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Foreign Arbitration Clauses in Maritime Bills of Lading: The Supreme Court's Decision in Vimar Seguros Y Reaseguros v. M/V Sky Reefer

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Foreign Arbitration Clauses in Maritime Bills of Lading: The Supreme Court’s Decision in *Vimar Seguros Y Reaseguros v. M/V Sky Reefer*

I. Introduction

A delicate balance exists between competing judicial interests in promoting modern principles of international comity and commercial practice in an expanding global market, while, at the same time, protecting certain classes of contracting parties from being taken advantage of due to inequality of bargaining power. An example of this delicate balance arises in the context of foreign arbitration clauses in maritime bills of lading.¹ In negotiating the terms of bills of lading, a carrier of goods usually has superior bargaining power over the owner of goods who is trying to get the carrier to transport the goods. Absent statutory prohibitions, a carrier can often present the terms of the bill, including an agreement to arbitrate disputes in a foreign forum, on a “take it or leave it” basis. Courts deciding the validity of such terms in maritime bills of lading face the dilemma of protecting the weaker contracting party at the risk of stifling international commerce and hurting international relations by demonstrating disdain for the competence of foreign forums.

In *Vimar Seguros Y Reaseguros v. M/V Sky Reefer*² the Supreme Court attempted to address these competing interests in “resolv[ing] a Circuit split on the enforceability of foreign arbitration clauses in maritime bills of lading.”³ In resolving this Circuit split, the Court was confronted with two issues. The first was whether a foreign arbitration clause in a bill of lading was invalid under the Carriage of Goods by Sea Act (COGSA)⁴ “because it lessens liability in the sense that COGSA

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¹ A “bill of lading” is defined as:
An instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place. It is a receipt for goods, contract for carriage, and is documentary evidence of title to goods.

³ Id. at 2326.
⁴ 46 U.S.C. §§ 1300-1315 (1970). The enabling clause of COGSA states that the Act shall be the law applicable to all bills of lading in United States foreign trade, inbound or outbound:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That every bill of lading or similar document which is evidence of a contract for the carriage of goods by sea to or from the ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act.

Id. at § 1300; see infra notes 65, 120 for discussions of the purposes for COGSA and the abuses it was designed to prevent.
prohibits." The second issue concerned whether the substantive law to be applied under the arbitration clause would reduce the obligations owed by the carrier of goods to the cargo owner below what COGSA guarantees. The Supreme Court decided that COGSA's prohibition of a carrier lessening its liability in a bill of lading did not apply to the mere inconvenience and additional costs that a cargo owner might experience as a result of arbitrating in a foreign forum. Since COGSA was modeled on an international agreement under which no other nation had declared a prohibition of foreign forum selection clauses, the Court declined "to interpret our version of the Hague Rules in a manner contrary to every other nation to have addressed the issue." Furthermore, the Court determined that it would be premature to consider whether the foreign forum's application of substantive law would lessen the carrier's liability under COGSA. Because the District Court retained jurisdiction over the case and would have an opportunity to review the foreign forum's enforcement of the law, the Court held that "mere 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 [the applicable provision of] COGSA ...."

Part II of this Note will examine the essential facts and procedural history of Sky Reefer which led to its eventual determination by the Supreme Court, as well as the Court's reasoning for its decision. Part III will discuss precedential cases and other background law accepted and rejected by the Court. Part IV will analyze the significance of Sky Reefer and the soundness of the Court's reasoning in arriving at its conclusion. Finally, Part V of this Note will critique the effect of the Supreme Court's decision in Sky Reefer and propose alternative solutions to the issues addressed in the case.

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5 Sky Reefer, 115 S. Ct. at 2325. 
6 Id. at 2329. "The central guarantee of [the COGSA provision at issue] is that the terms of a bill of lading may not relieve the carrier of the obligations or diminish the legal duties specified by [COGSA]." Id. 
7 Id. at 2327-28. 
9 Sky Reefer, 115 S. Ct. at 2328. 
10 Id. at 2330. 
11 Id. 
12 See infra notes 16-74 and accompanying text. 
13 See infra notes 75-132 and accompanying text. 
14 See infra notes 133-164 and accompanying text. 
15 See infra notes 165-172 and accompanying text.
II. Statement of the Case

A. Essential Facts

Bacchus Associates (Bacchus), a wholesale fruit distributor in the Northeast United States, contracted with Galaxie Negoce, S.A. (Galaxie), a Moroccan fruit supplier, for the purchase of a shipload of fruit. Bacchus contracted for a ship, the Sky Reefer, to transport the fruit from Morocco to Massachusetts. The Sky Reefer was owned by M. H. Maritima, S.A. (Maritima), a Panamanian company, who time-chartered the vessel to Honma Senpaku Co., Ltd., who in turn time-chartered it to Nichiro Gyogyo Kaisha, Ltd. (Nichiro), a Japanese company.

Independent ship loaders, or stevedores, were hired by Galaxie to load the fruit on to the ship. Complying with the customary procedures of international business transactions, Nichiro, acting as carrier, issued a preprinted bill of lading to Galaxie, the shipper, upon receipt of the cargo. Once the Sky Reefer set sail from Morocco, Galaxie tendered the bill of lading to Bacchus pursuant to the terms of a letter of credit posted in the carrier’s favor.

The bill of lading listed the respective rights and responsibilities of cargo owner and carrier, and included arbitration and choice-of-law clauses as follows:

(1) The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law.

(2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of the Japan Shipping Exchange, Inc., in accordance with the rules of TOMAC and any amendment thereto, and the award given by the arbitrators shall be final and binding on both parties.

When the Sky Reefer arrived in Massachusetts, Bacchus discovered that numerous boxes of oranges were crushed, resulting in over $1

17 Sky Reefer, 115 S. Ct. at 2325.
18 Sky Reefer, 115 S. Ct. at 2325; Sky Reefer I, 29 F.3d at 728. A “charter” designates the document in which are set forth the arrangements and contractual agreements entered into when one person (the “charterer”) takes over the use of the whole ship belonging to another (the “owner”). Grant Gilmore and Charles L. Black, Jr., The Law of Admiralty § 4-1 (2d ed. 1975). A “time charter,” is one in which “the owner’s people . . . navigate and manage the vessel, [and] her carrying capacity is taken by the charterer for a fixed time anywhere in the world . . . on as many voyages as approximately fit into the charter period.” Id.
19 Sky Reefer, 115 S. Ct. at 2325.
20 Id.
21 Id. A letter of credit is “an engagement, undertaking or promise by a bank to pay money to or on behalf of the customer for whom it has issued the credit.” Gilmore and Black, supra note 18, § 3-12.
22 Sky Reefer, 115 S. Ct. at 2325.
million in damages. Due to these damages, Vimar Seguros Y Reaseguros (Vimar Seguros), Bacchus’ marine insurer, paid Bacchus $733,442.90 and became subrogated to Bacchus’ rights.

B. Procedural History

Vimar Seguros and Bacchus filed an action for damages in the United States District Court for the District of Massachusetts against Maritima in personam and the Sky Reefer in rem. The defendants moved to stay the action and compel arbitration in Tokyo under the arbitration clause in the bill of lading and section 3 of the Federal Arbitration Act (FAA), which requires a federal district court, on the application of one of the parties, to stay proceedings and enforce arbitration agreements covered by the Act. Plaintiffs opposed the motion on the grounds that the arbitration clause was unenforceable because the clause violated section 3(8) of COGSA, which prohibits a carrier from “limiting [its] liability” in a contract for carriage.

The District Court held that the arbitration clause was enforceable, granted defendants’ motion to stay litigation and compel arbitration, retained jurisdiction pending arbitration, and certified for interlocutory appeal the question of “whether [COGSA sec. 3(8)] nullifies an arbitration clause contained in a bill of lading governed by COGSA.”

The Court of Appeals for the First Circuit affirmed the District Court’s order to arbitrate. The Court of Appeals assumed that the arbitration clause was invalid under COGSA but held that the FAA,

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23 Id.; Sky Reefer I, 29 F.3d at 728.
24 Sky Reefer, 115 S. Ct. at 2925.
25 Id.
26 See supra note 22 and accompanying text.
28 Sky Reefer, 115 S. Ct. at 2325; see id. at 2336-37 (Stevens, J., dissenting). See Sky Reefer I, 29 F.3d at 731 for further discussions of the provisions and meaning of the FAA.
29 Sky Reefer, 115 S. Ct. at 2325. Plaintiffs also argued that the arbitration clause was unenforceable as a contract of adhesion, but the District Court rejected this argument because the FAA explicitly defined such clauses in maritime bills of lading as enforceable and because Bacchus was a sophisticated party capable of negotiating the terms of such transactions. Id.
30 Id. Section 3(8) of COGSA provides as follows:

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

32 Sky Reefer I, 29 F.3d at 733.
33 Id. at 730. Despite proceeding on this assumption, the First Circuit expressed doubt that the clause actually lessened liability under COGSA. Id.
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as the later enacted and more specific statute, "alone governs the validity of arbitration clauses, both foreign and domestic, and consequently removes them from the grasp of COGSA."  

The Supreme Court granted certiorari to resolve a Circuit split on the enforceability of foreign arbitration clauses in maritime bills of lading and, in a seven-to-one decision, affirmed the judgment of the First Circuit and remanded the case for further proceedings consistent with its opinion.

C. Reasoning of the Supreme Court

1. Majority Opinion

The Supreme Court held that the foreign arbitration clause did not lessen the carrier's liability under COGSA and that it would be premature to consider whether to nullify the clause on the grounds that the Japanese arbitrators might not apply COGSA.

a. Foreign Arbitration Clause Does Not Lessen Carrier's Liability Under COGSA

Unlike the Court of Appeals, the majority declined to assume that the foreign arbitration clause in question violated COGSA and instead reasoned that the clause did not lessen the carrier's liability, thereby obviating any conflict between COGSA and the FAA. In so doing, the majority rejected a line of appellate decisions invalidating foreign forum selection clauses under section 3(8) of COGSA and relied on cases outside the realm of maritime bills of lading.

The majority cited the opinion of the Court of Appeals for the Second Circuit in Indussa Corp. v. S.S. Ranborg as the leading case for the nullification of a foreign forum selection clause and recognized that, "[f]ollowing Indussa, the Courts of Appeals without exception have invalidated foreign forum selection clauses under sec. 3(8)."

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34 Id. at 731-32.
36 Sky Reefer, 115 S. Ct. at 2326. To exemplify the Circuit split, the Court referred to a comparison between Sky Reefer, a First Circuit decision enforcing a foreign arbitration clause, assuming arguendo it violated COGSA, with State Establishment for Agricultural Product Trading v. M/V Wesermunde, 838 F.2d 1576 (11th Cir. 1988), an Eleventh Circuit case declining to enforce a foreign arbitration clause because that would violate COGSA. See infra notes 124-132 and accompanying text.
37 Sky Reefer, 115 S. Ct. at 2330. See infra notes 124-132 and accompanying text.
38 Id. at 2326-30. Justice Kennedy, writing for the majority, concluded: "[b]ecause we hold that foreign arbitration clauses in bills of lading are not invalid under COGSA in all circumstances, both the FAA and COGSA may be given full effect." Id. at 2330.
39 Id. at 2326-29.
40 Id. at 2326-29.
41 377 F.2d 200 (2d Cir. 1967) (en banc).
42 Sky Reefer, 115 S. Ct. at 2226.
Despite this clear line of precedent, the Sky Reefer Court rejected the Indussa rule,\textsuperscript{45} which had held "that COGSA invalidated a clause designating a foreign judicial forum because it '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 [owners] could sue in a convenient forum."\textsuperscript{44}

The majority in Sky Reefer rejected the Indussa rule because the Court interpreted section 3(8) of COGSA to prohibit only "the lessening of the specific liability imposed by the Act, without addressing the separate question of the means and costs of enforcing that liability."\textsuperscript{45} The Court noted that section 3 of COGSA delineated the particular substantive obligations and procedures which a carrier may not alter to its advantage in a bill of lading, none of which "prevent[] the parties from agreeing to enforce these obligations in a particular forum."\textsuperscript{46}

The majority drew support from the Court's decision in Carnival Cruise Lines, Inc. v. Shute\textsuperscript{47} in which the Court determined that a Florida forum selection clause in a cruise ticket purchased by Washington residents did not lessen liability in violation of the Limitation of Vessel Owner's Liability Act, a statute containing prohibitions against lessening liability much like those in COGSA.\textsuperscript{48} In Carnival Cruise Lines, the Court rejected the plaintiffs' argument that the cost and inconvenience of traveling a great distance lessened plaintiffs' ability to recover.\textsuperscript{49}

The Sky Reefer Court took the holding of the Carnival Cruise Line Court, which read "lessening liability" to exclude increases in the transaction costs of litigation in domestic forum selection clauses, and extended it to the context of foreign forum selection clauses, concluding that: "Even if it were reasonable to read sec. 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."\textsuperscript{50} Thus, the Sky Reefer Court held that

\textsuperscript{45} Id.
\textsuperscript{44} Id. (quoting Indussa, 377 F.2d at 203). Furthermore, the Indussa court reasoned "there could be no assurance that [the foreign court] would apply [COGSA] in the same way as would an American tribunal subject to the uniform control of the Supreme Court." Indussa, 377 F.2d at 203-04.
\textsuperscript{45} Sky Reefer, 115 S. Ct. at 2327.
\textsuperscript{46} Id.
\textsuperscript{48} Sky Reefer, 115 S. Ct. at 2327 (citing Carnival Cruise Lines, 499 U.S. at 595-97).
\textsuperscript{49} Id. (citing Carnival Cruise Lines, 499 U.S. at 596-97).
\textsuperscript{50} Id. The majority went on to state: "It would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier." Id. at 2328.

Justice O'Connor concurred in the judgment that increased costs of litigating in a
the lessening of liability prohibition of COGSA should be limited to issues of substance and should not encompass increases in the transaction costs of litigation in a merely inconvenient forum.\textsuperscript{51}

Furthermore, the majority reasoned that modern principles of international comity and commercial practice support the enforcement of foreign arbitration clauses in maritime bills of lading.\textsuperscript{52} The Court noted that COGSA is modeled on the Hague Rules, an international convention under which none of its signatories have interpreted their domestic enactment of section 3(8) to prohibit foreign forum selection clauses.\textsuperscript{53} Thus, the majority held:

In light of the fact that COGSA is the culmination of a multilateral effort "to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers inter se in international trade," we decline to interpret our version of the Hague Rules in a manner contrary to every other nation to have addressed the issue.\textsuperscript{54}

Similarly, "[i]t would also be out of keeping with the objects of the [Hague Rules] for the courts of this country to interpret COGSA to disparage the authority or competence of international forums for dispute resolution."\textsuperscript{55} In support of this proposition, the majority relied on the Court's decision in \textit{M/S Bremen v. Zapata Off-Shore Co. (The Bremen)}\textsuperscript{56} in which the Court, recognizing the realities of the expanding global market, enforced a foreign forum selection clause in an international contract and stated: "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."\textsuperscript{57}

In summarizing its belief that contemporary commercial realities and the importance of international comity dictate enforcement of foreign forum selection clauses, the \textit{Sky Reefer} Court stated:

If the United States is to be able to gain the benefits of international

\footnotesize{\textsuperscript{51} \textit{Sky Reefer}, 115 S. Ct. at 2327-28.
\textsuperscript{52} Id. at 2328.
\textsuperscript{53} Id. The Court stated that the English courts have long since rejected the reasoning adopted by the \textit{Indussa} court and noted that, in those countries that have invalidated foreign forum selection clauses, the countries have only done so pursuant to specific provisions to that effect in domestic versions of the Hague Rules. \textit{Id.}
\textsuperscript{54} Id. (quoting Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 301 (1959)). The Court pointed out that the FAA is also based on an international agreement, one that was intended to encourage the recognition and enforcement of arbitration agreements in international contracts. \textit{Id.} at 2328.
\textsuperscript{55} Id.
\textsuperscript{56} 407 U.S. 1 (1972).
\textsuperscript{57} \textit{Sky Reefer}, 115 S. Ct. at 2328 (quoting \textit{The Bremen}, 407 U.S. at 9).}
accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements. That concern counsels against construing COGSA to nullify foreign arbitration clauses because of inconvenience to the plaintiff or insular distrust of the ability of foreign arbitrators to apply the law.\(^\text{58}\)

### b. Consideration of Japanese Arbitrators’ Application of COGSA Would Be Premature

The majority in *Sky Reefer* declined to consider Bacchus’ argument that the arbitration clause should not be enforced because the Japanese version of the Hague Rules, which the Japanese arbitrators might choose to apply, would provide the carrier with a defense unavailable under COGSA, and thereby lessen its liability.\(^\text{59}\) Whether or not Bacchus’ reading of the law was correct, the Court held that its claim was premature because, at the interlocutory stage of enforcing the arbitration agreement, it had not yet been established what law the arbitrators would apply, and the District Court, by virtue of retaining jurisdiction over the case, would have the opportunity to review the judgment of the Japanese forum.\(^\text{60}\)

### 2. Dissent

Justice Stevens dissented to the majority opinion in *Sky Reefer*, stating that the Court “unwisely discards settled law and adopts a novel construction of sec. 3(8).”\(^\text{61}\) Stevens traced the history of COGSA and its predecessor, the Harter Act, and the cases that have interpreted these statutes and concluded:

> [O]ur interpretation of maritime law prior to the enactment of the Harter Act,\(^\text{62}\), our reading of that statute in *Knott*,\(^\text{63}\) and the federal courts’ consistent interpretation of COGSA,\(^\text{64}\) buttressed by scholarly

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\(^{58}\) *Id.* at 2329.

\(^{59}\) *Id.* Bacchus argued that Japanese law would permit the carrier a defense based on the acts or omissions of the stevedores who loaded the fruit on to the ship. *Id.; see supra* note 19 and accompanying text.

\(^{60}\) *Sky Reefer*, 115 S. Ct. at 2329-30. Here, the Court relied on its prior decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985). *Sky Reefer*, 115 S. Ct. at 2329-30. In *Mitsubishi Motors*, the Court stated that there was no need to speculate on a foreign arbitral tribunal’s application of American law at the stage when one party is seeking to enforce the agreement to arbitrate because “the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of [American] law has been addressed.” *Mitsubishi Motors*, 473 U.S. at 638.

\(^{61}\) *Sky Reefer*, 115 S. Ct. at 2331 (Stevens, J., dissenting).


\(^{64}\) See *infra* part III.B for a discussion of the *Indussa* line of cases.
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recognition of the commercial interest in uniformity,[65] demonstrate that the clauses in the Japanese carrier's bill of lading purporting to require arbitration in Tokyo pursuant to Japanese law both would have been held invalid under COGSA prior to today.[66]

Stevens argued that the majority construed section 3(8) too narrowly and that Congress intended for the statute's prohibition to encompass clauses in bills of lading that allow carriers to take advantage of their superior bargaining power.[67] Stevens also contended that the majority's opinion would damage the negotiability and uniformity of bills of lading, qualities that the financial community relies upon and that COGSA was designed to protect. Therefore, Stevens argued, the majority's reliance on Carnival Cruise Lines was misplaced because such statutory and public policy concerns were not implicated therein.[68] Finally, Stevens did not believe that invalidating the foreign arbitration clause would harm international commitments, as such obligations do not require enforcement of adhesionary clauses or those in violation of domestic statutes.[69]

Convinced of the overwhelming logic of his dissent, Stevens suspected that the majority really turned its back on the "clear meaning of COGSA and decades of precedent" in order to avoid conflict between COGSA and the FAA.[70] To obviate such a result, Stevens proposed an interpretation of the statutes which would demonstrate that there is no conflict between the two.[71] Because the FAA permits invalidation of an arbitration clause "upon such grounds as exist at law . . . for the revocation of any contract,"[72] and illegality under COGSA arguably is such an independent ground, Stevens

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[65] See, e.g., Gilmore and Black, supra note 18, § 3-25: [COGSA] allows a freedom of contracting out of its terms, but only in the direction of increasing the shipowner's liabilities, and never in the direction of diminishing them. This apparent onesidedness is a commonsense recognition of the inequality in bargaining power which both Harter and Cogsa were designed to redress, and of the fact that one of the great objectives of both Acts is to prevent the impairment of the value and negotiability of the ocean bill of lading.


[67] Id. at 2334 (Stevens, J., dissenting). Stevens feared that foreign arbitration clauses would result in shipper transaction costs that would either exceed potential recovery or unreasonably lessen net recovery. Id. at 2333 (Stevens, J., dissenting). Stevens also felt that the application of potentially disadvantageous legal standards was sufficient to improperly limit a carrier's liability under COGSA, and that the District Court's ability to review such application was inadequate protection for the shipper. Id. at 2333 (Stevens, J., dissenting) (citing Wilko v. Swan, 346 U.S. 427 (1953) to demonstrate the difficult burden a shipper would face in trying to challenge an arbitration decision).

[68] Id. at 2335 (Stevens, J., dissenting); see supra notes 47-50 and accompanying text.

[69] Sky Reefer, 115 S. Ct. at 2336 (Stevens, J., dissenting).

[70] Id. (Stevens, J., dissenting).

[71] Id. (Stevens, J., dissenting).

[72] 9 U.S.C. § 2; see infra note 87 and accompanying text.
concluded that there is no conflict between the statutes. Thus, there was no need for the majority to reject clear precedent for the sole reason, as Stevens perceived, of avoiding conflict between two federal statutes.

III. Background Law

A. Cases Supporting the Majority Decision

The majority in Sky Reefer relied on decisions outside the context of COGSA and maritime bills of lading in rejecting the Indussa rule and holding that a foreign arbitration clause did not improperly lessen a carrier's liability under COGSA. The first of these decisions, M/S Bremen v. Zapata Off-Shore Company (The Bremen), discarded the traditional American view of forum selection clauses as improperly "ousting" a court of jurisdiction and instead enforced such a clause as a valid, freely negotiated agreement.

In The Bremen, the Supreme Court considered whether to enforce a forum selection clause in an international towage contract between two sophisticated parties. The Court decided that "such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." Applying this standard to the circumstances of the parties in The Bremen, the Court determined that the clause at issue was not unreasonable because it was freely negotiated by sophisticated parties who intended to bring certainty to the transaction and that any inconvenience suffered by litigating in the contractual forum was clearly foreseeable to the parties at the time of contracting.

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73 Sky Reefer, 115 S. Ct. at 2337 (Stevens, J., dissenting).
74 Id. (Stevens, J., dissenting).
75 Id. at 2326-29; see supra notes 47-50, 56-57 and accompanying text.
76 407 U.S. 1 (1972).
78 The Bremen, 407 U.S. at 1-2. An American corporation contracted with a German corporation to tow the former's drilling rig from Louisiana to a point in the Adriatic Sea off the coast of Italy. Id. at 2. The German company's contract contained a forum selection clause requiring dispute resolution before the London Court of Justice. Id. The American company made several changes to the contract, but did not amend the forum selection clause. Id. at 3. When a storm damaged the rig in international waters and the American company commenced a suit in admiralty in United States District Court for damages, the German corporation invoked the forum clause of the towage contract. Id. at 3-4.
79 Id. at 10. The Court stated that fraud, undue influence, or "overweening" bargaining power would also serve as sufficient grounds to hold a forum selection clause unenforceable. See id. at 12-13. The Court noted that Indussa, which invalidated a forum selection clause as a "lessening of liability" in contravention of COGSA, might provide an additional basis for not enforcing such clauses, but that COGSA was not applicable to The Bremen case. Id. at 10 n.11.
80 Id. at 17-18. The Bremen Court was careful to distinguish the circumstances of the parties before them from the very different situation of an agreement between two Americans
The Court reasoned that the traditional American disdain for forum selection clauses had no place in an "era of expanding world trade and commerce" and stated: "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." The Court argued that forum selection clauses provide certainty in contracting and encourage international commerce, as well as accord with concepts of freedom of contract long accepted in other common-law countries.

In a five-to-four decision, the Supreme Court, in Scherk v. Alberto-Culver, extended the rule from The Bremen regarding forum selection clauses to include foreign arbitration clauses in international contracts. In Scherk, an American company contracted with a European businessman for the purchase of the latter's business enterprises and trademarks. The contract contained a clause providing for all claims and controversies arising out of the agreement to be referred to arbitration before the International Chamber of Commerce in Paris. When the American company sued the European businessman for fraudulent misrepresentation under the Securities and Exchange Act, the businessman attempted to stay the action pending arbitration pursuant to the agreement. The Court enforced the arbitration clause in accordance with the explicit provisions of the FAA, which provide "that an arbitration agreement such as is here involved 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"

The Court reasoned:

A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to resolve a local dispute in a "remote alien forum." In such a case, the Court stated:

[T]he serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause. The remoteness of the forum might suggest that the agreement was an adhesive one, or that the parties did not have the particular controversy in mind when they made their agreement . . . . Similarly, selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an important public policy of the forum.

Id. at 17.

81 Id. at 9.
82 Id. at 11-14.
84 Id. The Court stated: "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." Id. at 519; see supra note 50 and accompanying text.
85 Scherk, 417 U.S. at 508.
86 Id. at 509.
87 Id. at 510-13 (citing Federal Arbitration Act, 9 U.S.C. § 2).
to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.\textsuperscript{88}

Relying on \textit{The Bremen}, the \textit{Scherk} majority held that an invalidation of such an agreement would “damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.”\textsuperscript{89}

In a vigorous dissent, Justice Douglas argued: “When a foreign corporation undertakes fraudulent action which subjects it to the jurisdiction of our federal securities laws, nothing justifies the conclusion that only a diluted version of those laws protects American investors.”\textsuperscript{90} The dissent contended that the Court’s decision in \textit{Wilko v. Swan},\textsuperscript{91} that courts and not arbitration tribunals had jurisdiction over suits under the Securities Act, should control.\textsuperscript{92}

Justice Douglas maintained that neither the relative bargaining power of the contracting parties nor principles of international comity were relevant when dealing with securities and warned against the majority’s “invocation of the ‘international contract’ talisman” to get around the national public policy represented by \textit{Wilko}.\textsuperscript{93} Finally, the dissent listed some of the substantial rights a party may lose in arbitrating in a foreign forum: the arbitral award can be made without record and therefore be functionally unreviewable; a plaintiff loses pretrial discovery and choice of venue rights available in federal court; and, foreign arbitrators may improperly interpret substantive law.

The \textit{Sky Reefer} Court placed great emphasis on the Court’s earlier decision in \textit{Carnival Cruise Lines, Inc. v. Shute}.\textsuperscript{95} In this case, Washington residents purchased cruise tickets through a travel agency from a Florida-based cruise line. The tickets contained a Florida forum selection clause.\textsuperscript{96} When one of the passengers was injured and sued the cruise line in federal court in Washington for negligence, the cruise line moved for summary judgment based on the forum selection clause.\textsuperscript{97} The Supreme Court held that the forum selection clause was enforceable and did not violate a federal statute prohibiting vessel

\textsuperscript{88} Id. at 516.
\textsuperscript{89} Id. at 517-18. The Court quoted M/S Bremen v. Zapata Off-Shore Company, 407 U.S. 1, 9 (1972): “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. at 519.
\textsuperscript{90} Id. at 530-31 (Douglas, J., dissenting).
\textsuperscript{91} 346 U.S. 427 (1953).
\textsuperscript{92} \textit{Scherk}, 417 U.S. at 525 (Douglas, J., dissenting).
\textsuperscript{93} Id. at 525-31 (Douglas, J., dissenting).
\textsuperscript{94} Id. at 532 (Douglas, J., dissenting); see infra notes 151-152 and accompanying text.
\textsuperscript{95} 499 U.S. 585 (1991). The case was decided by a seven-to-two margin. Id.; see supra notes 47-50 and accompanying text.
\textsuperscript{96} Id. at 587-88.
\textsuperscript{97} Id. at 588.
owners from relieving themselves of liability in agreements with their passengers.\textsuperscript{98}

The majority in \textit{Carnival Cruise Lines} determined that \textit{The Bremen} decision's emphasis on free negotiation between sophisticated parties as justification for enforcing a forum selection clause did not bar enforcement of a nonnegotiated clause simply because the latter was not the product of negotiation.\textsuperscript{99} The Court reasoned that the business context of a preprinted ticket contract was much different than that of the towage contract in \textit{The Bremen} and, as such, withstood judicial scrutiny for reasonableness and fundamental fairness, even in the absence of free negotiation.\textsuperscript{100}

The majority also decided that the forum selection clause did not violate the statutory prohibition against a vessel owner relieving himself of liability to a passenger.\textsuperscript{101} Because the plaintiff could pursue her claim in Florida, the Court held that the clause at issue did not take away the passenger's right to "a trial by [a] court of competent jurisdiction" and that there was no authority to suggest that Congress intended the statute "to avoid having a plaintiff travel to a distant forum in order to litigate."\textsuperscript{102} The Court concluded: "Because the clause before us allows for judicial resolution of claims against [the cruise line] and does not purport to limit [its] liability for negligence, it does not violate sec. 183(c)."\textsuperscript{103}

Justice Stevens, writing for the dissent, argued that courts "traditionally have reviewed with heightened scrutiny the terms of

\textsuperscript{98} \textit{Id.} at 590-97.

\textsuperscript{99} \textit{Id.} at 593.

\textsuperscript{100} \textit{Id.} at 593-95. The Court listed the following reasons for enforcing the clause and distinguishing the reasoning of \textit{The Bremen}: (1) The forum selection clause could have spared the passengers and the judiciary the time and expense of litigating over the proper forum; (2) The passengers benefited from lower fares as a result of the cruise line's savings in limiting the fora in which it may be sued; (3) Florida is not a "remote alien forum" for which \textit{The Bremen} would have found an exception to the general validity of forum selection clauses \textit{(see supra} note 80); (4) There was no indication that the cruise line intended to discourage passengers from pursuing legitimate claims; (5) There was no evidence of fraud or over-reaching; and (6) The passengers had notice of the forum provision and could have rejected the contract. \textit{Id.} at 593-95.

\textsuperscript{101} \textit{Id.} at 595-97. 46 U.S.C. § 183(c) provides:

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, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner . . . 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 for such loss or injury . . . . All such provisions or limitations contained in such rule, regulation, contract, or agreement are hereby declared to be against public policy and shall be null and void and of no effect.


\textsuperscript{102} \textit{Carnival Cruise Lines}, 499 U.S. at 596.

\textsuperscript{103} \textit{Id.} at 596-97.
contracts of adhesion, form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power, and that, The Bremen notwithstanding, "the prevailing rule is still that forum-selection clauses are not enforceable if they are not freely bargained for, create additional expense for one party, or deny one party a remedy." The dissent concluded: "The stipulation in the ticket that Carnival Cruise sold to [the passengers] certainly lessens or weakens their ability to recover for the slip and fall incident. . . ."

B. Cases Supporting the Dissent's View That Foreign Arbitration Clauses Violate COGSA

The majority in Sky Reefer recognized that "[t]he leading case for invalidation of a foreign forum selection clause is the opinion of the Court of Appeals for the Second Circuit in Indussa Corp. v. S.S. Ranborg . . ." In Indussa, a New York corporation contracted with a Belgian carrier to transport goods from Belgium to California. In the maritime bill of lading evidencing the contract, a clause provided for dispute resolution in the country and under the laws where the carrier had his principal place of business.

When the New York shipper sued the carrier in federal court in New York for damages to the goods, the carrier, claiming that its principal place of business was in Norway, moved for an order declining jurisdiction based on the forum selection clause. The Court of Appeals for the Second Circuit held that the clause lessened the carrier’s liability in violation of section 3(8) of COGSA, stating:

We think that Congress meant to invalidate any contractual provision in a bill of lading for a shipment to or from the United States that would prevent cargo [owners] 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.

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104 Id. at 600 (Stevens, J., dissenting).
105 Id. at 601 (Stevens, J., dissenting).
106 Id. at 603 (Stevens, J., dissenting). Justice Stevens supported this conclusion by referring to the Indussa line of cases: "The Courts of Appeals, construing an analogous provision of the Carriage of Goods by Sea Act, 46 U.S.C. app. § 1300 et seq. [sic], have unanimously held invalid as limitations on liability forum-selection clauses requiring suit in foreign jurisdictions." Id. at 604 (Stevens, J., dissenting).
108 Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, 200 (2d Cir. 1967) (en banc).
109 Id. at 201.
110 Id.
111 See supra note 90 and accompanying text.
112 Indussa, 377 F.2d at 204. In a footnote to this holding, the court stated: "Our ruling does not touch the question of arbitration clauses in bills of lading which require this to be held abroad." Id. at 204 n.4. The court went on to state that the FAA would presumably take precedence over COGSA with respect to arbitration clauses, thereby upholding the validity
The *Indussa* court reasoned that a foreign forum selection clause lessens a carrier's liability in that it "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 [owners] could sue in a convenient forum."\(^{115}\) The court stated that there is no way to "bind [a] foreign court in its choice of applicable law,"\(^ {114}\) and, even if the court did apply the appropriate regime (e.g., COGSA), "there could be no assurance that it would apply [COGSA] in the same way as would an American tribunal subject to the uniform control of the Supreme Court, and 3(8) can well be read as covering a potential and not simply a demonstrable lessening of liability."\(^ {115}\)

Many other courts of appeals' decisions have adopted and expanded upon the *Indussa* rule. One of the first was the opinion of the Court of Appeals for the Fourth Circuit in *Union Insurance Society of Canton v. S.S. Elikon*.\(^ {116}\) In *Elikon*, a Middle Eastern buyer contracted with an American manufacturer for the purchase of air conditioners.\(^ {117}\) A German carrier provided a preprinted bill of lading covering the cargo which contained a forum selection clause requiring litigation in a German court.\(^ {118}\) When the cargo was damaged and the subrogee insurance company of the buyer sued the carrier in federal court in Virginia, the carrier challenged jurisdiction based on the forum selection clause.\(^ {119}\) The Fourth Circuit determined that, in accordance with *Indussa*, the clause at issue violated COGSA and "cannot alone preclude the district court from entertaining jurisdiction of this case."\(^ {120}\)

The *Elikon* court stated that *Indussa* "recognized that enforcement of foreign arbitration clauses. *Id.*

\(^ {115}\) *Id.* at 203 (citation omitted). The *Indussa* court drew support from *Knott v. Botany Mills*, 179 U.S. 69 (1900), a case in which the Supreme Court, under COGSA's predecessor, the Harter Act, declined to give effect to a clause making the law of the carrier's flag applicable. *Indussa*, 377 F.2d at 203.

\(^ {114}\) *Id*.

\(^ {116}\) *Id.* at 203-04.

\(^ {117}\) 642 F.2d 721 (4th Cir. 1981).

\(^ {118}\) *Id.* at 722.

\(^ {119}\) *Id.* at 722-23.

\(^ {120}\) *Id.* at 723. As part of its reasoning, the court provided a discussion of the goals of COGSA, the American enactment of the Hague Rules:

COGSA is... part of an international effort to achieve uniformity and simplification of bills of lading used in international trade. It was intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers and the liabilities of underwriters who insure waterborne cargo. By strictly circumscribing the ability of carriers to avoid liability on cargoes in their care, COGSA also greatly enhances the negotiability of bills of lading. Subsequent holders of a bill subject to COGSA can give value for it in confidence that they can ultimately obtain satisfaction thereon without elaborately investigating the circumstances of the shipment.

*Id.*
of foreign forum selection clauses could lead to the recrudescence of bills of lading that would effectively frustrate shippers' ability to recover damages from negligent carriers." The court distinguished *The Bremen* from the facts of the case before it, concluding that: (1) The Supreme Court stated in *The Bremen* that COGSA did not apply to that case; (2) *The Bremen* involved hard bargaining and not the form clauses of an adhesion contract, as here; and (3) "Congress intended COGSA to ameliorate this very difficulty of bills of lading with one-sided form provisions . . . [and] the general policy [of *The Bremen*, that such clauses are presumptively valid,] must recede before the specific policy enunciated by Congress through COGSA."123

The Court of Appeals for the Eleventh Circuit, in *State Establishment for Agricultural Product Trading v. M/V Wesermunde*,124 extended the *Indussa* rule invalidating foreign forum selection clauses under COGSA to also invalidate foreign arbitration clauses. In *Wesermunde*, an Iraqi government agency contracted with the M/V Wesermunde for the carriage of eggs from Florida to Jordan.125 The owner of the Wesermunde entered into a charter party agreement which contained an arbitration clause providing for arbitration in London; the bill of lading expressly incorporated this arbitration clause by reference.126 When fire on board the ship damaged the eggs and the Iraqi agency sued in federal court in Florida for damages, the defendants moved to have the dispute referred to arbitration in London pursuant to the arbitration clause.127 The Eleventh Circuit invalidated the clause as violative of COGSA.128

The *Wesermunde* court acknowledged that arbitration alone is not per se violative of COGSA, especially in light of the FAA, but did determine that:

[A] provision requiring arbitration in a foreign country that has no connection with either the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict with COGSA's general purpose of not allowing carriers to lessen their

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121 Id. at 724.
123 Wesermunde, 888 F.2d 1576 (11th Cir. 1988), cert. denied, 488 U.S. 916 (1988). *Contra supra* note 111 regarding the *Indussa* court's explicit statement that its ruling does not apply to foreign arbitration clauses.
124 Id. at 1578.
125 Id.; see *Indussa* note 79 and accompanying text regarding "charter party."
126 Wesermunde, 838 F.2d at 1578.
127 Id. at 1580-81.
Because the negotiation and performance of the bill of lading contract took place outside of England, the situs of the contractual forum, and because the charterer, not even a named defendant, was the only party related to the English forum, the court believed that enforcement of arbitration in London "would have the effect in this case of lessening liability of the carrier."\(^\text{100}\)

Even if the clause did not per se violate section 3(8) of COGSA, the Wesermunde court held that:

When a bill of lading provision] arguably conflict[s] with COGSA’s implied policy that an American forum will be made available to a consignee when a bill of lading is issued subject to the terms of that Act . . . [,] the consignee must be given actual notice of the conflicting provision before entering into the contract in order to have that provision enforced.\(^\text{151}\)

Since there was no express agreement between the parties that COGSA’s protections would not apply, and the terms of the bill of lading were more form clauses of an adhesion contract than they were the product of hard bargaining, the court concluded that no actual notice was provided and that the arbitration clause was therefore ineffective.\(^\text{152}\)

**IV. Significance of the Case**

The Supreme Court’s decision in *Vimar Seguros Y Reaseguros v. M/V Sky Reefer* to enforce a foreign arbitration clause in a maritime bill of lading abruptly overturned a long history of settled law\(^\text{133}\) and will have far-reaching implications in international commerce. Carriers of goods by sea to and from ports of the United States may now insert into bills of lading arbitration or forum selection clauses that mandate resolution of disputes arising under the contracts of carriage to take place at the location and according to the procedure of the carriers’ choice.\(^\text{134}\) This Note will now examine the extent to which the reasoning of the majority in *Sky Reefer* justifies the magnitude of its result.

\(^{129}\) *Id.* at 1581. The court emphasized COGSA’s “power to void overreaching clauses inserted by carriers in their bills of lading that unreasonably limit the carrier's liability or obstructs the freight claimant’s ability to secure redress” as the rationale behind the *Indussa* rule that forum selection clauses limit the liability of the carrier. *Id.* at 1580.

\(^{130}\) *Id.* at 1581.

\(^{131}\) *Id.*

\(^{132}\) *Id.* at 1581-82.

\(^{133}\) *See supra* part III.B.

\(^{134}\) Because the *Sky Reefer* Court, in reaching its conclusion regarding arbitration clauses clearly repudiated the reasoning of *Indussa* and instead adopted the rationale of *Carnival Cruise Lines*, both choice of forum cases, it is evident that the *Sky Reefer* approval of foreign arbitration clauses applies to foreign forum selection clauses as well. *See supra* notes 41-50 and accompanying text.
A. The Majority’s Formalistic Reading of “Lessening Liability” Under COGSA Appears to Have Ignored its Practical Meaning

The majority in Sky Reefer interpreted section 3(8) of COGSA to prohibit only the lessening of “liability for loss or damage . . . arising from negligence, fault, or failure in the duties or obligations provided in this section” and not to “prevent[] the parties from agreeing to enforce these obligations in a particular forum.” In making this distinction, the Court was able to distinguish forum selection and arbitration clauses, which would arguably only result in additional costs and inconvenience to the cargo owner, from a clause purporting to limit a carrier’s liability for negligence or other enumerated responsibilities, which would violate the substantive obligations of COGSA. The Court believed it was premature to consider whether the foreign forum’s potentially improper application of COGSA would lessen the carrier’s liability because the District Court would have an opportunity to review such application at the award enforcement stage of the proceedings. The majority’s reasoning in reaching these conclusions arguably failed to take into account the practical effects of enforcing a foreign forum selection or arbitration clause in a maritime bill of lading.

1. Foreign Forum Selection and Arbitration Clauses Can Actually Lessen a Carrier’s Liability Within the Meaning of COGSA

Section 3(8) of COGSA was designed to ameliorate carriers’ historic tendency to exploit their superior bargaining power with respect to bills of lading by exculpating themselves from liability under the terms of such bills. In light of this purpose, Justice Stevens maintained that “it is perfectly clear that a foreign forum selection clause ‘relieves’ or ‘lessens’ the carrier’s liability.” In many cargo disputes, a cargo owner’s costs in litigating in a distant forum will

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136 Sky Reefer, 115 S. Ct. at 2927. The Court stated: “By its terms, [COGSA] establishes certain duties and obligations, separate and apart from the mechanisms for their enforcement.” Id.
137 Id. at 2928. The Court, extending its holding in Carnival Cruise Lines from domestic to foreign forum selection clauses, read “‘lessening such liability’ to exclude increases in the transaction costs of litigation . . . .” Id.
138 See supra notes 59-60 and accompanying text.
139 See, e.g., Benjamin W. Yancey, The Carriage of Goods: Hague, COGSA, Visby, and Hamburg, 57 Tul. L. Rev. 1258 (1983) (providing a history of United States law regarding the liability of carriers to owners of goods); see also supra notes 65, 129 and accompanying text.
140 Sky Reefer, 115 S. Ct. at 2935 (Stevens, J., dissenting). The Indussa line of cases, Elkon and Wesermunde in particular, effectively demonstrate how foreign forum selection and arbitration clauses can lessen a carrier’s liability in a practical sense. See supra notes 111-115, 121-129, 129-130 and accompanying text.
exceed his potential recovery or at least make it impractical for the cargo owner to bother pursuing the matter. The _Sky Reefer_ majority’s construction of section 3(8) to exclude such results as a lessening of liability under the statute merely because they were procedural and not substantive is therefore arguably inconsistent with the purpose of COGSA.

2. _The Majority’s Analogy to Carnival Cruise Lines May Have Been Inapposite_

The _Sky Reefer_ majority relied on the Court’s construction of a different statute in _Carnival Cruise Lines_ to justify its narrow reading of section 3(8) of COGSA. However, because the statute at issue in _Carnival Cruise Lines_ only dealt with “the allocation of rights and duties between shippers and carriers” in a domestic context and not the broader concerns of uniformity and negotiability of maritime bills of lading addressed in COGSA, the Court’s interpretation of the former statute should not be relevant to the facts of _Sky Reefer_.

It is understood that COGSA was part of an international effort to achieve uniformity in bills of lading used in international trade and to prevent impairment of their negotiability. If each carrier is permitted to dictate a different forum for enforcing each bill of lading, then the ensuing uncertainty might damage the negotiability of the bills. Because the statutory interpretation in _Carnival Cruise Lines_ regarding “the enforceability of the ticket’s terms did not implicate the commercial interests in uniformity and negotiability that are served

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141 _Sky Reefer_, 115 S. Ct. at 2335 (Stevens, J., dissenting). Justice Stevens wrote: “As a practical matter, . . . in such a case no matter how clear the carrier’s formal liability may be, it would make no sense for the consignee or its subrogee to enforce that liability.” _Id._ (Stevens, J., dissenting). “The shipper will . . . be inclined either to settle the claim at a discount or to forego bringing the claim at all.” _Id._ at 2333 (Stevens, J., dissenting).

142 See Charles L. Black, Jr., _The Bremen, COGSA and the Problem of Conflicting Interpretation_, 6 VAND. J. TRANSNAT’L L. 365 (1973). Professor Black, anticipating that a court may try to extend the holding from _The Bremen_ to a forum selection clause in a bill of lading, counseled:

[I]t is hard to see how it can be looked on as other than a “lessening” of the carrier’s liability under COGSA to remit the bill of lading holder to a distant foreign court. It is quite true that the difficulty imposed would vary with the circumstances; Canada is not Pakistan. But there is always some palpable “lessening,” for if the choice-of-forum clause is ever enforced, the result must be to dismiss the litigant out of the United States court he has chosen to sue in. On most moderate-sized claims, remission to the foreign forum is a practical immunization of the carrier from liability. I hope we have not relapsed into such arid conceptualism as to make anything of the classification of this practical “lessening” as “procedural” rather than “substantive.”

_id._ at 368-69.

143 See _supra_ notes 47-50, 137 and accompanying text.

144 _Sky Reefer_, 115 S. Ct. at 2335 (Stevens, J., dissenting).

145 See, e.g., _supra_ notes 120, 139 and accompanying text.

146 Justice Stevens stated: “COGSA recognizes that this negotiability depends in part upon the financial community’s capacity to rely on the enforceability, in an accessible forum, of the bill’s terms.” _Sky Reefer_, 115 S. Ct. at 2335 (Stevens, J., dissenting).
by the statutory regulation of bills of lading," it was questionable for the Sky Reefer majority to apply Carnival Cruise Line's narrow construction to section 3(8) of COGSA.

3. American Judicial Review of Foreign Arbitration May Provide Inadequate Protection for the Rights of Cargo Owners

The cargo owner in Sky Reefer asserted that enforcement of the Japanese arbitration clause would lessen the carrier's liability in that the arbitrators might apply the Japanese version of the Hague Rules, providing the carrier with a defense unavailable under COGSA, or would apply COGSA improperly. The majority held that this claim was premature and that the cargo owner would be protected anyway because the District Court could review the Japanese arbitrators. However, from a practical standpoint, judicial review of arbitral awards may provide inadequate protection for the rights of cargo owners.

To permit arbitration to proceed in a foreign forum and to determine afterwards whether the arbitrators' application of law has in fact lessened the carrier's liability would not only lead to uncertainty and delay but would also ignore the practical difficulty a cargo owner would have in contesting an arbitration decision. In Wilko v. Swan, the Supreme Court recognized the burdens a party would face in challenging foreign arbitrators' application of U.S. law:

[Findings under the statute] must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of ... statutory requirements ... cannot be examined. Power

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147 Id. (Stevens, J., dissenting).
148 Id. at 2329; see supra notes 59-60 and accompanying text. This argument withstood judicial scrutiny in Indussa:

A clause making a claim triable only in a foreign court could almost certainly lessen liability if the law which the court would apply was neither the Carriage of Goods by Sea Act nor the Hague Rules. Even when the foreign court would apply one or the other of these regimes, requiring trial abroad might lessen the carrier's liability since there could be no assurance that it would apply them in the same way as would an American tribunal subject to the uniform control of the Supreme Court, and 3(8) can well be read as covering a potential and not simply a demonstrable lessening of liability.

Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, 203-04 (2d Cir. 1967); see also Knott v. Botany Mills, 179 U.S. 69 (1900) (nullifying choice of law provision under the Harter Act where British law would permit carrier to exempt itself in a bill of lading from liability for its own negligence).

149 Sky Reefer, 115 S. Ct. at 2329-30.
150 Id. at 2338-94 n.8 (Stevens, J., dissenting). Serious problems of uncertainty and delay result from judicial review of any foreign forum's decision, but the problems are particularly acute in the context of arbitration.

to vacate an award is limited.\footnote{Id. at 436 (invalidating a forum selection clause as an impermissible waiver of rights provided by the Securities Act of 1933). The Court in Wilko listed the limited circumstances, pursuant to statute, under which a United States District Court may vacate an arbitration award (e.g. corruption of the arbitrators). Id. at 437 n.22 (citing 9 U.S.C. § 10 (1952)); see also Scherk v. Alberto-Culver Company, 417 U.S. 506, 532 (1974) (Douglas, J., dissenting) (stating the limitations of judicial review in foreign arbitration).}

The Supreme Court later acknowledged that these problems associated with challenging foreign arbitration may in some cases be obviated by the United States’ adoption of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,\footnote{See Scherk, 417 U.S. at 519 (recognizing without deciding that fraud alleged under the Securities Exchange Act could be raised under the Convention in challenging the enforcement of a foreign arbitrator’s award); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 638 (1985) (stating that U.S. courts will have the opportunity under the Convention to ensure that the parties’ legitimate interests in the foreign arbitrators’ enforcement of antitrust laws have been addressed).} which permits each signatory country to refuse the enforcement of an arbitration award where “the recognition or enforcement of the award would be contrary to the public policy of that country.”\footnote{United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (1970) art. V(2)(b), 21 U.S.T. 2517, 2520 (codified at 9 U.S.C. § 201 (1970)).} Using this Convention as justification, the Sky Reefer majority insisted: “Were there no subsequent opportunity for review and were we persuaded 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 . . . , we would have little hesitation in condemning the agreement as against public policy.’”\footnote{Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2330 (1995) (quoting Mitsubishi Motors, 473 U.S. at 637 n.19).}

However, despite these hortatory assurances, the majority cites no authority in which a federal court has actually refused to enforce a foreign arbitral award on public policy grounds under the Convention.

Thus, the difficulty that a cargo owner would face in challenging a foreign arbitral tribunal’s decision calls the reasoning of the Sky Reefer majority into question. Because judicial review of foreign arbitration would provide a cargo owner with uncertain hope of adequate redress, it is reasonable to argue that any arbitration in a foreign forum which might reduce a carrier’s obligations below that which COGSA guarantees is a potential lessening of liability within the meaning of COGSA.

B. The Indussa Rule is not Necessarily Incompatible with International Comity

The majority in Sky Reefer strongly suggested that failure to enforce a foreign arbitration clause would damage “contemporary principles of
international comity and commercial practice." The Court placed great emphasis on the reasoning of *The Bremen* that "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." However, this view of the issue places too much emphasis on the "international" aspect of foreign arbitration clauses in bills of lading and too little on their adhesionary nature.

Justice Stevens, in his dissent to *Sky Reefer*, stated:

The concerns about invalidating freely negotiated forum selection clauses that this Court expressed in *The Bremen* . . . have no bearing on the validity of the provisions in bills of lading that are commonly recognized as contracts of adhesion. Our international obligations do not require us to enforce a contractual term that was not freely negotiated by the parties. Much less do they require us to ignore the clear meaning of COGSA—itself the product of international negotiations—which forbids enforcement of clauses lessening the carrier's liability.

This distinction between the freely negotiated contract in *The Bremen* and the take-or-leave adhesionary clause in *Sky Reefer* finds support in *The Bremen* decision itself. In *The Bremen*, the Court recognized the validity of the "Indussa" rule under COGSA and stated that COGSA was not applicable to the case before the Court. Thus, the valid concerns of the Court in *The Bremen* of not discouraging foreign trade

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156 *Sky Reefer*, 115 S. Ct. at 2328. The Court was concerned that failure to enforce the clause would result in an interpretation of the Hague Rules contrary to that of every other nation to address the issue and would violate the purposes of the Convention by "disparaging the authority or competence of international forums for dispute resolution." *Id.*; see *supra* notes 52-58 and accompanying text.

In his dissent, Justice Stevens disagreed with the majority's belief that statutes passed by other signatories to the Hague Rules which made foreign forum selection clauses unenforceable indicated an intentional departure from the Hague Rules that is not present in COGSA. See *supra* note 53. Stevens stated that the opposite conclusion is at least as possible:

"[T]hese foreign nations believed non-enforcement of foreign forum selection clauses was consistent with their international obligations, and they passed these statutes to make that explicit. If anything, then, these statutes demonstrate that several foreign countries agree that the United States courts' consistent interpretation of COGSA does not contravene our mutual treaty obligations."

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

157 *Id.* at 2328 (quoting M/S Bremen v. Zapata Off-Shore Company, 407 U.S. 1, 9 (1972)); see *supra* notes 81-82 and accompanying text.

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

159 See *supra* note 79. The decisions adhering to the "Indussa" rule similarly distinguish *The Bremen* as not applicable to COGSA cases. See, e.g., Conklin & Garrett, Ltd. v. M/V Finnrose, 826 F.2d 1441, 1442 (5th Cir. 1987) (stating that *The Bremen* involved a negotiated contract for towage and not a bill of lading and holding: "The ruling in *Zapata [Bremen] controls the field of admiralty to the extent that no federal legislation to the contrary is on the books. We hold that in this case COGSA is applicable and controlling.")) (citation omitted); Union Insurance Society of Canton v. S.S. Elkon, 642 F.2d 721 (4th Cir. 1981) (distinguishing *The Bremen* from COGSA cases because Congress had enunciated a specific policy regarding the latter subject which therefore took precedence over the general policy of *The Bremen*).
by insisting on resolving all disputes in America are arguably not relevant to a situation in which the international agreement is not a "solemn contract" but is instead a bill of lading dominated by the superior bargaining power of the carrier.

Furthermore, even if the concerns of The Bremen are at issue in a maritime bill of lading, a credible argument can be made that failing to enforce foreign forum selection clauses promotes, rather than discourages, international commerce and comity. Denying the validity of foreign forum selection clauses in bills of lading would force parties to resolve disputes within limited parameters and therefore increase the certainty and uniformity of the bills' enforceability in known, accessible fora. As a result, the international financial community would have increased reliance upon the negotiability of the bills, and the relevant parties to an international transaction—buyer and seller, carrier, marine insurer, and guarantors of letters of credit—would have greater confidence to enter into such transactions.  

The majority likely reacted too quickly in enforcing the foreign arbitration clause in Sky Reefer, because of its effect on foreign law and foreign courts, for fear of trampling upon the sovereignty of other nations. This invocation of the "international contract talisman" appears to disregard the more practical benefits to international commercial harmony that would inure from failing to enforce the clause.

C. The Indussa Rule as Applied to Foreign Arbitration Clauses Does not Necessarily Bring COGSA into Conflict with the FAA

Justice Stevens implied in his dissent to Sky Reefer that the majority may only have rejected the clear precedent of the Indussa line of cases so as "to avoid a perceived conflict with another federal statute, the Federal Arbitration Act . . ." The FAA exempts from enforceability an arbitration clause that is revocable as a contract "upon such grounds as exist at law or in equity." Stevens reasoned that COGSA 3(8) provides just such an independent ground and that clauses in violation of section 3(8) should therefore be exempted from the general policy of the FAA.

160 See supra notes 145-147 and accompanying text.
161 See supra note 93 and accompanying text.
162 Sky Reefer, 115 S. Ct. at 2336 (Stevens, J., dissenting); see supra note 70 and accompanying text.
163 See supra note 87 and accompanying text.
164 Sky Reefer, 115 S. Ct. at 2337 (Stevens, J., dissenting). Stevens addressed the policies of the two statutes and found them to be harmonious: COGSA seeks to ameliorate the inequality in bargaining power that comes from a particular form of adhesion contract. The FAA seeks to ensure enforcement of freely-negotiated agreements to arbitrate. . . . [F]oreign arbitration clauses in bills of lading are not freely-negotiated. COGSA's policy is thus directly served by
If the two statutes can be read in this way so as not to conflict, the Sky Reefer majority need not have gone to such great lengths to enforce the foreign arbitration clause as not violative of COGSA, despite clear precedent to the contrary.

V. Conclusion

In light of the gaps in logic in the majority's reasoning identified in Part IV, Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer appears to be wrongly decided and could result in unintended and harmful effects on international commerce. While the Court was certainly correct in supporting the proposition from The Bremen that the expanding world economy cannot permit the United States to "insist on a parochial concept that all disputes must be resolved under our laws and in our courts," the Court went too far in upholding this principle at the expense of enforcing an adhesionary clause. The Court could have found a middle ground that harmonized the goal of international comity with the need to protect contracting parties with inferior bargaining power.

The great weight of authority and logic suggest that foreign forum selection clauses do result in a practical (if not technical) lessening of a carrier's liability in violation of COGSA. However, COGSA's goal of protecting cargo owners can be met without insisting on an American forum and damaging international comity in the process. Instead of requiring blanket enforcement of foreign forum selection and arbitration clauses in bills of lading, the Court should
have instead required that the weaker contracting party receive *actual notice* of the clause before entering into the contract and that the chosen forum bear a *reasonable relation* to the transaction evidenced by the bill. In this way, not all foreign forum selection and arbitration clauses are unenforceable under COGSA, only those of which the cargo owner has no actual notice or in which the forum is so far removed from the transaction as to be unreasonable for the cargo owner to have to resolve its dispute there. These two requirements provide a substitute for the hard bargaining and negotiation absent in bill of lading contracts and, in so doing, make the international comity concerns of *The Bremen* relevant in the COGSA context, providing the requirements are met.

This method protects the owner of goods from a carrier inserting a clause requiring dispute resolution in a remote forum and thereby effectively insulating itself from liability. At the same time, this proposal recognizes the availability and competence of foreign fora, under fair and appropriate circumstances, and demonstrates the willingness of United States courts to defer to international comity concerns.

Thus, the *Sky Reefer* majority, in trying to bring the Court's guidance to lower courts in conformity with valid concerns of international comity and modern international commerce, likely went farther than necessary. The competing interests of international

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169 See State Establishment for Agricultural Product Training v. M/V Wesermunde, 838 F.2d 1576, 1581 (11th Cir. 1981) (determining enforceability of foreign arbitration clause and holding that:

[1] It is proper to require that a shipper be given actual notice of a provision that arguably conflicts with the protections afforded him under certain federal Acts, such as COGSA and the Harter Act, where those Acts are traditionally incorporated by reference into all bills of lading;

*supra* notes 129-132 and accompanying text.

170 See Wesermunde, 838 F.2d at 1581 (stating:

While we do not believe that arbitration in and of itself is per se violative of COGSA's provisions, especially in light of Congress' encouragement of arbitration by its enactment of the Arbitration Act, . . . the court does believe that a provision requiring arbitration in a foreign country that has no connection with either the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict with COGSA's general purpose of not allowing carriers to lessen their risk of liability.)

171 See *supra* notes 156-159 and accompanying text.

172 Professor Black believed that another solution was possible:

I will then say that the solution would have to be a single international court of appeals, whereeto judgments interpreting COGSA rendered in the national courts of last resort, could be brought by the nonprevailing party. Such a court should control its own jurisdiction; appeals to it should be heard at its discretion, as with our own Supreme Court's certiorari procedure, for much non-uniformity is trivial or at least tolerable, like some intercircuit differences in our system. But, on application by a party, the court should have the power to take up and decide any case hinging on the interpretation of COGSA.

Black, *supra* note 142 at 870 (emphasis in original). Professor Black's proposal appears to adequately address both the international comity and adhesion contract concerns.
comity, on the one hand, and the protection of contracting parties from adhesion contracts, on the other, could be better harmonized if the Court were to modify its holding in *Sky Reefer* to only permit the enforcement of foreign forum selection and arbitration clauses in maritime bills of lading if the cargo owner has actual notice of the chosen forum and the forum is reasonably related to the transaction itself.

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