Vimar Seguros y Reaseguros v. M/V Sky Reefer: Arbitration Clauses in Bills of Lading under the Carriage of Good by Sea Act

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On the first reading of [section 3(8)], it would seem to preclude any possible loophole through which the carrier could escape or lessen his liability; but by an examination of the bill in toto . . . . [Q]uite obviously, this clause really means nothing . . . .

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Introduction

The shipping market has historically been characterized by an imbalance of market power in favor of the carrier. Carriers used this market power to their advantage by placing onerous contractual terms, such as exculpatory clauses, in the bills of lading they issued to cargo. Attempts have been made to cure this imbalance of power. In the United States, Con-

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2. For a more complete discussion of the shipping market, see infra Part IV.A.

3. Gilmore and Black define a bill of lading as follows:

A bill of lading is, in the first instance and most simply, an acknowledgment by a carrier that it has received goods for shipment. Secondly, the bill is a contract of carriage. Thirdly, if the bill is negotiable (as, for practical purposes, all ocean bills are) it controls possession of the goods and is one of the indispensable documents in financing the movement of commodities and merchandise throughout the world.


4. Throughout this Note, "cargo" is personalized and represents cargo interests, or individuals and others who ship goods by common carrier over water.

5. The history and development of the bill of lading is discussed in more detail infra Part I.A. See also Daniel E. Murray, History and Development of the Bill of Lading, 37 U. Miami L. Rev. 689 (1983).

gress passed the Harter Act\(^6\) and the Carriage of Goods by Sea Act (COGSA)\(^7\) to prevent the imposition of contractual terms in bills of lading that would act to limit carrier liability.\(^8\) These acts sought to prevent the inclusion of terms that cargo would not have accepted in a free market absent price or non-price concessions from the carrier. International action was also taken to limit the adhesive nature of bills of lading. The Hague Rules set forth a framework for the unification of international rules regarding the content of bills of lading—the framework upon which COGSA was based.\(^9\)

Courts in the United States used the statutory provisions in COGSA to strike down foreign forum choice clauses found in bills of lading as limitations to liability.\(^10\) In Vimar Seguros y Reaseguros v. M/V Sky Reefer,\(^11\) a recent decision resolving a split among the circuit courts, the Supreme Court of the United States held that COGSA did not compel the invalidation of arbitration clauses found in bills of lading covered by the Act.\(^12\) The Court's holding was less surprising than both the reasoning the Court used to reach the result and the dicta, part and parcel of that reasoning, that seemingly limits the continuing viability of the Indussa doctrine.\(^13\)

On its face, Sky Reefer is a relatively uncomplicated case that gave specific commands to the shipping industry. Sky Reefer did not arise in a vacuum, however. The historical attempt to develop uniform international laws of shipping and arbitration came under direct scrutiny in Sky Reefer, a conflict previously dismissed by United States courts. The opinion itself contains tensions between statutory interpretation and legislative history. Although the effects of Sky Reefer have not yet surfaced in the shipping market, United States cargo interests are striving to reestablish the Indussa doctrine\(^14\) through the efforts of the Maritime Law Association.\(^15\)

This Note explores some implications of the Sky Reefer opinion. Part I details the history of COGSA and examines the common law predating international unification of the law relating to maritime bills of lading and the attempt to establish international uniformity in this area. Part II recounts the U.S. application of COGSA to foreign forum selection and foreign arbitration clauses found in bills of lading. Part III chronicles the Sky

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8. See discussion infra Parts I.B and I.C.
9. See discussion infra Part I.C.
10. The seminal case on this issue is Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967) (en banc). This case and its progeny are discussed infra Part II.
12. See id. at 2325.
13. See discussion infra Part II.A.
14. See discussion infra Part II.A.
15. The Maritime Law Association of the United States (MLA), discussed infra note 33, has proposed an "American COGSA" that would strike all jurisdictional clauses in response to Sky Reefer. For a complete discussion of the MLA proposal, see infra Part IV.B.
Reef decisions, contrasting the First Circuit's holding with the subsequent position taken by the U.S. Supreme Court. Part III also surveys the three opinions submitted by the Supreme Court Justices in Sky Reefer. Part IV examines the possible economic consequences of Sky Reefer, including attempts at recodification of the Indussa rule. In conclusion, this Note determines that Sky Reefer has restored the imbalance of market power in favor of the carrier, an imbalance that COGSA and the Hague Rules had attempted to eliminate.

I. The History of COGSA

A. The Common Law Before Unification

Before the United States and other nations16 attempted to codify the duties of carrier to cargo, those duties were spelled out under the common law. Although laws varied from country to country, carriers were generally strictly liable for damage to cargo.17 The two great seafaring nations of the time, the United States and Great Britain, took similar approaches to the law. Great Britain held carriers "absolutely responsible for the safety of the goods while they remained in his hands as carrier."18 Carriers in Britain, however, were allowed to contract out of liability with express contractual provisions, and British common law recognized exceptions to strict liability such as acts of God, enemy attack, or some "defect or infirmity of the goods themselves."19 Similar rules existed in the United States, where courts had deemed carriers insurers of the goods they were transporting. Absent legislative provision, acts of God, acts of a public enemy, non-negligent causes, or causes expressly excepted in the bill of lading, the common carrier would be held completely liable for damaged goods.20

Contractual provisions exculpating carriers from all liability were not allowed in either Britain or the United States. British carriers were allowed, in certain circumstances, to limit their liability for negligence or unseaworthiness, but only with "absolutely clear, unambiguous, and unequivocal terms."21 Although U.S. carriers could not contract out of liability for their negligent actions, federal courts limited the efficacy of this rule by placing


18. Id. at 1238-39.

19. See id. at 1239 (internal quotation marks deleted).

20. See id. For a historical look at the common law of carrier liability, The Propeller Niagara v. Cordes, 62 U.S. 7 (1858), is a good starting point. See Yancey, supra note 17, at 1239 n.5.

21. Id. at 1239. Extremely specific clauses in contracts would allow carriers in Britain to avoid liability completely for negligent actions of their servants or agents. See 1 T. Carver, Carriage by Sea 124-31 (R. Colnwaux ed., 13th ed. 1982).
a high burden of proof on cargo. If the reason for damage to goods came within an exception in a bill of lading, cargo was forced to prove that the carrier's negligence "caused or contributed to the loss." Thus, bargaining power was placed squarely in the hands of carriers. If cargo wanted to ship goods, they had to accept carrier-imposed bill of lading terms—terms that judicial activism would not alter regardless of their onerous qualities.

B. The Harter Act (United States)

Given the breadth of the contractual exceptions to liability allowed in both nations, bills of lading became a mine-field for unsuspecting cargo interests. Courts only required such clauses to be reasonable—providing little protection for cargo given the prevailing interpretation of "reasonable." Beginning in the 1890's, cargo began a concerted attempt to remedy their dissatisfaction with the common law.

In response to the collective cry of cargo, Congress passed the Harter Act. The Harter Act was the result of a compromise between cargo and carrier. Under the Harter Act, carriers could no longer place clauses in bills of lading excepting liability for negligence in the "proper loading,

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22. See Yancey, supra note 17, at 1239-40.

23. Id. at 1239. Given the difficulty of discovery before the implementation of specific discovery rules, the onus this procedural impediment placed on cargo claimants proved to be a "very real defensive weapon." Id.

24. On the hidden dangers of exculpatory clauses in bills of lading, J. M. Johnson, Assistant Secretary of Commerce, stated:

[T]aking advantage of this practical monopoly, the owners of the steamship lines combined to adopt clauses in their bills of lading, very seriously and unduly limiting their obligations as carriers of the goods, and refuse to accept consignments for carriage on any other terms than those dictated by themselves. That bills of lading have thus become so lengthened, complex, and involved, that in the ordinary course of business it is almost impossible for shippers of goods to read or check their various conditions, even if objections would be listened to, and the hardship aggravated by the fact that new and more stringent conditions are constantly being added by the shipowners to provide for new questions or claims that have arisen.


25. See Yancey, supra note 17, at 1239-40. Some of the excepting clauses included: thieves; heat, leakage, and breakage; contact with other goods; perils of the seas; jettison; damage by seawater; frost; decay; collision; strikes; benefit of insurance; liberty to deviate; sweat and rain; rust; prolongation of the voyage; nonresponsibility for marks or numbers; removal of the goods from the carrier's custody immediately upon discharge; limitation of value; time for notice of claims; and time for suit.

Id. at 1240.

Courts had found that all of the above exculpating clauses in a carrier's bill or lading, in any combination, were reasonable. Further, Yancey notes that the standards of reasonableness were "rather stringent in the carrier's favor." See id.

26. See id. at 1240-41.

stowage, custody, care or proper delivery" of goods\textsuperscript{28} or "purporting to reduce the obligation of the owner to exercise due diligence in regard to seaworthiness,"\textsuperscript{29} lest they be declared void. In return, cargo could not hold a carrier liable for losses resulting from "faults or errors in navigation or in the management" of the vessel if the carrier had used "due diligence" in keeping the vessel seaworthy.\textsuperscript{30}

The promise that the Harter Act held out for cargo proved to be illusory, however. Carriers were still able to insert clauses limiting the amount of recovery, requiring strict notice of claims, and calling for short periods of time to file suit.\textsuperscript{31} Also not affected by the Harter Act was the imposition upon cargo of the burden to prove otherwise should the loss seem to fall within one of the exempting clauses in a bill of lading—a burden that proved just as imposing after Harter as it had been before.\textsuperscript{32} Although Congress had attempted to level the bargaining power of cargo and carrier, the continued existence of burdensome exculpatory clauses strained the effort.

C. International Uniformity—COGSA and the Hague Rules

In response to the limitations of the Harter Act and calls from the Maritime Law Association of the United States,\textsuperscript{33} the Comité Maritime International (CMI) decided to reexamine the entirety of maritime law in 1912.\textsuperscript{34} In September 1921, the International Law Association,\textsuperscript{35} at The Hague, adopted the rules which the CMI had recommended.\textsuperscript{36} At the Brussels Convention in August 1924, the International Diplomatic Conference on Maritime Law signed the International Convention for the Unification of Certain Rules Relating to Bills of Lading (the Brussels Convention) with some minor adjustments.\textsuperscript{37} National versions of this legislation quickly

\begin{itemize}
\item \textsuperscript{28} See 46 U.S.C. app. § 190 (1995).
\item \textsuperscript{29} See 46 U.S.C. app. § 191 (1995). See also Yancey, supra note 17, at 1241.
\item \textsuperscript{31} Yancey, supra note 17, at 1241.
\item \textsuperscript{32} See id. Once again, the burden placed upon cargo in the days prior to the implementation of the rules of discovery proved too high in many instances—a burden the Harter Act did not address. See id.
\item \textsuperscript{33} The Maritime Law Association of the United States was formed in 1899 for the purpose of contributing to the efforts of the Comité Maritime International, discussed infra note 34. See John C. Moore, The Hamburg Rules, 1 J. MAR. L. & COM. 1, 2 (1978).
\item \textsuperscript{34} The CMI was formed in 1897. A conglomerate of several national "Associations of Maritime Law," the CMI committed itself to creating a uniform international law of shipping after recognizing that "private agreement would be ineffective." 1 LEGISLATIVE HISTORY, supra note 16, at 5. This private law organization has been devoted to the cause of international uniformity in maritime law since its foundation. See Moore, supra note 33, at 2.
\item \textsuperscript{35} See Yancey, supra note 17, at 1242.
\item \textsuperscript{36} The International Law Association (also known as the Association for the Reform and Codification of the Law of Nations) was one of the first groups to attempt to "achieve international uniformity for the law governing bills of lading" and other private law subjects. See 1 LEGISLATIVE HISTORY, supra note 16, at 4.
\item \textsuperscript{37} See Yancey, supra note 17, at 1242.
\item \textsuperscript{38} See id. Other uniform acts have followed. In 1968, the Visby Rules were amended to the existing Hague Rules. See id. at 1248. The Hamburg Rules represent the
followed in most major maritime nations. In 1936, the United States enacted its version of the Brussels Convention, the Carriage of Goods By Sea Act (COGSA).

COGSA covers the relation of cargo to carrier to the extent that a bill of lading establishes the contract of carriage. Applicable from the time the goods are loaded until they are discharged, COGSA leaves the Harter Act, which governs the period before loading and after discharge, otherwise unchanged. COGSA prohibits bill of lading clauses that would act to relieve a carrier from fault-based liability or to lessen its liability "otherwise than as provided" in COGSA.

Thus, the law of carrier liability has evolved from a regime of strict liability with exceptions that swallowed the rule to an arrangement wherein carriers have settled duties to cargo and cannot act to avoid those duties. Yet COGSA represented more than a mere list of the duties and responsibilities of the carrier; it represented an "allocation of financial responsibility for cargo loss or damage that occurs during ocean transportation."

The Hague Rules and COGSA also represented a compromise between cargo and carrier—a compromise that evened the bargaining power of the two groups in regard to adhesive, liability limiting clauses in bills of lading. The ability of carriers to limit their liability indirectly, however, may have been preserved by Sky Reefer—an ability that was previously limited in the United States by Indussa and its progeny.

II. Carrier Liability: Indussa and Its Progeny

A. Forum Choice Agreements Before Indussa

COGSA section 3(8) provides:

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties of obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect.

most recent attempt at international uniformity in maritime law. The Hamburg Rules show remarkable variance from Hague/Visby in the areas of liability and package limitation—changes that could cause problems in the areas of insurance and conflict of laws. See Moore, supra note 33, at 11.

39. See Yancey, supra note 17, at 1242. The quickest response was from the British Empire. Other nations waited until the United States enacted a version of the Brussels Convention in 1936 before adopting the rules as their own national law. See 1 Legislative History, supra note 15, at 15, 23.


41. See Yancey, supra note 17, at 1243.

42. See id. at 1244.


Courts in both England and France had upheld forum choice clauses under a similar section of the Hague Rules. In *The Fehmarn*, a British court invalidated a forum choice clause, stating that the clauses were prima facie valid, but enforceable at the discretion of the courts. The *Fehmarn* court also established guidelines, such as justice and propriety, for determining when the clauses should be enforced. By contrast, French courts have upheld forum choice clauses regardless of their potential effect on the outcome of litigation.

Initially, United States courts split over the enforceability of foreign forum selection clauses in bills of lading covered by COGSA. The Fifth Circuit, in *Carbon Black Export, Inc. v. S.S. Monrosa*, strictly construed a forum selection clause and held that the clause did not limit the court's ability to exercise in rem jurisdiction. The court disregarded the plaintiff's argument that the clause ran afoul of COGSA section 3(8), instead basing its decision on the principle that agreements ousting courts of jurisdiction are contrary to public policy. The Second Circuit faced the section 3(8) issue for the first time in 1955.

In *Wm. H. Muller & Co. v. Swedish American Line*, the Second Circuit enforced a foreign forum selection clause because it was reasonable. A jurisdictional clause contained in the defendant's bill of lading called for all claims to be decided in Swedish courts. The plaintiff argued that the clause ran afoul of COGSA section 3(8) because of the additional expense that a plaintiff would be forced to undertake in order to bring suit in a

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48. See id. at 514.
49. See id. See also WILLIAM TETLEY, MARINE CARGO CLAIMS 1100 (3d ed. 1988). "Jurisdiction clauses are valid except insofar as, in respect of a bill of lading to which the Hague/Visby Rules apply, they purport to select a forum which would apply a lesser liability of the carrier than the Visby Rules provide. . . ." Id. See also The El Amria [1981] 2 Lloyd's List L. Rep. 119, 123-24.
50. See TETLEY, supra note 49, at 1035 ("Under French law, jurisdiction clauses are valid . . . the French judge not being expected to concern himself about how a foreign court may render judgment.").
51. 254 F.2d 297, 300-301 (5th Cir. 1958). The clause at issue in *S.S. Monrosa* stated,

[No legal proceedings may be brought against the Captain or ship owners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there.]

Id. at 299.
52. See Brief of Appellant at 13-17, *Carbon Black Export, Inc. v. S.S. Monrosa*, 254 F.2d 297 (No. 16,667). The argument was persuasive enough to merit an in depth response from the appellees. See Brief of Appellees at 15-18, S.S. Monrosa (No. 16,667).
53. See S.S. Monrosa, 254 F.2d at 300-301. The court failed to list even the § 3(8) issue in its summary of the grounds for appeal. See id. at 299 n.3.
54. See 224 F.2d 806, 808 (2d Cir.), cert. denied, 350 U.S. 903 (1955), overruled by Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967) (en banc).
55. See id. at 807.
The court summarily rejected the argument, explaining that costs “incidental to the process of litigation” did not come under the auspices of section 3(8). The court instead held that jurisdictional clauses should be enforced if they were found to be reasonable. Thus, United States courts split on the validity of foreign forum choice clauses by applying general legal principles while avoiding the issue of whether or not section 3(8) precluded that enforceability.

International uniformity was not the primary concern for the U.S. courts when the Second Circuit Court of Appeals reversed its own precedent in 1967 and held forum choice clauses invalid under section 3(8) of COGSA. That American courts would refuse to enforce a forum choice clause was really no surprise. As one commentator had written, “[W]ith almost boring unanimity American courts have refused to enforce contractual provisions conferring exclusive jurisdiction in advance on a court or courts of a particular sister state or foreign country.” As the Second Circuit’s opinion in Wm. H. Muller showed, the doctrine of ouster appeared to be losing force in the admiralty context—until Indussa.

B. Indussa Corp. v. S.S. Ranborg

Indussa contracted with a Belgian agency to ship nails and barbed wire from Belgium to the United States on board the S.S. Ranborg. In the bill of lading issued to Indussa, a clause entitled “Jurisdiction” required all claims to be brought in the carrier’s principal place of business, and under Norwegian law. Indussa filed suit in the Southern District of New York in order to recover $2600 for damage caused by rust. Based on the jurisdictional clause found in the bill of lading, the district court determined that it had no jurisdiction. Rejecting the district court’s determination, the court of appeals reasoned that such a clause placed a “high hurdle” in the way of cargo’s pursuit of its claim.

Two arguments seemed to convince the Second Circuit that the district court could properly assert jurisdiction over the dispute. Initially, the court of appeals worried that a foreign tribunal would not apply COGSA or the Hague Rules to a claim and, even if it did, the tribunal’s application of those rules might not be the same as an American court’s. Even though Norway was a signatory to the Brussels Convention and the Norwegian law

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56. See id.
57. See id.
58. See id. at 808.
60. Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, 200 (2d Cir. 1967) (en banc).
61. The clause at issue provided, “Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein.” Id. at 201.
62. See id.
63. See id. at 200-01.
64. See id. at 203-04.
to be applied to Indussa's claim was similar to COGSA, the court refused to subject cargo with goods in transit "to or from ports of the United States" to different nations' interpretations of COGSA. The court interpreted COGSA as evidencing an intent to subject shipments to or from American ports to American courts' interpretations of COGSA, regardless of the state of the law of the country under whose jurisdiction the bill of lading required litigation.

The court also stated that "[s]uch a clause puts a high hurdle in the way of enforcing liability . . . and thus is an effective means for carriers to secure settlements lower than if cargo could sue in a convenient forum."

Thus, the Indussa court reasoned that a shipper may be less willing to prosecute a claim and more willing to accept a settlement below the true value of his claim if forced to litigate in a foreign jurisdiction. In addition, the court again interpreted COGSA as evidencing Congressional intent to "invalidate any contractual provision in a bill of lading for a shipment to or from the United States that would prevent cargo able to obtain jurisdiction over a carrier in an American court from having that court entertain the suit and apply the substantive rules Congress had prescribed." Thus, the Second Circuit was in fact troubled about the application of any law, regardless of its relation to COGSA, to a claim that was "properly before [an American court]."

The Indussa court's opinion did not sweep as broadly as it might have, however. The court limited the ruling in dicta: "Our ruling does not touch the question of arbitration clauses in bills of lading which require [arbitration] to be held abroad." The court asserted that the Federal Arbitration Act (FAA) by its own terms "validated a written arbitration provision in

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65. See id. at 201.
67. See Indussa, 377 F.2d at 203.
68. See id.
69. Id. at 203-04.
70. See id. at 203.
71. Id. at 204.
72. Id.
73. Id. at 204 n.4.

any maritime transaction . . . includ[ing] bills of lading of water carriers."

Thus, the court, while holding foreign forum choice clauses invalid per se, refused to do the same for foreign arbitration agreements.

The Supreme Court did not completely agree with the Indussa court's reasoning. In The Bremen v. Zapata Off-Shore Co., the Supreme Court held that foreign forum selection clauses should be upheld as a matter of course unless the resisting party could prove that the clause was unreasonable under the circumstances. Zapata contracted with Unterweser, owner of The Bremen, to tow a drilling rig from the United States to Italy after soliciting bids for the service. The contract, subject to extensive negotiation and revision, contained a forum selection clause calling for disputes to be litigated before the London Court of Justice. Zapata did not attempt to revise the jurisdiction clause, and the contract was accepted with the clause intact. When the drilling rig was damaged in transit, Zapata brought suit in U.S. district court to recover damages. The district court refused to enforce the forum choice clause, and the Fifth Circuit Court of Appeals affirmed. The Supreme Court granted certiorari to resolve a split in the circuits regarding the validity of foreign forum choice clauses in international towage contracts.

The Court carefully differentiated The Bremen from Indussa in several aspects, particularly in that the jurisdictional clause arose in a towage contract and not a bill of lading under the auspices of COGSA. However, the reasoning of The Bremen seemed broad enough to defeat the Second Circuit's Indussa holding. The heart of the opinion concerned the enforcement of contracts freely made between "experienced and sophisticated businessmen." The Court also worried about the economic impact a decision invalidating a forum choice clause would have on American businesses participating in international trade. Thus, the Supreme Court began undercutting the applicability of Indussa a mere five years after the decision.

Yet the Second Circuit's decision in Indussa continued to show vitality, and despite the Supreme Court's reasoning in The Bremen, other circuits

75. Indussa, 377 F.2d at 204 n.4 (internal quotation marks deleted). The court cited the FAA in support of its reasoning. Id. For a more detailed discussion of the FAA, see supra note 74 and accompanying text.
77. See id. at 15.
78. See id. at 2-3.
79. See id. at 4.
80. See id.
81. See id. at 4-11.
82. See id. at 2.
83. Id. at 11-12. The Bremen Court stated: "The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen . . . and . . . it should be honored by the parties and enforced by the courts." Id. at 12 (emphasis added).
84. See id. at 9. "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." Id.
uniformly invalidated foreign forum selection clauses under COGSA section 3(8).\textsuperscript{85} In \textit{Union Insurance Society of Canton v. S.S. Elikon},\textsuperscript{86} the Fourth Circuit refused to enforce a forum choice clause that would have vested exclusive jurisdiction in West German courts and called for the application of West German laws. Finding the intent of Congress in COGSA as "suggest[ing] a preference for an American forum,"\textsuperscript{87} the court relied heavily on the reasoning of \textit{Indussa}. As recently as 1987, the Fifth Circuit in \textit{Conklin & Garrett, Ltd. v. M/V Finnrose} held a Finnish forum selection clause void, citing concerns that a carrier's liability may be lessened in a foreign tribunal applying law other than COGSA.\textsuperscript{88}

C. The Final Blow to \textit{Indussa}

The \textit{S.S. Elikon} court distinguished \textit{The Bremen} in two ways. Initially, it noted that \textit{The Bremen} Court had not been faced with a "pre-printed form bill[ ] of lading," but rather a bill of lading that had been accepted only after solicitation of bids and a negotiation with the owner of the vessel.\textsuperscript{89} The \textit{S.S. Elikon} court also noted that the Supreme Court in \textit{The Bremen} had heard and decided the case in the absence of "congressional policy," which COGSA brought into play in \textit{Indussa}, \textit{S.S. Elikon}, and \textit{M/V Finnrose}.\textsuperscript{90} The \textit{S.S. Elikon} court noted that the passage of COGSA demonstrated an "explicit congressional concern[ ] about bills of lading in foreign trade."\textsuperscript{91} As evidence of this "explicit" concern, the court stated that COGSA was passed in order to "reduce uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers and the liabilities of underwriters," factors not implicated in an arm's length agree-


\textsuperscript{86} 642 F.2d 721, 1982 A.M.C. 588 (4th Cir. 1981). In \textit{S.S. Elikon}, Union Insurance paid its insured, General Electric (G.E.), for damage occasioned to G.E.'s goods while in transit from the United States to Kuwait. The carrier, Hansa, had issued two bills of lading to G.E. evidencing receipt of the goods on board the \textit{S.S. Elikon}. Union Insurance brought suit as the subrogee to G.E.'s claim in United States District Court for the Eastern District of Virginia. The jurisdiction clause in the bills of lading stated, "All actions under this contract shall be brought before the Court of the Bremen, Federal Republic of Germany and the laws of the Federal Republic of Germany shall apply." \textit{Id.} at 722 n.1.

\textsuperscript{87} \textit{Id.} at 726.

\textsuperscript{88} See 826 F.2d 1441, 1443-44, 1988 A.M.C. 318 (5th Cir. 1987). \textit{Conklin & Garrett} contracted to ship a merry-go-round from the United Kingdom to the United States on board the \textit{M/V Finnrose}, a vessel chartered by Atlantic Cargo Services. The bill of lading contained a jurisdictional clause calling for litigation in Finland under Finnish law. When the merry-go-round was damaged in transit, \textit{Conklin & Garrett} brought suit in United States District Court for the Southern District of Texas. \textit{See id.} at 1441.

\textsuperscript{89} See \textit{S.S. Elikon}, 642 F.2d at 724. \textit{See also Nakazawa and Moghaddam}, supra note 43, at 8.

\textsuperscript{90} \textit{See S.S. Elikon}, 642 F.2d at 724. \textit{The Bremen} Court had explicitly distinguished \textit{Indussa} due to the inapplicability of COGSA to the towage contract, and thus the Fourth Circuit could readily distinguish \textit{The Bremen} from \textit{S.S. Elikon}. \textit{See Nakazawa and Moghaddam}, supra note 43, at 8.

\textsuperscript{91} \textit{S.S. Elikon}, 642 F.2d at 723 (emphasis added).
ment between two parties as in *The Bremen*. As the S.S. *Elikon* decision showed, *The Bremen* was not considered strong enough to overcome a broad interpretation of COGSA, the basis of *Indussa*'s holding.

The Supreme Court revisited the issue of forum selection clauses in *Carnival Cruise Lines, Inc. v. Shute*, finally bringing *Indussa* and its progeny to the breaking point. Shute, a Washington resident, was injured while on board The Tropicale, a vessel owned by Carnival Cruise Lines. The ticket purchased by Shute contained a provision placing jurisdiction in "a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country." Shute filed suit in United States District Court for the Western District of Washington.

In *Carnival Cruise Lines*, the Court considered whether the Limitation of Vessel Owner's Liability Act invalidated the forum selection clause found in the cruise line ticket. The pertinent section of the Act, section 183c, stated:

> It shall be unlawful for the . . . 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 . . . to relieve such owner . . . from liability . . . for . . . loss or injury, 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 . . . All such provisions or limitations contained in any such rule, regulation, contract, or agreement are . . . null and void and of no effect.

Strictly construing the language contained in section 183c, which is analogous to COGSA section 3(8), the Court refused to find that the clause in

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92. *See id.*
94. *See id. at 588.*
95. *Id.*
96. *See id.*
98. *See Carnival Cruise Lines, 499 U.S. at 590.* The Limitation of Vessel Owner's Liability Act was passed "in response to passenger-ticket conditions purporting to limit the shipowner's liability for negligence or to remove the issue of liability from the scrutiny of any court by means of [an arbitration clause]." *Id.* at 596 (citing S. Rep. No. 74-2061, at 6 (1936); H.R. Rep. No. 74-2517, at 6 (1936)). The reasons behind the Limitation of Vessel Owner's Liability Act were similar to the rationale undergirding COGSA. For a discussion of the rationale underlying COGSA, see *supra* Part I.A.
100. *See 46 U.S.C. app. § 183c. The similarity of the two sections is readily apparent.*

COGSA § 3(8) provides:

> Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods . . . or lessening such liability otherwise than as provided in this Chapter, shall be null and void and of no effect.


The dissenters in *Carnival Cruise Lines*, Justices Stevens and Marshall, pointed out the similarity in the two clauses: "The Courts of Appeals, construing an analogous provision of the Carriage of Goods by Sea Act . . . have unanimously held invalid as limitations on liability forum-selection clauses requiring suit in foreign jurisdictions."
the ticket "lessen[ed], weaken[ed], or avoid[ed] the right of any claimant to a trial by court of competent jurisdiction."  

Applying reasoning similar to that of The Bremen Court, the Carnival Cruise Lines Court determined that the clause at issue was indeed reasonable. Citing the need for certainty, the judicial efficiency of forum choice clauses, and subsequent savings to passengers, the Court held the clause enforceable. Further, the Court noted that no facts were available on the record that would sustain the "heavy burden of proof" required to invalidate an otherwise valid jurisdictional clause.

III. Forum Choice, Arbitration, and Sky Reefer

In Vimar Seguros y Reaseguros v. M/V Sky Reefer, the arbitration clause in dispute arose from a "standard form bill of lading" for a shipment of fruit. Bacchus Associates (Bacchus) contacted a Moroccan supplier, Galaxie Negoce, S.A. (Galaxie), to purchase the fruit. Bacchus voyage-chartered the M/V Sky Reefer from Nichiro Gyogyo Kaisha, Ltd. (Nichiro) to transport the fruit from Morocco to Massachusetts. After Galaxie loaded the fruit, a bill of lading was issued to Galaxie, as shipper and consignee, by Nichiro, as carrier. In order to finalize the transaction, Galaxie then transferred the bill of lading to Bacchus based on a letter of credit posted in Galaxie's favor.

When a portion of the fruit was damaged in transit, Bacchus suffered over one million dollars in damages. Bacchus received compensation for the loss from its marine cargo insurer, Vimar Seguros y Reaseguros (Vimar Seguros). Bacchus and Vimar Seguros then commenced suit in United States District Court for the District of Massachusetts against the owner of the vessel, M.H. Maritima, in personam, and against the M/V Sky Reefer in rem. The defendants moved for a stay of the actions and for

Carnival Cruise Lines, 499 U.S. at 603-04. They would have applied Indussa type reasoning in order to invalidate the clause in question. See id.  
101. 46 U.S.C. app. § 183c. The Court held that the only limitation that section 183c established was that a clause may not both deprive all "competent" courts of jurisdiction and limit an owner's liability for negligence. See Carnival Cruise Lines, 499 U.S. at 596-97.  
102. See id. at 593-595.  
103. See id.  
104. See id. at 595. The Court avoided what may have been the plaintiffs' best argument, that they were "financially incapable of pursuing [the] litigation in [the contractual forum]," by holding that the court of appeals had not included enough information in the record for the Court to "validate the finding of inconvenience." See id. at 594.  
105. See Sky Reefer, 115 S. Ct. at 2325.  
106. Nichiro had time-chartered the vessel from M.H. Maritima, S.A., through Honma Senpaku Co., Ltd. See id.  
108. See Sky Reefer, 115 S. Ct. at 2325.  
109. In personam jurisdiction is used when seeking "judgment against a person involving his personal rights and based on jurisdiction of his person." BLACK'S LAW
specific enforcement of the arbitration agreement found in the bill of lading under section 3 of the FAA. The clause called for arbitration in Japan.

The district court halted the proceedings and issued an order compelling the petitioners to arbitrate, while retaining jurisdiction pending arbitration. On interlocutory appeal, the First Circuit affirmed the order. In order to resolve a split among the circuits, the Supreme Court granted certiorari to examine the enforceability of foreign arbitration clauses in maritime bills of lading.

Although seemingly a simple dispute that could be easily resolved by applying simple contract law, the application of domestic statutes, international treaties, and prior holdings of United States federal courts on related issues make Sky Reefer a case of particular import to the shipping industry. In fact, the district court quickly dismissed the simple contract argument that the bill of lading constituted a contract of adhesion because Bacchus was "a sophisticated party familiar with the negotiation of maritime shipping transactions." Thus, the only argument left for the petitioners was that arbitration clauses in bills of lading, otherwise enforceable under the FAA, were not enforceable because the clauses ran afoul of COGSA.

A. The First Circuit’s Sky Reefer

The interplay of arbitration clauses and bills of lading posed a problem previously unadressed by the First Circuit. Although forum selection clauses had been universally rejected under COGSA, a rejection widely supported by commentators, the Indussa court had avoided the particular problem previously unadressed by the First Circuit. The FAA is discussed in greater detail supra note 74 and accompanying text.

110. See Sky Reefer, 115 S. Ct. at 2325. The FAA is discussed in greater detail supra note 74 and accompanying text.
111. See id.
112. Id. at 2325.
113. See id. at 2326.
114. See id.
115. By contrast, the Supreme Court in Carnival Cruise Lines had enforced a forum selection clause over language in the Limitation of Vessel Owner’s Liability Act similar to that found in COGSA. For a discussion of Carnival Cruise Lines, see supra Part II.B.
116. See Vimar Seguros y Reaseguros v. M/V Sky Reefer, 29 F.3d 727, 729-30 (1st Cir. 1994). The court cited an impressive list of cases and articles including Conklin & Garrett, Ltd. v. M/V Finnrose, 826 F.2d 1441, 1443-44 (5th Cir. 1987), and Union Insurance Society of Canton v. S.S. Ellinon, 642 F.2d 721, 726 (4th Cir. 1981), as decisions supporting the invalidation of forum choice clauses under COGSA. The court also cited the following commentators as supporting the Indussa rule: Gilmore & Black, supra note 3,
lar question. As the *Indussa* court explained in a footnote, "Our ruling does not touch the question of arbitration clauses in bills of lading which require [arbitration] to be held abroad."117 The *Indussa* court noted in passing, however, that the FAA expressly covered arbitration clauses "in any maritime transaction" including "bills of lading of water carriers."118

After *Indussa*, courts split on the validity of arbitration clauses in bills of lading governed by COGSA.119 A particularly notable decision invalidating an arbitration clause was handed down by the Eleventh Circuit. In *State Establishment for Agricultural Product Trading v. M/V Wesermunde*,120 the court, borrowing the reasoning of *Indussa*, invalidated an arbitration clause that called for London-based arbitration.121 Given the existence of the FAA, the court did not hold the clause invalid per se; however, the court would have required express agreement between shipper and carrier before enforcing the arbitration clause.122 When *Vimar Seguros y Reaseguros v. M/V Sky Reefer* came to the First Circuit, the members of that court were finally confronted with the divisive issue of arbitration clauses covered by COGSA.123


117. *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 204 n.4 (2d Cir. 1967). Further, the *Indussa* court stated, "The validity of such a clause in a charter party, or in a bill of lading effectively incorporating such a clause in a charter party, has been frequently sustained." *Id.*

118. *Id.* (citing 9 U.S.C. § 2 (1947)). The court maintained that any conflict between the two statutes should be resolved in favor of the FAA, which was enacted subsequent to COGSA. *See id.*


120. 838 F.2d 1576, 1988 A.M.C. 2328 (11th Cir. 1988). State Establishment contracted with the owners and charterers of the M/V Wesermunde in order transport a shipment of eggs from the United States to Jordan. The charter party, incorporated into the bill of lading, contained a clause referring disputes to arbitration in London according to the "Arbitration Act." The eggs were destroyed by fire before they could be off-loaded in Jordan, and State Establishment commenced suit in the United States District Court for the Middle District of Florida to recover for the loss. *See id.* at 1578.

121. The clause stated, "[A]ny dispute arising under this charter party [is] to be settled by arbitration in London . . . according to the Arbitration Act." *Id.* at 1578.

122. *See id.* at 1581-82. The court would have required actual notice and/or express agreement over the arbitration clause; however, the court did show some propensity to hold the clause per se invalid as an illegitimate limitation of the carrier's liability under COGSA § 3(8). *See id.* at 1580-81.

123. *See discussion supra* notes 115-18 and accompanying text.
Relying heavily on two canons of statutory construction and assuming a conflict between the two statutes, the court found that the FAA rather than COGSA controlled the enforceability of arbitration clauses.\(^{124}\) The first canon used by the court was, "a later enacted statute generally limits the scope of an earlier statute if the two laws conflict;"\(^{125}\) therefore, the court reasoned that the FAA (1947) would control as opposed to COGSA (1936). The second canon cited stated, "where two statutes conflict, regardless of the priority of enactment, the specific statute ordinarily controls the general."\(^{126}\) The second canon operated to validate the clause because the FAA speaks specifically to arbitration, and even more specifically to arbitration in bills of lading,\(^{127}\) whereas COGSA merely voids any clause that limits a carrier's liability,\(^{128}\) without any specific "reference to arbitration, or for that matter, forum selection clauses."\(^{129}\)

The First Circuit was cautious in \textit{Sky Reefer}, avoiding broadly sweeping language and possible conflicts with \textit{Indussa}.\(^{130}\) The court noted further, "We recognize, however, that absent the FAA, COGSA might operate to nullify foreign arbitration clauses in bills of lading."\(^{131}\) The court also noted that a foreign arbitration agreement did not "deprive the federal court of its jurisdiction over the underlying dispute."\(^{132}\) Finally, the court found that the "strong federal policy favoring arbitration supports the primacy of the FAA over COGSA where arbitration agreements are concerned."\(^{133}\) This primacy resulted from the fact that foreign forum choice clauses were distinguishable from arbitration clauses because "there was no compelling congressional mandate in favor of giving effect to agreements to litigate before foreign tribunals."\(^{134}\) The Supreme Court decided that the First Circuit's scalpel cut too finely, and substituted a chain saw.

\(^{124}\) \textit{See} \textit{Sky Reefer}, 29 F.3d at 732.
\(^{125}\) \textit{Id}. at 732. COGSA was enacted in 1936. The FAA was reenacted in 1947. \textit{See id}. Although the FAA was originally enacted in 1925, it was recodified as positive law in 1947. \textit{See Indussa v. S.S. Ranborg}, 377 F.2d 200, 204 n.4 (2d Cir. 1967). Although the inaccurate use of the enacting dates of COGSA and the FAA would seem to contradict the First Circuit's reasoning, the subsequent dismissal of the First Circuit's interpretive arguments by the Supreme Court makes this argument moot. \textit{See Sky Reefer}, 115 S. Ct. at 2326.
\(^{126}\) \textit{Sky Reefer}, 29 F.3d at 732. The First Circuit assumed the existence of a conflict between the two statutes. \textit{See id}. at 730.
\(^{127}\) \textit{See} 9 U.S.C. §§ 1, 2.
\(^{129}\) \textit{Sky Reefer}, 29 F.3d at 732.
\(^{130}\) \textit{See id}. The court did, however, state that the reasoning underlying \textit{Indussa} was beginning to fade, citing authority for this proposition in \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth}, Inc., 473 U.S. 614, 626-27 (1985). \textit{See Sky Reefer}, 29 F.3d at 732 ("We are 'well past the time when judicial suspicion of . . . arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.'").
\(^{131}\) \textit{Id}. at 732 n.5.
\(^{132}\) \textit{Id}. at 733.
\(^{133}\) \textit{Id}. at 732. For a discussion regarding the "strong federal policy" implications of the FAA, see supra note 74 and accompanying text.
\(^{134}\) \textit{Id}.
B. The Supreme Court's Sky Reefer

The Court dealt quickly with the First Circuit's holding that COGSA and the FAA conflicted on the point at issue. Justice Kennedy stated that COGSA would have to nullify the arbitration agreement on its own terms for a conflict to exist. The majority then proceeded to dismantle Indussa. Finding that transaction costs do not act to "lessen liability" under COGSA section 3(8), the Court, strictly construing the statute, held:

The liability that may not be lessened is liability for loss or damage . . . arising from negligence, fault, or failure in the duties or obligations provided in this section. The statute thus addresses the lessening of the specific liability imposed by the act, without addressing the separate question of the means and costs of enforcing that liability.

The Court further noted that COGSA was enacted in order to correct "specific abuses by carriers," and, in so doing, set forth "explicit standards of conduct." "Nothing," the Court explained, "in this section . . . suggests that the statute prevents the parties from agreeing to enforce these obligations in a particular forum." In support of its statutory interpretation, the Court cited its opinion in Carnival Cruise Lines.

Two other grounds seemed to sway the Court's opinion regarding the correct interpretation of COGSA. First, the Court attacked the argument that transaction costs are necessarily increased when parties are forced to arbitrate in a foreign tribunal. The Court stated, "Requiring a Seattle cargo owner to arbitrate in New York likely imposes more costs and burdens than a foreign arbitration clause requiring it to arbitrate in Vancouver." The Court also pointed to other nations' interpretations of the Hague Rules, upon which COGSA is based, and noted, "Sixty-six countries . . . are now parties to [the Brussels Convention], and it appears that none has interpreted its enactment of section 3(8) of the Hague Rules to prohibit

135. Vimar Seguros y Reaseguros v. M/V Sky Reefer, 115 S. Ct. 2322, 1995 A.M.C. 1817 (1995). It is important to note at the outset that only eight justices heard the case, Justice Breyer having recused himself. Justice Kennedy wrote the opinion, and in order to craft a majority opinion, artfully avoided any use of COGSA's legislative history. In so doing, he avoided a probable concurrence from Justices Scalia and Thomas, set up a binding majority opinion holding that COGSA does not nullify a foreign arbitration clause, and included dicta broad enough to implicate Indussa. See Sky Reefer, 115 S. Ct. at 2324.

136. See id. at 2326. The Court noted, "[W]hen two statutes are capable of coexistence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Id. (citing Morton v. Mancari, 417 U.S. 535 (1974)) (internal citations omitted).

137. See Sky Reefer, 115 S. Ct. at 2326.

138. See id. at 2327 (emphasis added).

139. Id.

140. Id.

141. See id. For a discussion of Carnival Cruise Lines, see supra Part II.B.

142. See Sky Reefer, 115 S. Ct. at 2327. The Court noted, "Even if it were reasonable to read § 3(8) to make a distinction based on travel time, airfare, and hotel bills, these factors are not susceptible of a simple and enforceable distinction between domestic and foreign forums." Id.

143. Id. at 2327-28.
foreign forum selection clauses.” Because “conflicts in the interpretation of the Hague Rules not only destroy aesthetic symmetry in the international legal order but impose real costs on the commercial system in [which] the Rules govern,” the Court rejected Indussa’s interpretation of COGSA.145

Reasons of comity also compelled the Court’s decision. Citing The Bremen, the Court stated that the “historical judicial resistance to foreign forum selection clauses, has little place in an era when . . . businesses once essentially local now operate in world markets.”146 Uniformity in the market place and a refusal to “insist on a parochial concept that all disputes must be resolved under our laws and in our courts,”147 reasoned the Court, is the best manner in which to insure American expansion into international markets.148 The Court found further support in the FAA. The Court stated that the FAA was “intended to encourage the recognition and enforcement of commercial arbitral agreements in international contracts and to unify the standards by which agreements to arbitrate are observed . . . and enforced,” and that courts should therefore avoid a construction of “domestic legislation” that would limit the effectiveness of these international agreements.149

The Court’s most controversial reasoning concerned the plaintiffs’ claim that a foreign arbitrator may either apply COGSA incorrectly or not apply it at all. In a careful maneuver, the Court refused to pass judgment on the question, deeming the issue premature for this proceeding, which was predicated merely upon the enforcement of the arbitration clause.150 Justice Kennedy reasoned, “[M]ere speculation that the foreign arbitrators might apply Japanese law which, depending on the proper construction of COGSA, might reduce [the carrier’s] legal obligations, does not in and of itself lessen liability under COGSA section 3(8).”151 This reasoning was girded by the district court’s decision to retain jurisdiction for enforcement of the arbitral award, at which time the court could question the adequacy of the law applied as against public policy, if necessary.152

145. See id. (citing Sturley, International Uniform Laws, supra note 144, at 736). The Indussa court had read COGSA as preferring the application of American law in American courts to all claims that dealt with the transport of goods to or from American ports. See supra Part II.A.
146. Id. (citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) (internal quotation marks deleted)).
147. See id. (citing The Bremen, 407 U.S. at 9).
148. See id.
149. See id. at 2329 (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 (1974) (emphasis added)).
150. See id. at 2330.
151. Id.
152. See id. In support of its holding, the Court cites Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), where it stated that “the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies . . . . [W]e would have little hesitation in condemning the
Of particular note in the Sky Reefer majority is Justice Kennedy’s failure to cite any legislative history regarding section 3(8) of COGSA—legislative history that would have added support to the enforcement of the clause. Congress left forum selection clauses out of the Harter Act, even though cargo voiced concerns regarding the clauses. Furthermore, domestic legislation in other countries had invalidated foreign forum choice clauses. Nevertheless, the delegates to the London Conference of the CMI refused to include a clause invalidating forum selection clauses in the Hague Rules. The reason for this refusal was eloquently stated by then president of the CMI, Louis Franclc:

Then I hear that it has been suggested that we should increase the burden of the proposed Convention and of the Rules and include such matters as jurisdiction in it . . . . It may be an abundant source of litigation, but really it is not business. But surely this is not a system or a problem which only arises agreement as against public policy.” Id. at 637 n.19. However, arbitral awards have only been overturned in this country when they are deemed to be in “manifest disregard of the law.” San Maritime Compania de Nav. v. Saguenay Terminals, 293 F.2d 796, 801 (9th Cir. 1961), or are “contrary to well accepted and deep rooted public policy.” Sea Dragon, Inc. v. Gebr. Van Weelde Scheepvaartkantoor B.V., 574 F. Supp. 367, 372, 1984 A.M.C. 699 (S.D.N.Y. 1983), a standard that, according to two authors, is rarely if ever met. See Robert Force and Anthony J. Mavronicolas, Two Models of Maritime Dispute Resolution: Litigation and Arbitration, 65 Tul. L. Rev. 1461, 1506 n.145, 1508 n.152 (1991). See also Sky Reefer, 115 S. Ct. at 2333 (Stevens, J., dissenting) (“The foreign-law clauses leave the shipper who does pursue his claim open to the application of unfamiliar and potentially disadvantageous legal standards, until he can obtain review (perhaps years later) in a domestic forum under the high standard applicable to vacation of arbitration awards.” (emphasis added)).

153. For a discussion of possible reasons for the absence of legislative history in Justice Kennedy’s opinion, see supra note 135 and accompanying text.

154. Because the goal of Congress in enacting COGSA was to give effect to the Brussels Convention and because of the similarity between the text of section 3(8) of COGSA and the Hague Rules, the legislative history of both is fittingly considered in determining the breadth of the provision in regard to forum choice clauses. See Michael F. Sturley, Forum Selection and Arbitration Clauses Under Section 3(8) of the U.S. Carriage of Goods by Sea Act: Statutory Intent and Judicial Interpretation 25 (January 1996) (unpublished manuscript, on file with the author at the University of Texas Law School) [hereinafter Statutory Intent].


The Canadian Act is of particular import because it was used as the “principal model” for the Hague Rules. See Statutory Intent, supra note 154, at 27. See also 2 International Law Association, Report of the 30th Conference 160 (Hague Conference 1921), reprinted in 1 LEGISLATIVE HISTORY, supra note 16, at 266.

157. At the London Conference of the CMI, the delegates finalized the draft of the Hague Rules that was submitted at the Brussels Conference and later adopted as the Brussels Convention. See Michael F. Sturley, The History of COGSA and the Hague Rules, 22 J. MAR. L. & COM. 1, 27-28 (1991).
about the negligence clauses and we cannot bring it in here.\textsuperscript{158}

Thus, the inclusion of a section regarding forum selection clauses was specifically considered and dismissed by the drafters of the Brussels Convention—the model for COGSA.

In drafting COGSA, Congress was also directly confronted with the issue of forum choice clauses. Several bills introduced while Congress was considering the manner in which it would enact the Hague Rules contained provisions that would have invalidated forum choice clauses.\textsuperscript{159} In hearings on COGSA, the issue of forum selection clauses was presented once again to Congress—this time in the form of cases from other jurisdictions that had upheld forum selection clauses under section 3(8) of the Hague Rules.\textsuperscript{160} Thus, although delegates to the Brussels Convention and COGSA were confronted with the issue, both groups chose to avoid adding sections specifically affecting jurisdictional clauses.\textsuperscript{161}

Although concurring and agreeing with the two fundamental holdings of the majority, Justice O'Connor would have limited the holding in \textit{Sky Reefer} to clauses that dealt only with arbitration. Justice O'Connor reasoned that the assumption that the transaction costs of litigating in a foreign forum automatically lessen liability is, without more, flawed, and that the decision of the district court to retain jurisdiction in order to enforce the arbitral award was sufficient to insure that the arbitrator's decision did not run afoul of COGSA.\textsuperscript{162} However, Justice O'Connor would have limited the Court's reasoning to \textit{arbitration clauses} in bills of lading due to several


\textsuperscript{159} See Sturley, supra note 157, at 38 and n.300 (citing S. 427, 68th Cong., 1st Sess. § 3 (1923)). Several versions of McKellar-Nelson Bills were introduced to both houses of Congress each year from 1912 to 1923. See 1 \textit{LEGISLATIVE HISTORY}, supra note 16, at 16-17 (the McKellar-Nelson Bills, in particular, contained clauses that would have struck foreign jurisdiction clauses found in bills of lading). In 1923, Representative Edmonds introduced a similar bill, known as the 1923 Bill, which was not passed. See id. at 17. Edmonds reintroduced the bill with minor changes the next year. See id. (1924 House Bill). Senator McNary introduced a bill in 1924 similar to the McKellar-Nelson Bills. See id. at 18 (1924 Senate Bill). After being referred to committees, both bills were killed. See id. Edmonds introduced two bills in 1925; Congress passed neither. See id. at 18-19. Representative White and Senator Jones introduced similar bills in 1928, in their respective houses. The bills were not passed. See id. at 19-20. In 1929 and 1930, Congressmen White (by 1930 a Senator) introduced compromise versions of the bills. See id. at 20-21. Senator White introduced bills in each new session of Congress until 1935, when the White Bill was passed, thereby adopting the U.S. version of the Hague Rules—COGSA. See id. at 21-23.


\textsuperscript{161} Michael Sturley, the preeminent scholar on the history of the Hague Rules and COGSA, pointed out in his amicus brief on behalf of carrier interests in \textit{Sky Reefer} that section 3(8) was designed to establish a carrier's substantive rights and responsibilities, not to affect procedural matters. See Brief Amicus Curiae at 17, \textit{Sky Reefer}, 115 S. Ct. 2322 (No. 94-623). Professor Sturley was cited favorably by the majority in several instances. See \textit{Sky Reefer}, 115 S. Ct. at 2327, 2328.

\textsuperscript{162} See id. at 2330 (O'Connor, J., concurring).
factors: historical concerns that foreign forum choice clauses oust the courts of jurisdiction; the fact that the decision in *Indussa* was well established; and the consistent invalidation of foreign forum choice clauses by the lower courts.163

Justice Stevens authored a scathing dissent based on the historical nature of the maritime economy, the *Indussa* line of cases, and a broad interpretation of COGSA in relation to the FAA.164 The maritime market was historically controlled by carrier interests, and "[b]ecause a bill of lading was (and is) a contract of adhesion, which a shipper must accept or else find another means to transport his goods, shippers were in no position to bargain around [the exculpatory] clauses [contained in bills of lading]."165

Justice Stevens would have employed either the Harter Act, which still applies in areas outside the scope of COGSA,166 or COGSA to preclude all foreign forum choice clauses.167 Citing the myriad support by cases and commentators, Justice Stevens applied the "high hurdle" reasoning of the *Indussa* court, including that court’s consideration of the transactional costs incurred in seeking to establish liability.168 Justice Stevens also appealed to the application of *stare decisis* based on the fact that *Sky Reefer* dealt with commercial matters that were "well understood and . . . accepted for long periods of time."169

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163. See id. at 2330-31 (O’Connor, J., concurring).
164. See id. at 2331-37 (Stevens, J., dissenting).

> The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle [sic] or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business.

Id. at 441.

166. The Harter Act contains the following language:

> [i]t shall not be lawful for the . . . owner of any vessel transporting merchandise . . . from or between ports of the United States and foreign ports to insert in any bill of lading . . . any clause . . . whereby it . . . shall be relieved from liability for loss or damage . . . Any and all words or clauses of such import . . . shall be null and void and of no effect.

46 U.S.C. app. § 190 (1995) (emphasis added). The Harter Act provisions still apply in transport "between ports of the United States," i.e., domestic transport. However, regarding transport "to or from ports of the United States," i.e., foreign transport, COGSA sets forth the binding law. 46 U.S.C. app. § 1300. Justice Stevens found the language of the Harter Act compelling because the Supreme Court had previously used that language to overturn a foreign choice of law clause in a bill of lading. See *Sky Reefer*, 115 S. Ct. at 2331-32 (citing Knott v. Botany Mills, 179 U.S. 69, 77 (1900)).

167. See id. at 2333.

168. See id. at 2333. Not only did Justice Stevens take into account the costs of arbitrating in a foreign tribunal, but he also included the cost of having law other than COGSA applied, the cost of settlements due in large part to the increased costs of arbitrating in a foreign tribunal, the costs associated with an unequal amount of market power manifesting itself in the form of decreased value and negotiability of the bill of lading, and the costs accompanying review of foreign arbitral awards. See id.

169. Id. at 2334.
IV. Post-Sky Reefer

A. Economics

The text and history of COGSA section 3(8) support the Supreme Court's opinion in Sky Reefer. In passing COGSA, Congress was specifically confronted with the issue of forum selection clauses. The fact that the legislature subsequently refused to specifically discuss such clauses in the Act creates a strong presumption that the clauses were not to be covered by the Act. The Supreme Court's opinion promotes the goal of international uniformity envisaged by the drafters of the Hague Rules (codified in the United States as COGSA) and the New York Convention (codified in the United States as the FAA). The ramifications of the ruling are still unclear, however. Without a doubt, arbitration clauses in bills of lading covering the transport of goods to or from U.S. ports are now enforceable. In Kanematsu Corp. v. M/V Gretchen W,170 the district court relied on Sky Reefer to enforce a foreign arbitration clause contained in a bill of lading.171 The implications for foreign forum choice clauses are less clear.

Although the strength of the Court's reasoning applies equally to forum choice clauses, the reasoning in regard to those clauses is merely dicta. The issue presented to the Sky Reefer Court was only that of the enforceability of a foreign arbitration agreement.172 The Court's dicta, however, is quite compelling,173 and further invalidation of forum choice clauses under the Indussa doctrine appears improbable.174 Keeping in

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171. Judge Robert E. Jones stated, "[W]hen a party brings suit for damaged goods under the terms of a bill of lading, that party consents to all of the conditions of the bill of lading." Id. at 1317.
173. With only Justices O'Connor and Stevens refusing to join the majority opinion, in order to prevent the Court from overturning Indussa, two Justices from the majority would have to change their votes and Justice Breyer would have to join a dissent. This scenario of course assumes that Justice O'Connor would join the dissent (a high probability given her Sky Reefer concurrence). Given the text of the statute, it is unlikely that either Justice Thomas or Scalia would abdicate. The strong legislative history in support of the text would appear to keep Justice Rehnquist in the majority. With only the author, Justice Kennedy, and Justices Ginsburg and Souter remaining, the dissent would need Justices Ginsburg and Souter to change their support for the reasoning behind Sky Reefer in order to uphold Indussa.
174. Several district courts have enforced foreign forum choice clauses found in bills of lading in the wake of Sky Reefer. In G.A. Pasztory v. Croatia Line, the District Court for the Eastern District of Virginia discussed the application of Sky Reefer in this context at length. 918 F. Supp. 961, 966-68, 1996 A.M.C. 1189 (E.D. Va. 1996) (Croatian forum selection clause). The court initially adopted Sky Reefer's reasoning with respect to Indussa's "high hurdle" analysis and held that section 3(8) of COGSA did not invalidate a foreign forum selection per se. See id. Secondly, the court, placing the burden of proof on the cargo plaintiff, held that there was no proof that the law applicable in Croatia would act to lessen the liability of the carrier based on the substantive content of the applicable law. See id. at 966-67. It is important to note that this case was dismissed in favor of the Croatian forum, effectively preventing future review by American courts in order to insure the application of important American public policy as embodied in COGSA. See id. at 968; Sky Reefer, 115 S.Ct. at 2330. Although this distinction was noted, the court held that Sky Reefer had established that foreign forum selection clauses were presumptively enforceable absent proof that the substantive law that would be
mind the historical reasons for the passage of COGSA, particularly the inequality of bargaining power in favor of carriers and the subsequent use of that power to limit liability, the economic rationale for Sky Reefer is questionable. However, the further application of that reasoning in order to overturn the Indussa doctrine appears inevitable.

The shipping industry is basically composed of two markets, tramp shipping and liner/tanker shipping. The tramp shipping market is composed of a large number of small shippers and a large number of small carriers. This characteristic tends to allow for free competition among the competitors, and bargaining power is therefore relatively equal. Under these conditions, a shipper should be capable of negotiating for the contract of carriage he desires. Under these freely negotiated contracts, the shipper is able to assess his costs, both real and potential, prior to contracting. If confronted with a foreign arbitration or forum clause, the shipper will seek compensation for this additional cost in the form of price or non-price concessions from the carrier. Alternatively, given these market conditions, he may go to another tramer in order to ship his goods, thus avoiding the potential costs of arbitration at the same shipping rates or paying lower shipping rates in recognition of the potential costs of arbitration. In circumstances such as these, a shipper is confronted with all costs and a jurisdictional clause in the bill of lading may not act to lessen the shipper's potential recovery.

In the liner market, however, the shipper is confronted with oligopolistic power. These markets are controlled by one or a few large carriers, who may control from seventy to eighty percent of the total liner tonnage. Unlike the tramp shipping market, liner firms have regular, scheduled service to and from certain ports. Each firm in the oligopolistic market, due to its relative market power, may charge prices that will maximize their


175. The historical background of COGSA is discussed supra Part I.

176. See Ignacy Chrzanowski, An Introduction to Shipping Economics 56-61 (S.J. Wiater ed., 1985). This Note discusses the impact of Sky Reefer on the segment of the market known as “for hire carriage.” In this public market, individuals with goods to ship interact with vessel owners to contract for the carriage of their goods. A third segment of the shipping market consists of private firms with their own fleet of ships which are used to ship their own freight. This aspect of the shipping market is not affected by Sky Reefer. See Yancey, supra note 17, at 1243.

177. See Chrzanowski, supra note 176, at 56-57.

178. See id. at 56.

179. To the extent that the contract is embodied in a bill of lading, the shipper is still protected by the responsibilities imposed on the carrier by COGSA. See Yancey, supra note 17, at 1234.

180. See Chrzanowski, supra note 176, at 59.

181. See Interview with Jon L. Smith, supra note 176.
economic profits, using price discrimination\(^{182}\) or some variant thereof, to do so.\(^{183}\)

A December 1995 report by the Federal Trade Commission (FTC) details the ability of carriers in liner markets to act collusively in order to increase freight rates above the level that would predominate in a competitive market.\(^{184}\) Ocean carriers may enter into collusive price fixing agreements with antitrust immunity.\(^{185}\) However, the effectiveness of liner conferences, or any collusive arrangement, depends upon the ability of the colluding group to “identify and punish defection from the collusive outcome, and ... prevent entry [into the market].”\(^{186}\) Furthermore, although entry into the liner market is relatively easy\(^{187}\)—a factor that normally limits the effectiveness of collusive behavior—the policing of members is performed at no extra cost to the group, thereby allowing for a more cohesive cartel.\(^{188}\)

Under the Shipping Act of 1916,\(^{189}\) all carriers and conferences\(^{190}\) are required to file their rates with the Federal Maritime Commission (FMC). The FMC is authorized to fine any carrier who illegally discounts from the filed rates.\(^{191}\) Thus, the existence of the filing and enforcement provisions of the Shipping Act of 1916 allows carriers to more easily collude and extract supracompetitive profits from the market. Because carriers are allowed to charge different rates based on the type and volume of cargo being shipped, this tariff filing scheme does not prevent price discrimination.\(^{182}\) Thus, large shippers with market power are allowed to extract concessions from the carriers in the form of marginally cheaper shipping rates.\(^{193}\)

The power of carriers, however, does not end at the ability to price discriminate. The FTC report concludes, “an increase in market concentra-

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182. For the purposes of this Note, price discrimination is defined as the sale of a service at more than one price to different buyers. For a more complete discussion of price discrimination in markets characterized by sellers with monopoly or market power, see Douglas F. Greer, Industrial Organization and Public Policy 437-438 (3d ed. 1992).

183. See Chrzanoski, supra note 176, at 58. This market power is not absolute, however. Large shippers of goods may have some countervailing market power that will tend to limit the ability of carriers to completely recover monopoly profits from the market. See Paul S. Clyde & James D. Reitzes, The Effectiveness of Collusion Under Antitrust Immunity, in Staff Report of the Bureau of Economics of the Federal Trade Commission 5 (Dec. 1995).

184. See Clyde & Reitzes, supra note 183, at 2-3.

185. See id. at 4.

186. Id. at 2.

187. See id. at 5.

188. For a more complete discussion of the policing of liner conferences see infra notes 189-191 and accompanying text.


190. A liner conference is a group of carriers who have agreed upon the price that they will charge to ship goods. See Clyde & Reitzes, supra note 183, at 4.


192. See Clyde & Reitzes, supra note 183, at 13.

193. See id. at 5 n.8.
tion is associated with increased freight rates.” These findings show two things. First, carriers possess market power. Second, the ability to price discriminate exists. *Sky Reefer* allows carriers to go one step further by allowing for non-price discrimination. A relatively simple hypothetical illustrates this implication of *Sky Reefer*.

Assuming that the rates charged for shipping an amount of cargo are proportional to the amount of cargo shipped (i.e., rates are the same for all cargo regardless of type or volume), a shipper, large or small, in the liner market will be charged marginally equal rates regardless of the size of the shipment. If shipper A transports two tons of cargo at $2000 per ton, the total cost of shipment is $4000. Suppose further that shipper B transports sixty tons of cargo at $2000 per ton for a total cost of shipment of $120,000. Due to the market power of the carrier, neither party is able to freely negotiate its bill of lading, which contains a foreign arbitration clause. In transit from Taiwan to San Francisco, the carrier negligently damages $1000 worth of A’s and $1000 worth of B’s goods.

Though all things appear to be equal, the ability of the carrier to price discriminate over non-price terms is preserved. Prior to *Sky Reefer*, the expected return from pursuing the two claims would have been equal, and the incentive would have existed to do so up until the point that the cost of litigating in the American court equaled the value of the expected recovery, $1000. After *Sky Reefer*, however, both shippers will be forced to pursue their claim through foreign arbitration. The enforcement of the arbitration clause creates two problems.

Initially, the cost of pursuing the claim through foreign arbitration may be higher than U.S. court litigation. If foreign arbitration is indeed more expensive than domestic litigation, then the two shippers are confronted with costs that they would not have faced in a free market—costs they could have avoided were they capable of negotiating a bill of lading without an arbitration agreement. The imposition of these additional costs decreases their expected return by the amount of the increase in costs due to the arbitration clause.

The second problem that may confront the shippers is the application of a law other than COGSA, thus decreasing their expected returns due to the potential for a smaller recovery. Yet even in these circumstances the two shippers are treated equally. Further, because arbitration is generally less expensive than litigation, the problem of decreased expected

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194. Id. at 34. The researchers go on to conclude that “increases in market concentration are associated with statistically significant, but economically small, increases in freight rates.” Id. at 3.

195. A characteristic that does not exist in the liner market. See id. at 13. This assumption merely allows the author to isolate the effect of the arbitration clause on the shipper’s costs. Without the assumption, the differences in costs would be more pronounced because of legal volume discounts to high volume shippers.

196. Assuming negligence and a proper application of law, a carrier could not have lessened his liability substantively based on section 3(8) of COGSA.

197. Although the relative costs of litigation versus arbitration have been debated frequently, most attorneys believe that arbitration is less expensive than litigation, even in
returns due to higher costs is diminished. Moreover, since many nations have codified domestic Hague Rules, the chance that a carrier will be able to exculpate or otherwise limit its liability based merely on jurisdiction is limited. Here again, however, the two shippers are treated equally. Problems of disparate treatment arise when a carrier strategically enforces the forum selection clause in its bill of lading.

Sky Reefer preserves the ability of carriers to non-price discriminate based on the terms of the bill of lading through strategic enforcement of forum selection clauses. Because shipper B transports more cargo more often than shipper A, his business is more valuable to the carrier. If shipper B files suit in an American court, the carrier can refuse to seek enforcement of the arbitration clause, litigate in an American tribunal, and thus ensure shipper B’s expected return. Due to the marginal value of shipper A to the carrier, if suit is filed in an American court, the carrier will move to compel arbitration.

Due to the decrease in expected return accompanied by this change, the incentive to settle is increased and the claim may be discharged for less than what it would have been worth if litigated in a U.S. court. In this manner, shipper A's cost of doing business with the carrier is increased marginally over shipper B's cost, due to the diminished expected return on A's claim.

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198. See discussion supra note 39 and accompanying text.

199. Assuming the costs of litigating in a foreign tribunal are at least equal to, if not greater than, the costs of domestic litigation and/or foreign arbitration, the concerns in the accompanying text are only magnified if Sky Reefer can in fact be read to overrule Indussa.


201. This discrimination has been found to exist in the market. One anonymous practitioner described small to medium claims as “Sky Reefer bait.” In order to keep large shippers happy, claims are litigated domestically. Arbitration is threatened in small to medium claims in the hopes of achieving settlements below their true value. The attorney went on to state that many of the claims had been settled for half their actual value. Several participants in the shipping market share this view. Paul S. Edelman, a partner at Kreindler & Kreindler, projects "tremendous repercussions" from the Sky Reefer decision; David W. Martowski, president of Transport Mutual Services, Inc., predicts increased settlements; Donald J. Bilski, manager of subrogation at Royal Insurance, a cargo insurer, forecasts slow claim resolution, costing "the American economy billions of dollars." See Dominic Bencivenga, Foreign Jurisdiction; Court Ships Cargo Arbitration Actions Overseas, N.Y.L.J., July 6, 1995, at 5.

B. Statutory Proposals

Given the present lack of uniformity in the rules governing the carriage of goods by sea and the express intent of the framers of the Hague Rules to avoid placing procedural rules within the purview of an international agreement, it becomes the province of national law whether to enforce forum choice clauses found in bills of lading. With these facts in mind, the Maritime Law Association of the United States has proposed significant changes to the United States COGSA. The proposed changes represent a compromise between cargo and carrier interests in the United States, just as the Hague Rules represented a compromise between cargo and carrier internationally. The compromise embodied in the proposal is so fragile that the committee states:

[T]he bill does not represent a series of proposed changes in the law. Rather, the overall compromise must be taken as a whole, for individual sections of the bill are acceptable to specific segments of the industry only because they are balanced by other changes to the law found elsewhere in the proposed legislation.

Section 3(8)(b) of the proposed legislation specifically addresses the issue of forum selection arrangements.

Although one commentator has articulated a different approach, the rule proposed by the Maritime Law Association is based on a compromise by both cargo and carrier and therefore represents the best manner in which to deal with the forum selection issue. The proposed rule states:

Any clause, covenant, or agreement made before a claim has arisen that specifies a foreign forum for litigation or arbitration of a dispute governed by this Act shall be null and void and of no effect if:

(i) the port of loading or the port of discharge is or was intended to be in the United States; or

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203. See supra note 38 and accompanying text.
204. See supra note 157-58 and accompanying text.
205. Revising COGSA, supra note 44, at 31.
206. Id. at 10.
207. Id. at 9-10.
209. Revising COGSA, supra note 44, at 10. The committee describes the compromise as "better than any other alternative that is reasonably likely to be enacted in this country." Id. at 11.
210. See id. at 31.
211. See Patrick J. Borchers, Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform, 67 Wash. L. Rev. 55, 106 (1992) (proposing statute to enforce "forum agreements in which the aggregate consideration for the transaction" is greater than $50,000).
(ii) the place where the goods are received by a carrier or the place
where the goods are delivered to a person authorized to receive them is
or was intended to be in the United States;

provided, however, that if a clause, covenant, or agreement made before a
claim has arisen specifies a foreign forum for arbitration of a dispute gov-
erned by this Act, then a court, on the timely motion of either party, shall
order that arbitration shall proceed in the United States. 212

According to the subcommittee that drafted the proposed legislation, the
bill would invalidate any foreign forum choice clause or foreign arbitration
clause if the goods covered by the bill were or were intended to be loaded or
discharged in a U.S. port or if the carrier received or delivered the goods in
the United States. 213 The drafters of the legislation did, however, provide
parties who had agreed to foreign arbitration the ability to request and
proceed to arbitration in the United States. 214

After a dispute has arisen in U.S. courts, either party may make a
timely request to submit the dispute to domestic arbitration based on the
existence of a foreign arbitration clause in the bill of lading. 215 The draft-
ers do note that this legislation might force a party into domestic arbitra-
tion who might not have agreed to it otherwise, but go on to state that "the
alternative is to deprive parties of arbitration entirely." 216 This provision
will have two effects. A plaintiff, usually the shipper, who has sought
domestic arbitration but resisted foreign arbitration, may file suit in the
United States and then request that the court order arbitration in the
United States. Thus, cargo avoids what may have constituted an adhesive
foreign arbitration agreement yet is not entirely deprived of the arbitral
forum. The defendant, on the other hand, is not forced into court and may
avoid domestic arbitration altogether by carefully drafting the arbitration
clause in his bills of lading. 217 More troublesome, however, is when the

212. Revising COGSA, supra note 44, app. 1 at 51 (emphasis in original).
213. See id. at 31. If, however, the only basis for jurisdiction within the United
States is the ability to exercise jurisdiction over the ship, then the validity of the clauses would
be determined by general maritime law. See id. Thus, if a plaintiff cannot obtain per-
sonal jurisdiction over the defendant in the United States, then section 3(8)(b) will not
govern. See id.
214. Id. at 31.
215. See id. If neither party requests the submission of the dispute to arbitration,
then the suit may continue in the district court "as if there had been no arbitration
clause." See id.
216. Id. at 32.
217. See id. at 31-32. Although the committee claims that the language of the statute
will allow for a foreign arbitration clause to be drafted specifically enough to allow a
party who is unwilling to arbitrate in the United States that freedom, the language of the
statute does not support that reading. According to the statute, "[i]f a clause . . . speci-
fies a foreign forum for arbitration of a dispute . . . then a court, on the timely motion of
either party, shall order that arbitration shall proceed in the United States." Id. at app. 1
at 51 (emphasis added). The proposed legislation gives the court no discretion: it
merely requires an arbitration clause specifying a foreign forum and timely motion by a
party.
To that end, a carrier would not be able to place a clause avoiding domestic arbitration
in a bill of lading. As soon as a carrier specifies foreign arbitration, the clause is either
void or, upon timely motion by either party, enforceable only in the United States.
plaintiff has sought to avoid arbitration entirely.

A defendant is in a position to force an arbitration-adverse plaintiff into U.S.-based arbitration under the present form of the proposed legislation. Bills of lading are adhesive agreements. Because cargo plaintiffs, particularly in the liner market, are unable to bargain over bill of lading terms, their willingness to assent to arbitration is difficult to presume. By allowing the defendant to move for arbitration and requiring the court to order the dispute submitted to domestic arbitration, the plaintiff is deprived of his ability to file suit in a domestic court. Arguably, this plaintiff is not injured. He may still pursue his claim domestically, thereby avoiding what some feel are the increased costs associated with foreign arbitration.

At the same time, the plaintiff gets the benefit of experienced American admiralty arbitrators applying the United States COGSA. Even though the grounds for setting aside an arbitral award due to a mistake of law are still limited, the probability that the law will be applied incorrectly is presumably narrow due to the experience of American arbitrators, and limitations on the plaintiff's recovery are therefore also confined.

The proposed legislation specifically addresses the issue of foreign forum choice agreements and works to provide "greater protection for cargo interests" than under Sky Reefer. Under the proposal a cargo plaintiff could avoid foreign litigation or arbitration while being guaranteed the option of domestic litigation or arbitration. Although a plaintiff may be forced to arbitrate domestically, a forum he would not have agreed to in a competitive market, he is still protected from the added costs some have associated with foreign arbitration. The proposal, in fact, goes farther than its framers intended because it limits the ability of a carrier defendant to draft a forum clause that would avoid litigation in a United States forum under all circumstances. Contractual problems with the proposal do exist as a party that never assented to arbitration may be forced to arbitrate. Nonetheless, the compromise characteristics of the entire piece of legislation hasten against questioning the committee's rationale.

Conclusion

The Hague Rules and the Carriage of Goods by Sea Act were passed in order to redress the inequality of bargaining power between cargo and carrier in the shipping market. These laws prevented a carrier from limit-
ing his liability to a shipper through clauses found in a bill of lading. Although lower federal courts had ruled that forum choice clauses violated the intent of COGSA, in *Sky Reefer* the Supreme Court upheld a forum choice clause calling for foreign arbitration. The Court’s reasoning eroded the very foundation supporting *Indussa’s* per se invalidation of foreign litigation clauses found in bills of lading. In a perfectly competitive market, the costs of these clauses could be avoided by the shipper, but the market power of carriers prevents shippers from avoiding these costs. This allows shippers to discriminate over non-price terms, limiting the ability of smaller shippers to compete in the market for carriage.

Although the shipping market normally reacts very slowly to changes, the impact of *Sky Reefer* has already been felt. Carrier attorneys are able to settle claims for less than if they had been litigated in American courts under the umbrella of COGSA. The Maritime Law Association of the United States has acted to cure this market inequity by proposing legislation striking foreign jurisdiction clauses of all types. Only if these proposals are adopted can the balance of power be restored to the shipping industry, curing the inequities of *Sky Reefer* and fulfilling the promise of COGSA.

222. *See id.*