalid.<sup>45</sup> The court relied on COGSA section 3(8),<sup>46</sup> holding

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35. 46 U.S.C. app. § 1303(8) (1975) (emphasis added).

36. See, e.g., *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441, 1442-44 (5th Cir. 1987); *Union Ins. Soc’y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 723-25 (4th Cir. 1981); *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967).

37. 377 F.2d 200 (2d Cir. 1967) (en banc). Judge Friendly wrote the opinion in the *Indussa* case. It is interesting to note that while Judge Friendly was a recognized expert in admiralty and maritime law matters, the Supreme Court has been without a maritime expert since the death of Justice Henry Brown in 1913. *JARVIS*, *supra* note 13, at 5.

38. *Indussa*, 377 F.2d at 203.

39. *Id.* at 203-04.

40. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322, 2326 (1995); see also *supra* note 36.

41. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

42. *Sky Reefer*, 115 S. Ct. at 2326.

43. 838 F.2d 1576 (11th Cir.), *cert. denied sub nom.* United Kingdom Mut. S.S. Assurance Ass’n (Bermuda) Ltd. v. State Establishment for Agric. Prod. Trading, 488 U.S. 916 (1988).

44. *Id.* at 1582. The lease agreement (“charter-party”), see *supra* note 11, between the owners of the ship and the defendants in *Wesermunde* required arbitration in London. *Wesermunde*, 838 F.2d at 1578, 1580. The bill of lading between the plaintiffs and defendants, however, stated only that the charter-party was incorporated by reference. *Id.* The defendants argued that the arbitration requirement was thereby incorporated. *Id.* at 1578-79. This lack of actual notice was a key fact in the *Wesermunde* case. See *id.* at 1583.

45. *Wesermunde*, 838 F.2d at 1582.

46. See 46 U.S.C. § 1303(8) (1975).

that while arbitration is not per se violative of COGSA, requiring arbitration in a country that has no connection with the making or performance of the bill of lading does “conflict with COGSA’s general purpose of not allowing carriers to lessen their risk of liability.”<sup>47</sup>

In *Sky Reefer*, however, the First Circuit Court of Appeals reached the opposite conclusion and enforced a foreign arbitration clause.<sup>48</sup> The *Sky Reefer* dispute arose after the charterer of the *Sky Reefer* failed to adequately stow a shipment of Moroccan oranges and lemons destined for New York.<sup>49</sup> The cargo shifted in transit, causing over \$1 million in damage.<sup>50</sup>

The consignee and its insurance company sued the charterer and the ship’s owner for the damage in the United States District Court for the District of Massachusetts.<sup>51</sup> However, because the bill of lading for the fruit required arbitration in Tokyo governed by *Japanese* rules, the charterer moved the District Court to compel arbitration.<sup>52</sup> Even though the bill of lading had been negotiated between the charterer and the shipper/fruit seller and simply tendered to the consignee/fruit purchaser, the District Court granted the motion.<sup>53</sup>

The First Circuit Court of Appeals affirmed the District Court, noting a key difference between foreign forum selection clauses and foreign arbitration clauses.<sup>54</sup> Namely, with arbitration clauses, the Federal Arbitration Act (FAA) comes into play.<sup>55</sup> Congress enacted the FAA to eliminate the common law hostility to arbitration clauses.<sup>56</sup> To this end, section 2 of the

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47. *Wesermunde*, 838 F.2d at 1581.

48. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 29 F.3d 727, 733 (1st Cir. 1994), *aff’d*, 115 S. Ct. 2322 (1995).

49. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322, 2325 (1995).

50. *Id.*

51. *Id.* In admiralty cases, the ship and its various parts are sued in rem, and the ship’s owner, Master, charterer, and any of their agents or insurance companies are sued in personam. *See, e.g., Wesermunde*, 838 F.2d 1576 (the full name of the defendant parties reading “M/V *Wesermunde*, Her engines, tackle, apparel, furnishings, etc.; in rem: Marquis Compania Naviera, S.A.; The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited; Pateras Brothers, Ltd.; Pateras Investments, S.A.; and Kittiwake Compania Naviera, S.A., in personam”).

52. *Sky Reefer*, 115 S. Ct. at 2325.

53. *Id.* at 2325-26.

54. The Eleventh Circuit Court of Appeals made only passing reference to the FAA, stating that it was indicative “of Congress’ encouragement of arbitration.” *Wesermunde*, 838 F.2d at 1581. Nowhere in the opinion does the Eleventh Circuit explore the interplay between the two statutes, perhaps because the bill of lading at issue in that case did not contain an express arbitration clause. *See id.*; *supra* note 44 (discussing the facts of the case).

55. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 29 F.3d 727, 730 (1st Cir. 1994), *aff’d*, 115 S. Ct. 2322 (1995).

56. *See Sky Reefer*, 115 S. Ct. at 2337 (Stevens, J., dissenting).

FAA provides that “[a] written provision in any maritime trans-action . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>57</sup> Because this statutory provision gives presumptive validity to all maritime arbitration clauses, and because COGSA has been judicially interpreted to presumptively invalidate foreign arbitration clauses, section 2 of the FAA appears to conflict directly with section 3(8) of COGSA.<sup>58</sup> The First Circuit held that because Congress enacted the FAA later in time, the FAA controlled,<sup>59</sup> and the FAA required enforcement of the foreign arbitration clause in the bill of lading.<sup>60</sup>

Because of this split among the circuits as to the enforceability of foreign arbitration clauses,<sup>61</sup> the Supreme Court granted certiorari in *Sky Reefer*. While the Supreme Court affirmed the order of the First Circuit Court of Appeals compelling plaintiffs to arbitrate in Tokyo,<sup>62</sup> its analysis of the law differed markedly from that of the lower court. The Supreme Court did not hold that the FAA controlled over COGSA,<sup>63</sup> but that the language of COGSA itself did not require the invalidation of the foreign arbitration clause.<sup>64</sup> The Court reasoned that the term “liability” as used in the statute referred to the *legal* liability, and not to the ultimate cost liability.<sup>65</sup> Thus, the increased transaction costs required to secure an award from a foreign tribunal did not “lessen the liability” of the carrier in contravention of COGSA.<sup>66</sup>

In so holding, the Court expressly overruled *Indussa* and its progeny<sup>67</sup> and instead adopted the reasoning of *Carnival Cruise Lines, Inc. v. Shute*.<sup>68</sup> In *Carnival Cruise Lines*, the Court upheld a domestic forum selection clause

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57. 9 U.S.C. § 2 (1970).

58. See *Sky Reefer*, 29 F.3d at 732.

59. *Id.* at 732.

60. *Id.* at 731-32.

61. Siding with the Eleventh Circuit in voiding foreign arbitration clauses are courts in New York and Washington, and also the well-known scholars Gilmore and Black. See *id.* at 731 (citations omitted). Siding with the First Circuit in upholding foreign arbitration clauses are courts in New York, Maryland and Massachusetts. See *id.*

62. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322, 2330 (1995).

63. *Id.* (holding that both the FAA and COGSA can be given full effect); cf. *Sky Reefer*, 29 F.3d at 731-32 (holding that the FAA controls over COGSA).

64. *Sky Reefer*, 115 S. Ct. at 2327, 2330.

65. *Id.* at 2327.

66. *Id.*

67. *Id.* at 2326.

68. 499 U.S. 585 (1991).



that required pleasure cruise passengers to litigate claims in Florida.<sup>69</sup>

*Carnival Cruise Lines* involved the interpretation of the Limitation of Vessel Owner's Liability Act ("Vessel Owner's Act"),<sup>70</sup> which contains a provision substantively similar to section 3(8) of COGSA.<sup>71</sup> In *Carnival Cruise Lines*, the Court reasoned that because the clause at issue did not purport to limit the cruise line's liability for negligence, the Vessel Owner's Act could not be used to strike the clause.<sup>72</sup> The *Sky Reefer* Court held this reasoning from *Carnival Cruise Lines* applicable and binding, despite the factual differences<sup>73</sup> between the cases.<sup>74</sup> Thus, the Court glibly discounted the fact that prohibitive costs of filing suit could reduce liability in practice, if not on paper.<sup>75</sup>

In deciding *Sky Reefer*, the Court did not rely solely on domestic law, but also bolstered its reasoning with international considerations. First, the Court

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69. *Id.* at 595-96. The Court in *Carnival Cruise Lines* rejected plaintiffs' argument that because the ticket was an adhesion contract, the forum selection clause was unenforceable. *Id.* at 590. Specifically, in another important forum selection case, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2 (1972). Plaintiffs in *Carnival Cruise Lines* argued that the holding of *The Bremen* did not apply due to the adhesion nature of the ticket in issue. The Court rejected this argument, stating that it was "refin[ing] the analysis of *The Bremen* to account for the realities of form passage contracts." *Carnival Cruise Lines*, 499 U.S. at 593. These "realities," according to the Court, are that ticket purchasers will never be in a position to bargain over the terms of passage. *Id.* Thus, for this reason and because ex ante determination of litigation fora results in substantial public benefits, *see infra* note 103, courts should tolerate forum selection clauses so long as the forum selected is reasonable, regardless of increased costs to plaintiffs.

The plaintiffs in *Sky Reefer* also unsuccessfully argued adhesion in the District Court. *See Sky Reefer*, 115 S. Ct. at 2325-26.

70. 46 U.S.C. §§ 181-195 (1993).

71. The relevant provision of the Vessel Owner's Act, section 183c, states in pertinent part: It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of . . . negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability . . . , or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability . . . .

46 U.S.C. app. § 183c (1996). Compare section 3(8) of COGSA, *supra* note 35 and accompanying text.

72. *Carnival Cruise Lines*, 499 U.S. at 596-97.

73. Some of the more general factual differences between the cases include: two different statutes, a domestic forum selection clause versus a foreign arbitration clause, a standard adhesion ticket for passage versus a negotiated bill of lading, a dispute between a company and private individuals versus a dispute between commercial parties, and an injury to person versus injury to commercial property. *See Sky Reefer*, 115 S. Ct. at 2325; *Carnival Cruise Lines*, 499 U.S. at 587-89; *see also infra* notes 87-89 and accompanying text (discussing Justice Stevens' dissent).

74. *Sky Reefer*, 115 S. Ct. at 2327-28.

75. *Id.* The Court noted that were a simple reference to increased costs dispositive of the enforceability of a forum selection clause, many national, as well as international, clauses would be unenforceable. *Id.*

looked to the Hague Rules.<sup>76</sup> The Court noted that of the sixty-six signatory nations, not one had interpreted its domestic enactment of the Rules to prohibit foreign forum selection clauses unless local statutory provisions so required.<sup>77</sup> Of special consideration was that England had expressly disavowed such a construction almost fifty years ago.<sup>78</sup> The Court stated that it would not interpret the United States' version of the Hague Rules to conflict with that of every other nation to have addressed the issue.<sup>79</sup>

In addition, the Court looked to international policy interests to support its holding. Specifically, the Court stated that for the United States to gain a position of trust and respect in the international community, it would have to honor its negotiated international obligations.<sup>80</sup> Such agreements included not only the Hague Rules,<sup>81</sup> but also the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which formed the basis of the FAA.<sup>82</sup> The Court believed that to consistently refuse to honor foreign arbitration and forum selection clauses would be "to disparage the authority [and] competence of international forums for dispute resolution."<sup>83</sup>

Justice Stevens's dissent in *Sky Reefer*, however, declares this majority analysis "overzealous formalism"<sup>84</sup> and provides a more traditional interpretation of the law. In his analysis of the validity of a foreign arbitration clause contained in a bill of lading, Justice Stevens makes four points; the first three counter the majority's logic, while the fourth rebuts the Court of Appeals's holding regarding the supremacy of the FAA.

First, Justice Stevens points out that COGSA's purpose was to remedy the unequal bargaining position between shippers and carriers.<sup>85</sup> The majority's

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76. *Id.* at 2328.

77. *Id.* (citing Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729, 776-96 (1987)).

78. *Sky Reefer*, 115 S. Ct. at 2328 (citing *Maharani Woollen Mills Co. v. Anchor Line*, 29 Lloyd's List L. Rep. 169 (C.A. 1927)).

79. *Id.*

80. *Id.* at 2329. The Court warned that "the United States . . . should be most cautious before interpreting its domestic legislation in such a manner as to *violate* international agreements." *Id.* (emphasis added). This implies that the Court believed any conclusion regarding the enforcement of foreign arbitration clauses other than the one it reached would in fact breach the United States's international obligations. This seems to be somewhat of an extreme position. *See infra* notes 90-92 and accompanying text (discussing Justice Stevens's dissent).

81. *Sky Reefer*, 115 S. Ct. at 2328. For a discussion of the Hague Rules, see *supra* notes 27-30 and accompanying text.

82. *Sky Reefer*, 115 S. Ct. at 2329.

83. *Id.* at 2328.

84. *Id.* at 2337 (Stevens, J., dissenting).

85. *Id.* at 2334-35 (Stevens, J., dissenting).

narrow construction of section 3(8)'s "lessening of liability" provision fails to fully comport with this remedial purpose.<sup>86</sup>

Second, Justice Stevens asserts that the majority's reliance on *Carnival Cruise Lines* is misplaced<sup>87</sup> because that case, unlike *Indussa*, did not involve COGSA. Also, because the case involved a domestic, rather than an international, forum selection clause,<sup>88</sup> the Court's application of the *Carnival Cruise Lines* reasoning to the facts of *Sky Reefer* is a "wooden" extension not compelled by the case itself.<sup>89</sup>

Third, Justice Stevens points out that the United States' "international obligations do not require [the Court] to enforce a contractual term that was not freely negotiated<sup>90</sup> by the parties."<sup>91</sup> That two countries purposely enacted prohibitions on foreign forum selection clauses suggests not a diversion from the accepted version of the Hague Rules, but that the common understanding provides for such express exemptions.<sup>92</sup>

Finally, Justice Stevens argues that an unspoken concern regarding the interplay between the FAA and COGSA drove the majority's holding.<sup>93</sup> Stevens asserts that such concern is unfounded because the two statutes do not conflict.<sup>94</sup> the FAA provides that an arbitration clause must be enforced only where no contrary rule of law exists.<sup>95</sup> COGSA furnishes that contrary

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86. *Id.* at 2335 (Stevens, J., dissenting).

87. *Id.*

88. *Id.*

89. *Id.*

90. However, in *Carnival Cruise Lines, Inc. v. Shute*, the Court held that not even American common law required free negotiation to enforce a forum selection clause, much less any international obligations. 499 U.S. 585, 593 (1991); see also *supra* note 69 (discussing *The Bremen*). Stevens observes in his *Sky Reefer* dissent that while the circumstances of *The Bremen* required enforcement of the foreign forum selection clause (i.e., the clause was indeed freely negotiated), the circumstances in *Sky Reefer* were quite different, (i.e., the clause was not negotiated). *Sky Reefer*, 115 S. Ct. at 2336 (Stevens, J., dissenting). However, by acknowledging that "bills of lading are commonly recognized as contracts of adhesion," Justice Stevens opens the door for the reasoning of *Carnival Cruise Lines*. *Id.* This requires enforcement of the arbitration clause even if *The Bremen* does not. Nevertheless, applying the application of *The Bremen* through the filter of *Carnival Cruise Lines* distorts the holding of *The Bremen*. If the reasoning of *The Bremen* were applied directly to *Sky Reefer*, the arbitration clause would be invalidated because, unlike in *The Bremen*, the *Sky Reefer* arbitration clause was not freely negotiated. This reasoning accords better with the accepted principles of contract law. Further, the *Carnival Cruise Lines* holding supposedly modified the holding of *The Bremen* in order to comport with the realities of form passage contracts. See *Carnival Cruise Lines*, 499 U.S. at 593. This holding should not apply where no form passage contract is in issue, and where, to the contrary, the underlying statute was enacted for the express purpose of providing augmented ability to negotiate.

91. *Sky Reefer*, 115 S. Ct. at 2336 (Stevens, J., dissenting).

92. *Id.*

93. *Id.* at 2336-37 (Stevens, J., dissenting).

94. *Id.*

95. The FAA states that an arbitration clause is enforceable "save upon such grounds as exist at

rule of law.<sup>96</sup>

Beyond the halls of justice, commentators in the shipping industry have debated the practical implications of the *Sky Reefer* decision.<sup>97</sup> Three issues appear to cause the most concern: (1) the prospect of forum shopping, (2) the difficulty of damage recovery, and (3) the loss of business for U.S. admiralty lawyers.<sup>98</sup>

First, and most viscerally, many shippers believe that carriers will now choose fora for litigation in remote, inaccessible foreign locales in order to deter aggrieved parties from filing suit.<sup>99</sup> This has several repercussions. It will allow carriers to handle cargo more carelessly than they otherwise might, thereby increasing the risk of damage to goods.<sup>100</sup> Then, when such damage to cargo occurs, shippers will likely accept unreasonably low settlements rather than incur the expense of foreign dispute resolution.<sup>101</sup> Or, where the value of the disputed shipment is high enough to merit legal action, shippers will seek to have the selected forum struck before incurring the expense of filing suit in an unusually distant site.<sup>102</sup> This process will generate increased litigation in the United States and will frustrate the efficiency goals of forum selection clauses.<sup>103</sup>

Several considerations appear to counteract this forum shopping concern. First, *Carnival Cruise Lines* imposes a rule of reasonableness on the selected

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law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1970); *supra* note 57 and accompanying text. Stevens also points out the identity of purpose between the two statutes. *Sky Reefer*, 115 S. Ct. at 2337 (Stevens, J., dissenting).

96. *Sky Reefer*, 115 S. Ct. at 2337 (Stevens, J., dissenting). Adhesion and unconscionability would also provide the necessary grounds. *Id.* But see, *supra* notes 69, 90 (discussing *The Bremen*).

97. See Mottley, *supra* note 9, at 56 ("The subsequent frothing [after the *Sky Reefer* decision was handed down] among shippers, brokers, and admiralty attorneys has churned alarmist fears that have reached Kafkaesque dimensions."); Dominic Bencivenga, *Court Ships Cargo Arbitration Overseas*, N.Y.L.J., July 6, 1995, at 5 ("It is a most important case and it's going to have tremendous repercussions.") (statement of Paul S. Edelman).

98. Mottley, *supra* note 9, at 56.

99. *Id.*

100. *Id.*

101. *Id.*

102. See *id.*

103. In *Carnival Cruise Lines, Inc. v. Shute*, the Court stated that ex ante determination of litigation fora results in substantial public benefits. 499 U.S. 585, 593-94 (1991). Under the specific facts of *Carnival Cruise Lines*, the Court pointed out the following three benefits: (1) the carrier, which carries passengers from all over the world and thus could be subject to litigation in as many places, benefits from designating a forum for all suits; (2) the passengers benefit from the carriers' savings in the form of reduced fares; and (3) the parties involved in a dispute benefit because they need not spend time and money litigating the issues of jurisdiction and venue. *Id.*

forum.<sup>104</sup> If the Court truly adopted *Carnival Cruise Lines*'s reasoning in the context of COGSA, the Court should not enforce a clause designating a remote forum. Second, some commentators argue that because the United States offers lower potential liabilities than many other nations, carriers may not wish to designate a foreign forum.<sup>105</sup> Third, shippers can insist on U.S. venues in negotiations.<sup>106</sup> This possibility is augmented by the fact that if carriers offer certain terms to one client, they are statutorily required to make the same terms available to all clients.<sup>107</sup> Fourth, because bills of lading are form documents, a change in the forum clause requires substantial reprinting fees.<sup>108</sup> If Congress or the courts invalidate a carrier's clause, the carrier will be forced to reprint its supply of bills of lading.<sup>109</sup>

Each of these points can be successfully rebutted. First, how the Court would rule on a clause designation of a remote forum simply cannot be predicted with accuracy. If an arbitration clause is presumptively valid,<sup>110</sup> there is little basis by which to assert that the Court would allow lower courts to decide on a case-by-case basis whether a forum fits within a nebulous range of acceptability. Second, some scholars assert that liabilities imposed in U.S. litigation are *higher* than those in other countries.<sup>111</sup> Third, American shippers probably cannot negotiate for favorable forum selection clauses because most bills of lading are contracts of adhesion.<sup>112</sup> Finally, the cost of reprinting bills of lading simply cannot begin to approach the costs of litigation.<sup>113</sup> It is far more likely that carriers will prefer to avoid litigation and

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104. The Court stated in *Carnival Cruise Lines* that when a forum selection clause is subject to judicial review, the reviewing court must scrutinize the clause for "fundamental fairness." *Id.* at 595. Under the facts of *Carnival Cruise Lines*, the Court held that because the carriers' headquarters were in Florida and many of its cruises departed from Florida ports, there was no indication that the carrier had chosen the forum in bad faith and that the selection clause should be enforced. *Id.*

105. The Hague-Visby Rules, which govern 70% of U.S. foreign trade, allow liquidated damages in the amount of \$1,060 per "package." Mottley, *supra* note 9, at 56. A "package" refers to each carton on a pallet. *Id.* On the other hand, COGSA sets damages at \$500 per package, and a COGSA package is an entire pallet. *Id.* Further, some foreign countries generally require the loser of a court battle to pay the winner's court costs and attorney fees. *Id.* (noting that in the United Kingdom the loser pays the winner's legal fees).

106. *Id.*

107. *Id.* Thus, if one large client can get a carrier to give a domestic venue stipulation, all smaller clients are entitled to the same forum. *Id.*

108. *See id.*

109. *Id.*

110. *See supra* note 57 and accompanying text.

111. *See* TETLEY, *supra* note 17, at 12 ("The U.S. per-package limitation is high as compared with most countries.").

112. *See* *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322, 2334 (1995) (Stevens, J., dissenting) (describing "arm's length negotiation" of bill of lading).

113. While the author has no hard data on these costs, common sense indicates that it should be

will not be dissuaded by ministerial printing expenses.

The second concern of American shippers is that those forced to file suit in a foreign jurisdiction will “face an uphill fight” to recover damages.<sup>114</sup> For example, in *Sky Reefer*, the plaintiffs were concerned that Japanese arbitrators might not apply COGSA.<sup>115</sup> If, instead, the arbitrators applied Japanese law, the plaintiffs would either receive damages less than if the case had been decided under American law, or the carrier might be relieved of certain duties imposed by COGSA resulting in absolutely no recovery.<sup>116</sup> Those supporting the *Sky Reefer* decision assert that where application of foreign law results in such a true lessening of liability, COGSA would be violated and the shipper would have a cause of action in the United States.<sup>117</sup> However, this places on the shipper not only the expense and burden of litigating or arbitrating in a foreign jurisdiction, but also of re-litigating in the United States.<sup>118</sup> Arguably, most shippers simply could not afford to bear this type of burden, and would take what recovery they could get.

The third concern is that of U.S. admiralty attorneys.<sup>119</sup> They fear a substantial loss of business as claims are increasingly filed abroad.<sup>120</sup> Others, however, believe that this loss will be offset by an increase in pre-suit litigation over the reasonableness of selected fora and in post-suit litigation when a carrier’s substantive liability is actually eliminated or reduced by the laws of the foreign jurisdiction.<sup>121</sup> However, the underlying assumption of these counter-arguments is that American shippers will trouble with the courts at all when the dollar value of shipments is not high enough to merit extended and distant foreign litigation.<sup>122</sup> Instead of litigation, settlements will be the

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true.

114. Mottley, *supra* note 9, at 56.

115. *Sky Reefer*, 115 S. Ct. at 2329.

116. *See id.* Another consideration is that once a case is removed from the United States, the shipper can no longer pursue certain third-party claims. Robert Mottley, *Beware of Foreign Arbitration*, AM. SHIPPER, Mar. 1996, at 52.

117. *See Mottley, supra* note 9, at 56; *Sky Reefer*, 115 S. Ct. at 2333, n.8 (Stevens, J., dissenting).

118. *See Mottley, supra* note 9, at 56.

119. *Id.*

120. *Id.*

121. *See id.* Further, the author suggests that regardless of the country in which an American shipper files its claim, it most likely will want the input of an American attorney. Thus, while American attorneys may see a drop in their courtroom performances, it is doubtful that they will be excluded from the litigation field entirely.

122. *See Vimar Seguros y Reasegurors, S.A. v. MV Sky Reefer*, 115 S. Ct. 2322, 2333-35 (1995) (Stevens, J., dissenting).

norm.<sup>123</sup> Because an attorney's role in a settlement is far less intense than in litigation, admiralty attorneys will feel the effects of *Sky Reefer*.

Given these practical considerations, it is clear that the *Sky Reefer* decision negatively affects the American shipping industry.<sup>124</sup> The *Sky Reefer* decision takes a card out of the hand of the shipper, and adjusts downward what bargaining power the shipper may have had.<sup>125</sup> Now, when a shipper approaches the table—assuming the carrier sees fit to negotiate with the shipper at all in the context of a standard form bill of lading—the shipper has yet another concession that it must seek to persuade the carrier to grant; namely, domestic jurisdiction. But, as Justice Stevens correctly acknowledges, the forum selection clause will not be negotiated.<sup>126</sup> Bills of lading are contracts of adhesion.<sup>127</sup> Thus, American shippers will be forced to litigate in foreign forums chosen to the best advantage of the carrier—from London to Odessa to Rijekav.<sup>128</sup>

COGSA was enacted to provide shippers with better risk allocation in bills of lading in light of their weak bargaining position.<sup>129</sup> COGSA established the baseline for negotiations, which could be altered in favor of the shipper, but not in favor of the carrier.<sup>130</sup> The Carriage of Goods Committee of the Maritime Law Association has already begun formulating draft proposals to submit to Congress in order to legislatively overrule *Sky Reefer*.<sup>131</sup> The bill would restore the balance struck by Congress between shippers and carriers when it enacted COGSA.<sup>132</sup> Shippers today can only hope that the proposals will succeed.

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123. See *id.* at 2333 (Stevens, J., dissenting); see also Mottley, *supra* note 9, at 56.

124. See *supra* notes 97-123 and accompanying text.

125. See *infra* note 130 and accompanying text.

126. *Sky Reefer*, 115 S. Ct. at 2334 (Stevens, J., dissenting).

127. *Id.* at 2334-35.

128. *Paszatory v. Croatia Line*, 918 F. Supp. 961 (E.D. Va. 1996) (upholding a forum selection clause in a bill of lading requiring the parties to pursue claims in Rijekav, Croatia, based on the *Sky Reefer* decision).

129. See *supra* notes 19-35 and accompanying text.

130. *Sky Reefer*, 115 S. Ct. at 2333 (Stevens, J., dissenting) (citations omitted); GILMORE & BLACK, *supra* note 15, \* 3-25.

131. See Mottley, *supra* note 9, at 56. The proposals increase the current \$500 liquidated damages amount per package to the Hague-Visby \$1,060. *Id.* Further, they would change certain burdens of proof and eliminate certain defenses of the carriers. *Id.* Finally, they would prohibit foreign arbitration or litigation clauses in bills of lading for shipments to or from the United States. *Id.*

132. *Id.*