

Statutory Disputes Arbitration

— Disputes Relating to COGSA —

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Introduction

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Introduction

International transactions for the carriage of goods by sea have a long history, time-honored traditions and trade customs. As carriers had stronger market power against shippers, carriers included favorable contract terms for them such as exculpatory clauses in the contract, or the bills of lading when they were issued to cargoes even though in normal circumstances, generally common carriers were strictly liable for damage to cargoes.

In order to establish uniform bills of lading to govern the rights and liabilities of carriers and shippers in international trade, international form and convention had been drafted,⁽¹⁾ and the U.S. adopted legislation, among which the Carriage of Goods by Sea Act of 1936 (COGSA) followed the

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1. The Liverpool Conference Form of 1882, the Hamburg Rules of Affreightment of 1885, the Hague Rules of 1921, the Brussels Convention of 1924, 51 Stat.233; the Visby Rules of 1968; the Hague/Visby Rules of 1980.

Convention,⁽²⁾ namely, the International Convention on the Carriage of Goods by Sea for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules) of 1921, which was amended by the Brussels Convention of 1924.

COGSA provides in Section 3(8) that:

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 and 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.

In the situation where cargo was lost or damaged, and a cargo owner filed a suit before a U.S. court for damages or moved to compel arbitration under the arbitration clause, a carrier raised a defense of lack of jurisdiction of the U.S. court under the conditions of the bill of lading, which provided for the jurisdiction of a foreign court or arbitration abroad, the U.S. court denied such defense under the COGSA which forbids any agreement lessening or reducing the carrier's liability. As a foreign forum selection clause or a foreign arbitration clause imposes potentially prohibitive costs on the cargo owner, the U.S. court had always held that such clauses "lessen", "reduce" or "relieve" the carrier's liability. Now the rule has changed, and a carrier may insert a foreign arbitration clause in a bill of lading.⁽³⁾

This chapter traces the development of international trade of cargo

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2. The Harter Act of 1893, ch.105, 27 Stat.445 (1893), 46 U.S.C. § § 190-196,; the Uniform Bills of Lading Act of 1909; the Federal Bill of Lading (Pomerene) Act of 1916, ch.415, 39 Stat.538-45 (1916), 49 U.S.C. §§81-124; the Carriage of Goods by Sea Act of 1936(COGSA), ch.229, 49 Stat.1207 (1936), 46 U.S.C. § § 1300-1315, and the Uniform Commercial Code (UCC).
 3. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 29 F.3d 727 (1st Cir. 1994), *cert. granted*, 513 U.S. 1013, *aff'd*, 515 U.S. 528 (1995).

with a bill of lading and settlement of disputes by the court or arbitration, and examines how arbitration has been allowed to function in this sphere of maritime transactions.

1. Maritime Common Law, Convention and Legislation

Under common law, the liability of a public carrier was strict, and it was absolutely responsible for the safety of the goods in hands except for acts of God and public enemy. A carrier could not contract against liability for its own negligence in cargo damage; such a provision was against the public policy in the U.S., whereas it could be modified in the U.K. if such a provision was expressed in unambiguous terms.⁽⁴⁾ On the other hand, the nature of a shipper's liability for dangerous goods had not been firmly settled in U.S. maritime common law before the enactment of the COGSA.⁽⁵⁾

The U.S. enacted the Harter Act in 1893, which was confined to relations between carrier or ship and shipper and prohibited an agent or owner of a ship to insert in a bill of lading or agreement any clause whereby it would be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of merchandise. It prevents a carrier from avoiding its common law responsibilities by including exculpatory clauses.⁽⁶⁾

In the mean time, in the international domain of maritime transport,

4. Benjamin W. Yancey, *The Carriage of Goods: Hague, COGSA, Visby and Hamburg*, 57 Tul. L.Rev. 1238 (1983).

5. *The Santa Clara*, 281 F. 725 (2nd Cir. 1922); *Senator Linie GmbH & Co. v. Sunway Line*, 291 F. 3d 145 (2nd Cir. 2002). n.33.

6. *See The Delaware*, 161 U.S. 459 (1896). The Harter Act was designed to fix relations between cargo and vessel, and to prohibit contracts restricting liability of a vessel and owners in certain particulars connected with construction, repair, and outfit of a vessel, and care and delivery of cargo. It is mainly a re-enactment of certain well-known provisions of common law applicable to duties and liabilities of vessels to their cargo.

the Comité Maritime International (CMI) was formed in 1897 as a conglomerate of several national associations to create a uniform international maritime law. The Maritime Law Association of the U.S. was formed in 1899 to maintain contact with the CMI. In 1912, it recommended that CMI examine the entirety of maritime law. In 1921 at the Hague, the International Law Association adopted the rules, “the Hague Rules”, which the CMI had recommended. The Hague Rules, with minor amendments, were submitted to the International Diplomatic Conference on Maritime Law at Brussels in 1924 for adoption as the International Convention for the Unification of Certain Rules Relating to Bills of Lading, “the Brussels Convention.” The previously enacted Harter Act had some bearing on the Convention.

The U.S. enacted the Carriage of Goods by Sea Act in 1936 (COGSA), whose purpose it is to create international uniformity and simplification, and consistencies with other nations as to the text of those clauses of ocean bills of lading, which governs the rights and obligations between a shipper and a carrier or ship under a bill of lading establishing the contract of carriage.⁽⁷⁾ The relationship between the Harter Act and the COGSA is that whereas the former is still in effect before loading the goods on board a ship and after discharge of the goods from a ship, the COGSA is generally applicable after the goods are loaded on a ship and during transportation of goods between foreign and U.S. ports.⁽⁸⁾

The COGSA prohibits the carrier or the ship from relieving or lessening liability for loss or damage to the goods arising from negligence, fault, or failure in the duties and obligations as mentioned above, in Section 3

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7. See *The S.S. Asturias*, 40 F. Supp. 168 (D.C.N.Y. 1941), *aff'd*, 126 F.2d 999 (2nd Cir. 1942). *Pan-Am Trade & Credit Corp. v. The Camphire*, 156 F.2d 603 (2nd Cir.), *cert. denied*, 329 U.S. 774 (1946). *Serrano v. US Lines Co.*, 238 F. Supp. 383 (D.C.N.Y. 1965).

8. Section 12 of COGSA. *Nissho Iwai Am. v. M/V Sea Bridge*, 1991 AMC 2070 (1991).

(8). The carrier shall be bound to exercise due diligence to make the ship seaworthy, in Section 4(1). No particular forum selection clause is provided, but case law is divided whether the statute prohibits the parties from agreeing on a foreign forum because it was said to lessen liability.

2. The U.S. Supreme Court Decision — *the M/V Sky Reefer Case*

Case laws have changed from old cases. Firstly, a recent case is introduced. The U.S. Supreme Court granted *certiorari* in 1995, to resolve split decisions of the Circuit Courts on the enforceability of foreign arbitration clauses in bills of lading in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*,⁽⁹⁾ and affirmed the Circuit Court order to compel arbitration in Tokyo under an arbitration clause of the bill of lading.

The fact was a simple and typical one in the maritime transactions. A New York wholesale fruit distributor, Bacchus, purchased a shipload of fruit from a Moroccan supplier, Galaxie, and chartered a ship to transport it from Morocco to Massachusetts. The refrigerated cargo ship *M/V Sky Reefer* owned by Maritima, S.A., a Panamanian company, was time-chartered to Nichiro, a Japanese company. Nichiro as a carrier issued a bill of lading to Galaxie as shipper and consignee, which then tendered it to Bacchus according to a letter of credit posted in favor of Galaxie. When the ship arrived in Massachusetts, the fruits were damaged over \$1 million. Bacchus received \$733,443 compensation from the cargo insurer, Vimar, which subrogated to Bacchus' rights.

Vimar and Bacchus filed a suit against Maritima *in personam* and *M/V Sky Reefer, in rem* in the U.S. District Court for the District of Massachusetts. The defendants moved to stay the suit and compel arbitration in Tokyo

9. *M/V Sky Reefer*, *supra* note 3.

under the arbitration clause in the bill of lading,⁽¹⁰⁾ and Section 3 of the Federal Arbitration Act (FAA). The plaintiffs opposed the motion arguing the arbitration clause was unenforceable because it was an adhesion contract and the inconvenience and costs of proceedings in Japan would “lessen ... liability” under the COGSA. The District Court rejected both reasons, and granted the motion to stay the suit and compel arbitration. The First Circuit affirmed the order to arbitrate. The U.S. Supreme Court granted *certiorari* and affirmed the order.

There were two issues alleged by the plaintiff; the first one was the relationship between the Federal Arbitration Act (FAA) and the COGSA, *i.e.*, whether a foreign arbitration clause “lessened” the COGSA liability by increasing the cost of traveling and costs of proceedings, and the second was a risk that foreign arbitrators would not apply the COGSA. The U.S. Supreme Court examined *Indussa Corp. v. S.S. Ranborg*,⁽¹¹⁾ a leading case for the Second Circuit, which found that the COGSA invalidated a foreign judicial forum selection clause because it puts “a high hurdle” in the way of enforcing liability, and held that the Court could not endorse the reasoning or the conclusion of *Indussa*.

Section 3(8) of the COGSA provides the “lessening” of the specific liability imposed by the Act, but the means and cost of enforcing the liability are not addressed there; the latter are the procedure for enforcing the former, which are the statutory guarantees. 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.

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10. Arbitration clause: 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 ...

11. 377 F.2d 200 (2nd Cir. 1967).

None of the member countries parties to the Brussels Convention (the Hague Rules), on which the COGSA is modeled, has interpreted its enactment of Section 3(8) of the Hague Rules to prohibit a foreign forum selection clause, by the reasoning of *Indussa*. The Court declined to interpret the U.S. version of the Hague Rules in a manner contrary to every other nation to have addressed this issue. The Court also referred to *the Bremen v. Zapata*,⁽¹²⁾ and *Mitsubishi Motors v. Soler Chrysler-Plymouth*,⁽¹³⁾ on the necessity of paying respect to the principles of “international comity” and “international business transactions”, and stated that if the U.S. was to be able to gain the benefits of international accords and had a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such a manner as to violate international agreements.

On the second issue, though the Court briefly considered the Japanese version of the Hague Rules, the Court stated the claim was premature, and it was available to review as “the second look” at the time of the enforcement of the arbitral award as mentioned in *Mitsubishi Motors*.⁽¹⁴⁾

The Court holds that a foreign arbitration clause in a bill of lading is not invalid under the COGSA in all circumstances; both the FAA and the COGSA may be given full effect.

12. 407 U.S. 1 (1972). Forum selection clause at London court agreed by an American and a German company is enforceable; businesses now operate in world markets.

13. 473 U.S. 614 (1985). If international arbitral institutions are to take a central place in the international legal order, national courts will need to shake off the old judicial jurisdiction hostility to arbitration, and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign transnational tribunal.

14. *Id.* at 638. The U.S. court will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the laws has been addressed.

3. Development of the Case Law

Maritime case laws are to be reviewed here from the era of maritime common law before the adoption of legislative Acts up to the era under the COGSA. As the fact pattern of each case is usually similar, such as loss or damage to goods loaded on board the vessel, and a shipper or cargo owner, or insurance company by subrogation, files a suit against a carrier and a ship or ship owner, the facts will be referred to only in specific cases under examination.

1) *The Propeller Niagara v. Cordes* (1859)⁽¹⁵⁾

After a vessel was stranded at Lake Huron in the winter, the master returned home keeping the cargo in the vessel with some crew members until spring. The U.S. Supreme Court held that the law was well settled, and that it was the duty of the master to adopt every reasonable and practicable method to take care of the goods by unloading and storing to prevent wetting. The master was found guilty of gross negligence.

Common carriers by waters are liable at common law, and independently of any statutory provision, for losses arising from the acts or negligence of others, to the same extent and upon the same principles as carriers by land, that is to say, they are in the nature of insurers, and are liable in all events, and for any loss, however sustained, unless it happens by an act of God or the public enemy, or by an act of a shipper, or from some other cause or accident expressly excepted in the bill of lading.

2) *Liverpool and Great Western Steam Co. v. Phenix Ins. Co.* (1889)⁽¹⁶⁾

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A cargo at New York, loaded in a steamship owned by an English company, where the bill of lading was signed and issued by the ship's agent,

15. 62 U.S. 7 (1859).

16. 129 U.S. 397 (1889).

bound for Liverpool was lost or damaged by stranding on the coast of Wales because of the negligence of her master and officers.

The U.S. Supreme Court stated that by common law of England and America before Independence, common carrier could not stipulate for immunity for its own or its servants' negligence. The bill of lading, which was issued at New York, was an American not an English contract and was governed by American law. By American law, the stipulation by which the carrier undertook to exempt itself from liability for negligence of its servants was contrary to public policy and therefore void, and the loss of the goods was a breach of contract.

3) *Compañía de Navegación la Flecha v. Brauer* (1897)⁽¹⁷⁾

165 live cattle were loaded on the ship, on deck at owner's risk,⁽¹⁸⁾ at New York to be transported to Liverpool in 1891. The ship encountered heavy weather, which caused heavy rolling and some of the cattle pens broke. The ship's master ordered 126 cattle pushed overboard, but half of the cattle were sound and were jettisoned unnecessarily, due to the panic of the ship's crew.

The U.S. Supreme Court held that by the law of this country, before the Harter Act, common carriers, by land or sea, could not, by any form of contract with the owner of property carried, exempt themselves from responsibility for loss or damage arising from negligence of their own servants; and any stipulation for such exemption was contrary to public policy

17. 168 U.S. 104 (1897).

18. The contract provided that on deck at owner's risk, the steamer was not to be held accountable for accident to or mortality of the animals, from whatever causes arising. The carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea or other waters; by barratry of the master or crew; by collisions, stranding or other accidents of navigation, of whatever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the ship owner.

and void. The phrase “on deck at owner’s risk” could not have been intended by the parties to cover risks from all causes whatsoever, including negligence or willful acts of the master and crew. The wrongful jettison of the sound cattle by the act of the carrier’s servant could not be regarded as reasonable or consistent with the line of English authorities, or with our own decisions, be considered either as an “accident to or mortality of the animals” or as a “loss or damage occasioned by causes beyond his control, by the perils of the sea or other waters,” or yet as a loss or damage “by collisions, stranding or other accidents of navigation.” The Court concluded that the facts of the case did not bring it under any exceptions of the bill of lading.

4) *Red Cross Line v. Atlanta Fruit Co.* (1924)⁽¹⁹⁾

A dispute arose from payment of the charter-party, which provided an arbitration clause.⁽²⁰⁾ The charterer sought to enforce the arbitration clause at the State court of New York. The Supreme Court of New York ordered proceeding to arbitration as provided in the contract, which the Appellate Division confirmed. The Court of Appeals reversed, stating that the dispute between the parties was one of admiralty, which was within the exclusive jurisdiction of the admiralty court; federal jurisdiction and the State court had no power to compel arbitration. The U.S. Supreme Court granted *certiorari*, but reversed the judgment of the New York Court of Appeals.

The U.S. Supreme Court stated first that the Arbitration Law of New

19. 233 N.Y. 373, *cert. granted* 260 U.S. 716, (1923), *rev'd*, 264 U.S. 109 (1924).

20. Arbitration clause: That should any dispute arise between Owners and Charterers, the matters in dispute shall be referred to three persons in New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them, shall be final and for the purpose of enforcing any award, this agreement may be made a rule of Court....

York, enacted on April 19, 1920, amended on March 1, 1921, applied to contracts concluded before its enactment, if the controversy arose thereafter. Reference of maritime controversy to arbitration has long been common practice. In admiralty, agreements to submit controversies to arbitration were valid. State courts have jurisdiction *in personam*, concurrent with the admiralty courts, of all causes of action maritime in their nature arising under charter-parties. A State may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction. But otherwise, the State, having concurrent jurisdiction, was free to adopt such remedies, and to attach to them such incidents as it saw fit. New York, therefore, had the power to confer upon its courts the authority to compel parties within its jurisdiction specifically to perform an agreement for arbitration, which was valid by the general maritime law, as well as by the law of the State, which was contained in a contract concluded in New York and which, by its terms, was to be performed there. New York Arbitration Law did not attempt either to modify the substantive maritime law or to deal with the remedy in courts of admiralty.

5) *Marine Transit Corp. v. Dreyfus* (1932)⁽²¹⁾

A cargo owner filed a suit for damages for the loss of the wheat sank by fault of the carrier and later moved for arbitration in accordance with the arbitration clause.⁽²²⁾ The Committee on Grain of the New York Produce Exchange awarded against the carrier. The award was confirmed by the U.S. District Court and affirmed by the U.S. Court of Appeals for the Second Circuit. The *certiorari* was granted by the U.S. Supreme Court.

21. 49 F.2d 215 (2nd Cir. 1931), *aff'd*, 284 U.S. 263 (1932).

22. All disputes arising under this contract are to be arbitrated before the Committee on Grain of the New York Produce Exchange whose decision shall be final and binding.

The carrier insisted that the District Court had no power to order an arbitration under the Federal Arbitration Act (FAA) of 1925.

The U.S. Supreme Court stated that the cargo was being transported under a marine contract, and the loss had occurred upon a waterway of the navigable waters of the U.S., the subject matter of the controversy was under the jurisdiction of admiralty.⁽²³⁾ The dispute as to liability was within the “promise to arbitrate”. The order directing the arbitration of the issues arising under the contract between the parties was authorized by the statute. The Court may direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award. The Congress has authorized the court to direct the parties to proceed to arbitration in accordance with a valid stipulation of a maritime contract and to enter a decree upon the award found to be regular and within the terms of the agreement. The FAA does not unconstitutionally infringe upon the U.S. Constitution art.3 maritime jurisdiction of the Federal courts.

6) *May v. Hamburg-Amerikanische Packetfahrt* (1933)⁽²⁴⁾

A ship, sailing from the U.S. coast with cargo for Bremen, Hamburg, Germany, stranded near Bremen by negligent navigation. After inspected by an examiner of the ship’s owner at Bremen, the ship started for Hamburg, about seventy miles away, in the towage of three tugs in the Weser River, and was stranded again. Before delivery at the destination, the carrier demanded consignees to deposit cash as security for the pay-

23. The Court referred in note 2 of the decision to the Record of the House Judicial Committee. The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction of admiralty, or which may be the subject of litigation in the federal courts.... The remedy is founded also upon federal control over interstate commerce and admiralty. House Rep. No.96, 68th Cong., 1st sess.

24. 57 F.2d 265 (S.D.N.Y. 1931), *aff’d*, 63 F.2d 248 (2nd Cir.), *rev’d*, 290 U.S. 333 (1933).

ment of general average contribution to the sacrifices and expenses due to two strandings. The bill of lading included the so called “Jason clause”.⁽²⁵⁾ The consignees filed a suit to recover the money deposited as security for general average contributions. The District Court decided the security was chargeable, which the Second Circuit affirmed. The U.S. Supreme Court granted *certiorari*, but reversed.

The U.S. Supreme Court stated that the consignees did not dispute the first stranding but did dispute the second one. The Harter Act grants a new immunity: neither the vessel nor her owner is to be liable for damage or loss resulting from faults or errors in navigation or in management, if the owner has complied with a prescribed condition; the owner must have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied. The owner, by dispatching an examiner to Bremen for inspection, intervened in the management of the vessel. The examiner inspected the rudder stock and the rudder blade in a dry dock and reported the blade was intact, but in fact its lower part was bent about five degrees. The inspection was after dark with the bottom of the rudder still under water. The Court stated that the vessel owner had failed to sustain the burden of establishing due diligence in making the ship seaworthy for her voyage down the Weser River. The seaworthiness of a vessel is a condition of exemption, and unseaworthiness is the basis for damages. The Court concluded that the ship owner was not relieved by the Harter Act from the negligence of the pilot in the navigation of the vessel, and that for like reasons the cargo owners were not chargeable with general average contributions.

25. “Jason clause”, whereby the consignees agree that if the ship owner has used due diligence to make the ship seaworthy, the cargo is to be liable in general average when the sacrifice or expense results from negligence in navigation.

7) *Uniao de Transportadores para Importacao e Comercio, Ltda. v. Companhia de Navegacao Carregadores Acoreanos (1949)*⁽²⁶⁾

A shipper filed a suit for damages of merchandise transported from New York to a port in Portugal. The carrier defended with reference to an arbitration clause in the bill of lading.⁽²⁷⁾ The bill of lading specifically provided that it shall have effect subject to the provisions of the COGSA of the U.S., approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities under said Act. The shipper claimed that arbitration was inconsistent with the provisions of the COGSA.

The U.S. District Court stated that the Federal Arbitration Act (FAA) first became a law in 1925 and was reenacted in June 30, 1947. The COGSA was enacted on April 16, 1936. It seemed reasonable that if Congress in 1947 thought that the COGSA of 1936 would be affected or forbidden by any provisions in the FAA of 1947, it would and could have plainly avoided any such confusion. The Court was unable to find in the COGSA any reason or statement forbidding such parties voluntarily to agree to take advantage by arbitration and to arbitrate their controversy rather than be compelled to have the delay and expense of a trial. Staying suit pending arbitration does not oust the court of jurisdiction, but provides for maintaining its jurisdiction. Arbitration in a proper case is to be desired. The Court limiting the decision to the facts of this particular case of two corporations, both of Portugal, agreed to arbitrate their difference

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27. Arbitration clause: In case of dispute between the parties relating to the present contract, the matter in dispute to be submitted in Lisbon to two arbitrators chosen, each by one of the parties, and in case the two arbitrators should be unable to come to an agreement, they to choose a third arbitrator, and the decision of the majority to be considered by the parties hereto as final and without appeal.

in Lisbon, granted to stay the suit pending arbitration.

8) *The U.S. v. Atlantic Mutual Ins. Co. (Esso Belgium) (1952)*⁽²⁸⁾

The ship *Bacon* collided with the ship *Belgium*, and the cargo and the ships were damaged. The bill of lading issued by *the Bacon* to the cargo owners contained a “both-to-blame” clause,⁽²⁹⁾ by which relationship between the two ship owners mutually at fault, the normal admiralty requires an equal division of all aggregated damages, but ship owners may stipulate otherwise. Between the ship owner and the cargo owner, the cargo owners were required to indemnify the carrier of *the Bacon* for any amounts *the Bacon* loss because damages recovered by the cargo owners from *the Belgium* were included in the aggregate damages divided between the two ships.

The suit was filed by the owner of *the Bacon* against *the Belgium* to recover damages to *the Bacon* and its cargo. Certain insurance companies intervened by subrogation against *the Belgium*. The owner of *the Belgium* cross-filed to recover damage incurred to *the Belgium* including the amount to be payable to the cargo of *the Bacon* against the owner of *the Bacon*. The owner of *the Bacon* then impleaded the owners of the cargo for indemnity under the both-to-blame clause. Three of the suits

28. 90 F. Supp. 836 (S.D.N.Y. 1950), *rev'd*, 191 F.2d 370 (2nd Cir. 1951), *cert. granted*, 342 U.S. 913, *aff'd*, 343 U.S. 236 (1952).

29. The “both-to-blame” clause offered provisions if the ship comes into collision with another ship as a result of the negligence of the other ship and any act, negligence or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship. Then the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier. *Id.* 343 U.S. at 239. n.5.

were filed at the U.S. District Court for the Southern District of New York. The issue was the validity of the both-to-blame clause, commonly used in an ocean bill of lading, under the Harter Act and the COGSA. It was the first test of the legality of the clause in the courts. The District Court held that it was valid, which the Second Circuit reversed. The U.S. Supreme Court affirmed.

The U.S. Supreme Court stated that prior to the passage of the Harter Act in 1893, cargo damage incurred in a both-to-blame collision could be recovered in full from either ship. The Harter Act, in some circumstances, took away the right of the cargo owner to sue his own carrier for cargo damage caused by the negligent navigation of the carrier's servants or agents. It did not deprive the cargo owner of his tort action against the non-carrying ship. The COGSA did not change the practices under the Harter Act. It would be anomalous to hold that a cargo owner, who has an unquestioned right under the law to recover full damages from a non-carrying vessel, can be compelled to give up a portion of that recovery to his carrier because of a stipulation exacted in a bill of lading.

9) *Wm. H. Muller & Co. v. Swedish American Line, Ltd.* (1955)⁽³⁰⁾

On route from Sweden to New York, the ship was lost with a cargo of cocoa beans. The consignee filed a suit for damages at the U.S. District Court for the Southern District of New York. The ship owner moved to decline jurisdiction based on the jurisdiction clause in the bill of lading.⁽³¹⁾ The District Court dismissed the suit. The Second Circuit affirmed the judgment which dismissed the complaint.

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30. 224 F.2d 806 (2nd Cir.), *cert. denied*, 350 U.S. 903 (1955).

31. Jurisdiction: Any claim against the carrier arising under this bill of lading shall be decided according to Swedish law, except as provided elsewhere herein, and in the Swedish courts, to the jurisdiction of which the carrier submits himself.

The Court first noted that Section 3(8) of the COGSA did not expressly invalidate the jurisdictional agreement contained in the bill of lading, nor might the Act properly be interpreted to invalidate such agreement. The COGSA contains no express grant of jurisdiction to any particular courts, nor any broad provisions of venue.

The consignee argued that if trial was to be held in Sweden, a substantial expense for transport was needed, and such expense was a ‘lessening’ of liability under the COGSA, and the enforcement of this clause would be in contradiction of public policy. The Court stated that certainly the clause here involved was not one necessarily ‘relieving the carrier or the ship from liability’, and such possible expense, which was only incidental to the process of litigation, was not enough to bring this jurisdiction agreement within the ban of section 1303(8) of the COGSA. In each case the enforceability of such an agreement depended on its reasonableness. The parties by agreement could not oust jurisdiction otherwise obtaining; notwithstanding agreement, the court had jurisdiction. The Court therefore came to consideration of the reasonableness of this particular agreement in the setting of this case. The ship was not only Swedish owned, but also was constructed there. All crew resided there. Hence most of the evidence as to unseaworthiness would be more readily available in a Swedish court. The Court also added that there was an undisputed showing that Swedish courts apply the same measure of damages as American Maritime courts and that limitation proceedings under Swedish law would be no more restrictive than under American law on libellant’s recovery. Further, there was no contention that the Swedish courts were not capable of adjudicating this case fairly and justly. The District Court rightly concluded that the jurisdictional agreement was not unreasonable and that the adherence of the parties to that agreement should be given effect.

10) *The Monrosa et al. v. Carbon Black Export, Inc.* (1959)⁽³²⁾

Carbon black was loaded at Houston and New Orleans to be delivered to the ports of Italy, where a portion was damaged at the first port and the remains were not delivered to the other two ports. The shipper filed a suit for damages to and non-delivery of cargo at the U.S. District Court of the Southern District of Texas against *the Monrosa, in rem* when she came to the port of Houston on another voyage and the Italian ship owner *in personam*, which moved to decline jurisdiction based on the clause in the bills of lading.⁽³³⁾ The District Court granted the motion, subject to filing a bond. The Fifth Circuit reversed, the clause was inapplicable to suits *in rem*, and it declined to enforce the terms to require a dismissal of the suit *in personam*. The Court stated that one of the most universally recognized rules of law was that which gave the right to libellant, possessing a maritime lien against a vessel, to proceed *in rem* in the jurisdiction where the vessel was found, and the Court distinguished *Muller* of the Second Circuit,⁽³⁴⁾ which was not an *in rem* action because of its being lost at sea. The U.S. Supreme Court granted *certiorari*, considering the conflicts in principle between the Second Circuit⁽³⁵⁾ and the Fifth Circuit, but later dismissed *certiorari* with four dissents, stating that this case did not afford an appropriate instance to pass upon the extent to which effect could be given to such stipulations in an ocean bill of lading not resorting to the courts of this country.

32. 254 F.2d 297 (5th Cir.), *cert. granted*, 358 U.S. 809 (1958), *cert. dismissed*, 359 U.S. 180, *reh'g denied*, 359 U.S. 999 (1959).

33. Jurisdiction: 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.

34. *Muller*, *supra* note 30.

35. *Id.*

11) *Robert C. Herd & Co. v. Krawill Machinery Corp. (1959)*⁽³⁶⁾

The machinery company sold and agreed to deliver the machines from Detroit to a Spanish purchaser. The machines were transported by rail to the pier in Baltimore, where they were to be loaded on the ship by a stevedore. Due to the stevedore foreman's failure of coordination between the men on the pier, the deck and the derrick, a machine weighing nineteen tons fell into the harbor after it was lifted for a short time. The shipper filed a tort suit for damages against the stevedore at the U.S. District Court for the District of Maryland. The stevedore denied the negligence, or alternatively, if the damage was caused by its negligence, its liability was limited to \$500 by the limitation-of-liability provisions of the COGSA, and the bill of lading. The stevedore was an independent company orally engaged by the carrier to load the cargo aboard the ship. A bill of lading was prepared by the machinery company, on forms of the carrier, and was submitted to and signed by an agent of the carrier. The District Court held that the limitation-of-liability provisions of the bill of lading were, in express terms, applicable only to the carrier, and the machinery company was entitled to recover the full amount of its damages from the stevedore. The Court also added that the casualty occurred before the machine had been loaded on the ship, and that the COGSA was not applicable because its effective period had not begun. The Fourth Circuit affirmed. The U.S. Supreme Court granted *certiorari*, considering the conflict decisions of the Fifth Circuit⁽³⁷⁾ and the Fourth Circuit, and the question was important to the shipping industry. The U.S. Supreme Court affirmed the judgment of liability against the stevedore.

36. 145 F. Supp. 554 (D.Md.), *aff'd*, 256 F.2d 946 (4th Cir. 1958), *cert. granted*, 358 U.S. 812, *aff'd*, 359 U.S. 297 (1959).

37. *A.M. Collins & Co. v. Panama R. Co.*, 197 F.2d 893 (5th Cir.), *cert. denied*, 344 U.S. 875 (1952). The Fifth Circuit held that the stevedore was entitled to any immunity to which the ship was entitled, by reason that the stevedore was the ship's agent.

The U.S. Supreme Court first reviewed the legislative history of the Harter Act, Hague Rules, Brussels Convention and the COGSA, and stated that legislative history and environment of the Act expressly or impliedly did not indicate any intention to regulate the stevedore or other agents of a carrier, or to limit the amount of their liability for damages caused by their negligence. The bill of lading did not indicate that the contracting parties intended to limit the liability of the stevedore or other agents. The Court secondly expressed disagreement with *Collins*,⁽³⁸⁾ upon which the stevedore relied to protect itself by the carrier's limitation, though such agents were not parties to nor express beneficiaries of the contract. The Court concluded that under the common law as declared by this Court, the stevedore was liable for all damages caused by its negligence unless exonerated therefrom, in whole or in part, by a statutory rule of law. No statute had limited its liability, and it was not a party to, nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by that contract. It followed that the stevedore's common law liability for damage caused by its negligence was in no way limited.

12) *Indussa Corp. v. S.S. Ranborg* (1967)⁽³⁹⁾

Steel products shipped from Belgium to San Francisco were damaged, primarily by rust. A New York consignee filed a suit for damages against a Norwegian ship owner and *the S.S. Ranborg, in rem* at the U.S. District Court for the Southern District of New York. The ship owner moved for an order declining jurisdiction based on the jurisdiction clause of the bill of

38. *Id.*

39. 377 F.2d 200 (2nd Cir. 1967).

lading.⁽⁴⁰⁾ The District Court granted the motion for jurisdiction in Norway. The Second Circuit reversed *in banc* with ten judges overruling the ruling of *Muller*.⁽⁴¹⁾ The Court, first by three judges, heard the case and thought *Muller* was wrongfully decided and should be overruled, and then asked all judges *in banc* to consider the appeal. The Court stated that *Muller* was inconsistent with the COGSA, whose provision would seem to forbid an American court from a holding that might cause a bill of lading covering an ocean shipment to or from the U.S. to be subject to foreign rather than American law in litigation. Although these provisions of the COGSA did not speak directly to a clause which simply vested a foreign court with exclusive jurisdiction, giving effect to such a clause was almost as objectionable as enforcing a clause subjecting the bill of lading to foreign law. A clause making a claim triable only in a foreign court would almost certainly “lessen liability” if the law which the court would apply was neither the COGSA nor the Hague Rules. There could be no assurance that the foreign court would apply them in the same way as would an American tribunal subject to the uniform control of the U.S. Supreme Court. Requiring an American plaintiff to assert his claim only in a distant court “lessened” the liability of the carrier quite substantially, particularly when the claim was small. Such a clause puts “a high hurdle” in the enforcing liability. The Court held merely that Congress outlawed clauses prohibiting American courts from deciding causes otherwise properly before the American courts.

40. Jurisdiction: 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.

Period of Responsibility: In case the Contract evidenced by this Bill of Lading is subject to the U.S. COGSA, then the provisions stated in said Act shall govern before loading and after discharge and throughout the entire time the goods are in the Carrier's custody.

41. *Muller*, *supra* note 30.

One judge, concurring in the result, added that he found no necessity to proclaim the superiority of American courts, American law and the ample adequacy of American awards. Nor would he speculate on Congressional intent - always a rather uncertain, at best, venture. He found it singularly inappropriate for the U.S. courts to say, in effect, that the courts of all other nations were so unable to dispense justice that, as a matter of public policy, we had to protect our citizens by outlawing any other tribunal than our own.

A footnote in the decision referred to arbitration that this ruling did not touch the question of arbitration clause in bills of lading which required this to be held abroad. 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. Although the FAA of 1925 validated a written arbitration provision "in any maritime transaction" and defined that phrase to include "bills of lading of water carriers", the COGSA, enacted in 1936, made no reference to that form of procedure. If there be any inconsistency between the two Acts, presumably the FAA would prevail by virtue of its later reenactment as positive law in 1947.

13) *The Bremen v. Zapata Off-Shore Co.* (1972)⁽⁴²⁾

This is an epoch-making case for upholding the forum selection clause in the contract of the parties. This is, however, not a case of a bill of lading but an arms-length negotiated towage contract case; therefore, this is not covered by the COGSA.

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On route towing an offshore drilling rig by a tug from Louisiana to the Adriatic Sea off Italy, the rig was damaged by a storm in the Gulf of Mexico. The owner of the rig, Zapata, an American company, filed a suit against *the Bremen*, *in rem* and its German tug operator at the U.S.

42. 446 F.2d 907 (5th Cir. 1971), *vacated*, 407 U.S. 1 (1972).

District Court for the District of Florida. The U.S. Supreme Court upheld the forum selection clause at the London Court of Justice because of the bargained nature of the contract between two business corporations, the reasonableness of the forum selected and the general policy encouraging private contractual choice for dispute resolution, particularly in the context of international trade.

14) *Pacific Lumber & Shipping Co. v. Star Shipping A/S* (1979)⁽⁴³⁾

The bill of lading contained an arbitration clause in London.⁽⁴⁴⁾ The U.S. District Court for the Western District of Washington found that the arbitration clause was not negotiated or discussed with the shipper, nor did the shipper ever have an option to have that clause deleted. The bill of lading was not received in its completed form until after the ship sailed from Coos Bay. The Court denied the motion for a stay of action pending arbitration, stating that the bill of lading was contract of adhesion, and the “London arbitration clause” was not freely negotiated between the parties. That clause was a foreign forum clause. This case was governed by the provisions of the COGSA. If ocean carriers were allowed unilaterally to select the forum for the resolution of cargo claims, it would be an invitation to carriers to select a forum having no relationship to the ports of loading or discharge and the carriers would be at liberty to select forum that might not fairly enforce the COGSA.

15) *Union Insurance Society of Canton, Ltd. v. S.S. Elikon and Hansa* (1981)⁽⁴⁵⁾

Air conditioners were shipped by a German freighter owned by a

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43. 464 F. Supp. 1314 (D.Wash.1979).

44. Arbitration clause: All disputes arising under this bill of lading shall be settled in accordance with the provisions of the Arbitration Act of 1950 in London. The award of the arbitrator or umpire to be final and binding upon both parties.

45. 642 F.2d 721 (4th Cir. 1981).

German from Virginia to Kuwait, where the cargo were found damaged. A marine insurer as subrogee filed to recover its loss from the ship owner and *S.S. Elikon*, *in rem* at the U.S. District Court for the Eastern District of Virginia. The ship owner challenged the jurisdiction of the District Court based on the jurisdiction clause in the bill of lading.⁽⁴⁶⁾ The District Court agreed with the foreign jurisdiction and dismissed the suit due to lack of jurisdiction, relying on the authority of *the Bremen*,⁽⁴⁷⁾ and considering the parties were all foreigners.

The Fourth Circuit reversed. The Court distinguished *the Bremen* from *Indussa* and this case: the former was not covered by the COGSA. The COGSA should continue to serve as a basis for the jurisdiction of the District Court. The COGSA not only invalidates a forum selection clause appointing a foreign tribunal and designating the application of foreign law, but appears to suggest a preference for an American forum. The Court did not decide the “forum non-convenience” issue, but because the foreign nationality of the parties alone did not support denial of admiralty jurisdiction, the District Court on remand should develop the additional

46. This bill of lading shall have effect subject to the provisions of the COGSA of the U.S., approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act shall (except as may be otherwise provided herein) govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the Carrier. The Carrier shall not be liable in any capacity whatsoever for any delay, nondelivery, misdelivery or loss or damage to the goods occurring while the goods are not in the actual custody of the Carrier.

Jurisdiction: All actions under this contract shall be brought before the Court of Bremen, Federal Republic of Germany and the laws of the Federal Republic of Germany shall apply. No other Court shall have jurisdiction with regard to any such action unless the carrier appeals to another jurisdiction or voluntarily submits himself thereto.

47. *The Bremen*, *supra* note 42.

facts necessary to ascertain whether the Eastern District of Virginia was a forum non-convenience for this litigation.

16) *Conklin & Garrett, Ltd. v. M/V Finnrose* (1987)⁽⁴⁸⁾

A merry-go-round shipped from the U.K. to Florida was damaged. Conklin, a Canadian company, filed a suit at the U.S. District Court for the Southern District of Texas against *the M/V Finnrose*, under a flag of the Bahamas, *in rem*, its owner, a Finnish company, and a charterer, a Swedish company. The defendants moved to dismiss for lack of jurisdiction based on the clause in the bill of lading.⁽⁴⁹⁾ The District Court granted the motion and dismissed the suit. The Fifth Circuit reversed. The Court examined the cases of *the Bremen*, *S.S. Monrosa*, *Indussa*, *S.S. Elikon*,⁽⁵⁰⁾ and concluded that in view of the statutory language of the COGSA and also considering the pertinent authorities, the District Court erred in declining to take jurisdiction. *The Bremen* is inapposite.

17) *State Establishment for Agricultural Product Trading v. M/V Wesermunde* (1988)⁽⁵¹⁾

A cargo of fresh eggs loaded in Florida to be delivered to Jordan was destroyed by fire before off-loading. The cargo owner, an agency of the Iraqi government, filed a suit at the U.S. District Court for the Middle

48. 826 F.2d 1441 (5th Cir. 1987).

49. Jurisdiction: Any dispute arising under this bill of lading shall be decided in Finland and Finnish law shall apply except as provided elsewhere herein.

Notwithstanding any provisions found elsewhere in this bill of lading, insofar as the ... carriage covered by this ... contract is performed within the territorial limits of the U.S., it shall be subject to the provisions of the COGSA ... which shall be deemed to be incorporated herein.

50. *The Bremen*, *supra* note 42. *S.S. Monrosa*, *supra* note 32. *Indussa*, *supra* note 39. *S.S. Elikon*, *supra* note 45.

51. 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988).

District of Florida against *the M/V Wesermunde, in rem*, her owner, management of the vessel, liability underwriter, such as Panama, the Bahamas, Greece and UK companies. The defendants moved to demand arbitration based on the clause in the bill of lading.⁽⁵²⁾ The cargo owner argued that it was not a party to the charter-party, nor did the disputes arise from it. The District Court ruled that the bill of lading given to the cargo owner effectively incorporated by reference the arbitration clause found in the Charter-Party, ordered arbitration, and stayed the proceedings. The Eleventh Circuit reversed, vacated and remanded.

The Eleventh Circuit stated that the Court did not believe that arbitration in and of itself is *per se* violative of the COGSA's provisions, especially in light of Congress' encouragement of arbitration by its enactment of the FAA. The Court, however, did believe that a provision requiring arbitration in a foreign country that had no connection with either the performance of the bill of lading contract or the making of the bill of lading contract was a provision that would conflict with the COGSA's general purpose of not allowing carriers to lessen their risk of liability. Where the provision was incorporated by reference in the short form bill of lading, the language was never specifically brought to the consignee's attention, the consignee did not have actual knowledge of the provision in the long form bill of lading. Absent actual notice to the cargo owner of the foreign arbitration clause found in the Charter-Party, the COGSA and the case law interpreting that Act would have barred defendants from invoking the language requiring arbitration. The Court concluded that the COGSA would either bar *per se* the enforcement of the instant arbitration clause or the

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52. Bill of lading: All the terms, conditions, liberties and exceptions of the Charter-Party are herewith incorporated. As per Charter-Party dated December 18th, 1981.

The Charter-Party: Any dispute arising under this Charter-Party to be settled by arbitration in London (not lawyers) according to the Arbitration Act.

provision would be ineffective unless actual notice of it was given to the cargo owner when it signed the bill of lading. By adopting the COGSA contractually into the bill of lading, these protections should be afforded the cargo owner unless there was an express agreement by the parties that a contrary result was intended.

18) *Carnival Cruise Line v. Shute* (1991)⁽⁵³⁾

This admiralty case is not a case on COGSA but on the forum selection clause.

Shutes, residents of the State of Washington, bought tickets at a travel agent there for Carnival's passenger cruise line. Shutes boarded the ship at Los Angeles and Mrs. Shute was injured slipped on the deck in international waters off the coast of Mexico. Shutes filed a suit at the U.S. District Court for the Western District of Washington for damages against Carnival. Carnival moved for summary judgment based on the forum clause in the ticket,⁽⁵⁴⁾ or alternatively, lack of personal jurisdiction of the District Court because of insubstantial contacts by Carnival with the State of Washington. The District Court granted the motion, based on the latter contention. The Ninth Circuit reversed, justifying the personal jurisdiction of the District Court, reasoning that "but for" Carnival's solicitation of business in

53. 897 F.2d 377 (9th Cir.), *cert. granted*, 498 U.S. 807 (1990), *rev'd*, 499 U.S. 585 (1991).

54. Subject to Conditions of Contract on Last Pages IMPORTANT ! Please read contract - on last pages 1, 2, 3.

Terms and Conditions of Passage Contract Ticket:

The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket....

It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.

Washington, Shute would not have been injured. The Ninth Circuit considered the forum clause issue in applying *the Bremen*,⁽⁵⁵⁾ and here Shute was not a business person and the clause was not negotiated, and ruled that the clause should not be enforced because enforcement effectively would deprive Shute of opportunity to litigate claim against Carnival. The U.S. Supreme Court reversed.

The Supreme Court granted *certiorari* to consider the forum selection clause by refining the analysis of *the Bremen* to account for the realities of form passenger contracts. A passenger contract is purely routine and nearly identical to every commercial passage. A ticket of this kind is a form contract the terms of which are not subject to negotiation, and an individual purchasing the ticket will not have bargaining parity with the cruise line. Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons. First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of potential motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued. It bears emphasis that forum selection clauses contained in form passage contracts are subject to judicial review for funda-

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55. *The Bremen*, *supra* note 42.

mental fairness. In this case, there was no indication that Carnival set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims. Any suggestion of such a bad faith motive was belied by the two facts: Carnival has its principal place of business in Florida, and many of its cruises depart from and return to Florida ports. Similarly, there is no evidence that Carnival obtained the Shutes' accession to the forum clause by fraud or overreaching.

19) *Nissho Iwai America Corp. v. M/V Sea Bridge* (1991)⁽⁵⁶⁾

After time-barred for demanding arbitration, a cargo owner asked the U.S. District Court for the District of Maryland to reconsider, maintaining that arbitration clause⁽⁵⁷⁾ was invalid under the Harter Act; the cargo was carried above deck, which was not 'goods' under the COGSA. The Court denied reconsideration by stating after referring to the cases *S.S. Elikon*, *Indussa*, *the Bremen*, *Carnival Cruise*,⁽⁵⁸⁾ that the non-existence in the Harter Act of a provision making null and void clauses requiring arbitration combined with express provisions of the FAA made it clear that Congress did not intend to make null and void arbitration clauses like the one before the Court. The time-barred claim was due to failure of the cargo owner itself to comply with a foreign arbitration clause.

56. 1991 AMC 2070 (D.Md. 1991), *supra* note 8.

57. Arbitration clause: Any dispute arising from or relating to this Bill of Lading shall be referred to arbitration of three persons in Tokyo, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final and binding upon both parties. Any claim must be made in writing and the claimant's arbitrator must be appointed within twelve months from the date of final discharge; otherwise the claim shall be deemed waived and absolutely time barred.

58. *S.S. Elikon*, *supra* note 45. *Indussa*, *supra* note 39. *The Bremen*, *supra* note 42. *Carnival Cruise*, *supra* note 53.

20) *Kanematsu Corp. v. M/V Gretchen W* (1995)⁽⁵⁹⁾

Kanematsu purchased corn in Louisiana from Dreyfus, which arranged for shipping by chartering from Hyundai *the M/V Gretchen* owned by Black Stallion, to Japan. Much of the corn was damaged by exposure to water and heat in transit. A cargo owner Kanematsu filed a suit at the U.S. District Court for the District of Oregon for damages against *the M/V Gretchen*, *in rem*, the ship's owner and Hyundai, while the ship was at the port of Oregon. Defendants moved to stay the proceedings pending arbitration based on the bill of lading.⁽⁶⁰⁾ The Court stayed proceedings, waiting for the U.S. Supreme Court decision in *the M/V Sky Reefer*, and granted the motion to reopen the case after *the M/V Sky Reefer* was decided by the U.S. Supreme Court.

The cargo owner asserted that referring the case to a foreign arbitration would "lessen" defendants' liability in violation of the COGSA. The District Court adopting the decision of *the M/V Sky Reefer* stated that as the foreign arbitration clause did not violate the COGSA, there was no conflict between the COGSA and the FAA. The cargo owner was bound by the conditions of the bill of lading and had to arbitrate its disputes with defendants in London. This decision appears consistent with the Supreme Court and Congress' strong preference to promote arbitration agreements. Moreover, judicial economy was promoted by requiring a unified proceeding because the defendants would be arbitrating the dispute among themselves in London regardless of the cargo owner's presence. The Court noted that at the time this action was commenced, there was considerable

— 59. 897 F. Supp. 1314 (D.Ore. 1995).

四 60. The bill of lading: All terms, conditions and provisions of the Strike, Kightorage
九 Clause No. 6 and Arbitration Clause of the 'Centrocon' charter-party would apply. Centrocon, which applies to the grain trade, Arbitration Clause: All disputes from time to time arising out of this contract shall ... be referred to the final Arbitration of two arbitrators carrying on business in London.

disagreement among the Circuits as to whether foreign arbitration clauses in bills of lading conflicted with the COGSA, and because *the M/V Sky Reefer* resolved this conflict, the issue of the applicability of foreign arbitration clauses in bills of lading was no longer a “controlling question of law as to which there was substantial ground for difference of opinion.”

21) *Great American Ins. Co. v. M/V Kapitan Byankin* (1996)⁽⁶¹⁾

An insurance company as a subrogee filed a suit at the U.S. District Court for the Northern District of California for damage to cargo of oranges from California to Australia. The carrier based its defense on lack of jurisdiction under the clause in the bill of lading, which provided for Australian courts.⁽⁶²⁾ The Court upheld the forum selection clause; it did not “lessen” the carrier’s liability under the COGSA and it is valid pursuant to *the M/V Sky Reefer*. The plaintiff asked the Court to have the defendant waive its statutes of limitations defense in Australia as a condition to dismiss, to which the Court rejected, reasoning that as the plaintiff failed to timely file in the forum named in the forum selection clause, the plaintiff should bear the burden of the running of the statute of limitations. The Court finds that *the M/V Sky Reefer* does not require the waiver of the statute of limitations as a condition for dismissal.

22) *Fireman’s Fund Ins. Co. v. M/V DSR Atlantic* (1998)⁽⁶³⁾

An insurance company as a subrogee filed a suit at the U.S. District Court for the Northern District of California for freeze damage to a cargo of wine from France to California. The carrier defended itself on the basis

61. 1996 AMC 2754 (N.D.Cal. 1996).

62. The bill of lading: All actions against the ship owner may only be instituted at its principal place of business in Sydney, Australia.

63. 1996 AMC 878 (N.D.Cal.1995), *rev’d*, 131 F.3d 1336 (9th Cir. 1997), *cert. denied*, 525 U.S. 921 (1998).

of lack of jurisdiction under the clause in the bill of lading.⁶⁴⁾ The Court refused to enforce the forum selection clause, though it agreed that the holding in *the M/V Sky Reefer* should apply to the forum selection clause as well as the arbitration clause. There is no right of an *in rem* action in Korea, plaintiff's rights are clearly "lessened" within the meaning of Section 3(8) of the COGSA. The Court found the forum selection clause to be unenforceable. The Ninth Circuit reversed, upholding *the M/V Sky Reefer* and *the Carnival Cruise* for the arbitration clause and forum selection clause. The mere unavailability of *in rem* proceedings does not constitute a "lessening" of the specific liability imposed by the COGSA. As Korean law is at least as favorable as the COGSA to Fireman's Fund, Korean law will not "reduce" the carrier's obligation below what the COGSA guarantees. The Court concluded that the forum selection clause was enforceable, and remanded to the District Court to dismiss the matter for want of jurisdiction. The U.S. Supreme Court denied *certiorari*.

23) *Thyssen, Inc. v. Calypso Shipping Corp.* (2002)⁶⁵⁾

Thyssen, an importer, contracted for a cargo of steel coils to be delivered to the U.S., where they were found damaged by rust. Thyssen filed a suit for damages against the ship owner *in personam* and *the M/V Markos N*, *in rem* at the U.S. District Court for the Southern District of Texas, where the ship was in berth. In exchange for releasing the ship, Thyssen accepted a "Club Letter of Undertaking" promising to pay up to \$600,000

64. The bill of lading: The contract evinced by or contained in this Bill of Lading is governed by the law of Korea and any claim or dispute arising hereunder or in connection herewith shall be determined by the courts in Seoul and no other courts. (reverse side) For shipments to and from the U.S., the governing law is the COGSA.

65. 2001 U.S. Dis. LEXIS 11560 (S.D.N.Y. 2001), *aff'd*, 310 F.3d 102 (2nd Cir.2002), *cert. denied*, 123 S.Ct. 1573 (2003).

with a reservation of all defenses from the ship's insurer. The parties agreed three months later to transfer the case to the U.S. District Court for the Southern District of New York. The ship owner answered with defenses but without referring to the arbitration clause in the bill of lading.⁽⁶⁶⁾ One year and ten months after the alleged losses occurred, Thyssen moved for partial summary judgment. The ship owner opposed the motion and made a cross-motion to stay the proceedings under the FAA. The District Court stayed the proceedings leaving several issues to be decided by arbitration.

After arbitrators were appointed in London, the parties agreed to ask the Commercial Court of London to decide whether Thyssen's claims were time-barred. The Commercial Court decided that the claims were time-barred under English law, a one-year time bar on damaged-goods claims as the COGSA, and dismissed Thyssen's claims. The ship owner argued that the judgment of the Commercial Court should be enforced as if it were an arbitration award, which the District Court confirmed, stating that the decision of the Commercial Court was mutual, final and definite, and confirmation of the decision did not violate Section 3(8) of the COGSA. On appeal, Thyssen argued, *inter alia*, that as under English law arbitrators did not have *in rem* jurisdiction, forcing London arbitration *in rem* claims would be void under the COGSA. The Second Circuit affirmed the District Court's judgment, stating that Section 8 of the FAA⁽⁶⁷⁾ making clear that

66. Bill of lading: All terms and conditions, liberties and exceptions to the Charter-Party, including the Law and Arbitration Clause, are herewith incorporated.

Charter-Party: Disputes shall be resolved by arbitration in London under English law.

67. Section 8 of the FAA: If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then ... the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

where there was an arbitration clause in a contract, *in rem* proceedings served to provide a plaintiff with security while the *in personam* claim awaited arbitration. Almost all maritime disputes generate both *in personam* and *in rem* claims; if plaintiffs were able to bring *in rem* claims in court after the failure of their *in personam* claims before an arbitrator, parties would have no incentive to arbitrate maritime matters. Thyssen's *in rem* rights were protected in this case, as it accepted a Club Letter of Undertaking for \$600,000 as full security. The charter-party's arbitration clause was incorporated in the bill of lading. Section 3(8) of the COGSA did not render the arbitration clause in the charter-party invalid and the charter-party bound both Thyssen and the ship owner. The U.S. Supreme Court denied *certiorari*.

4. Review and Analysis

As mentioned above, maritime transactions have a long history and trade customs; therefore, it is a specialized area of international trade. In order to understand the development of arbitration in this area, relevant cases have been reviewed not only by selecting arbitration cases, but also by referring to critical cases on cargo transactions, jurisdiction, the Convention, the Harter Act and the COGSA.

There is a distinction between an arbitration clause and a forum selection clause. From the point of view of the COGSA, both are treated almost the same without distinction in substance. Upon the analysis previously taken by the courts, an increased cost and inconvenience to the cargo owner for initiating the proceedings or arbitration abroad would "lessen" the carrier's liability under the COGSA, and also there could be no assurance that the foreign arbitrator or the court would apply the COGSA in the same way as would an American tribunal. The U.S. Supreme Court states that foreign arbitration clauses are but a subset of foreign forum selection

clauses in general.⁽⁶⁸⁾ However, whereas even by ordering arbitration abroad, the court would retain jurisdiction to ensure that the legitimate interest in the enforcement of the laws has been addressed, the foreign forum selection clause ousts the jurisdiction of the U.S. courts, which was considered to be contrary to public policy.⁽⁶⁹⁾ The issue of the foreign jurisdiction and arbitration will be revisited later, and as the U.S. courts have held these issues by using the analogous analysis in the decisions, relevant cases are studied in this chapter.

1) The history of maritime trade is a long one. When loading goods on a ship, a carrier or the captain of the ship issues a bill of lading as a receipt of the goods and an agreement of transportation of the goods, and if negotiable, it constitutes a document of title. The bill of lading is said to have been used commonly in the sixteenth century. The oldest one found in Spain was issued in 1544.⁽⁷⁰⁾

At common law, common carriers by waters are liable for losses arising from the acts or negligence of others unless they happened by acts of God

68. *M/V Sky Reefer*, *supra* note 3. 515 U.S. at 534. (For example, Justice Stevens mentioned in his dissent that, of course, the objectionable feature in the instant bill of lading is a foreign arbitration clause, not a foreign forum selection clause. But this distinction is of little importance; in relevant aspect, there is little difference between the two... The majority reasoning ...thus presumably covers forum selection clauses as well as arbitration.)

69. *Indussa*, *supra* note 39, at 203. *M/V Sky Reefer*, *supra* note 3, at 533, 540. *The Bremen*, *supra* note 42, at 6. *Mitsubishi Motors*, *supra* note 13, at 638. *S.S. Monrosa*, *supra* note 32, at 300-301. *Carnival Cruise*, *supra* note 53, at 602.

70. Daniel E. Murray, *History and Development of the Bill of Lading*, 37 U. Miami L.Rev. 689 (1983). M. Bayard Crutcher, *The Ocean Bill of Lading -- A Study in Fossilization*, 45 Tul. L.Rev. 697 (1971). Anthony N. Zock, *Charter Parties in Relation to Cargo*, 45 Tul. L.Rev. 733 (1971). Yancey, *supra* note 4. See, *The Propeller Niagara*, *supra* note 15; Yancey, *id.* n.5. (This case is a virtual encyclopedia of the general maritime law of common carriage.); Brabdon L. Milhorn, Note: *M/V Sky Reefer: Arbitration Clause in Bill of Lading Under the COGSA*, 30 Cornell Int'l L.J. 173, n.20 (1997). (For a historical look at the common law of carrier liability, this case is a good starting point.)

or public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier. Common carriers by waters were thus like insurers, liable in all events, for every loss or damage, but some causes expressly precluding liability in the bill of lading were allowed. A carrier's duty for transporting goods by waters is to provide a seaworthy ship, necessary furniture and a competent crew for the voyage.

Carriers had tried to limit their liability in bills of lading. Even an old 1544 bill of lading is said to limit a carrier's liability for losses caused by dangerous seas. As case law developed in England and the U.S. on the extent of respective liability of carriers, ship owners, captains, and shippers for representation on bills of lading, confusions were recognized regarding respective liabilities of the parties.

The U.S. enacted the Harter Act in 1893,⁽⁷¹⁾ for domestic and international maritime trade. In 1936 the COGSA was enacted using similar language but its scopes are different as mentioned above. Section 3(8) of the COGSA as quoted above governs rights and obligations between a shipper and a carrier or ship, *i.e.*, the COGSA prohibits any clause relieving or lessening 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 and obligations.

2) The term "relieving or lessening" in Section 3(8) of the COGSA had created an issue for the U.S. courts as to how to apply the term to the situa-

71. The Harter Act provides in Section 190 for stipulations relieving from liability for negligence that: It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the U.S. and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

tion, particularly as in the cases discussed above. As litigation in a foreign forum or arbitration abroad needs expenses to travel there and imposes inconveniences for an American party to participate in the proceedings, the American party, *i.e.*, cargo owner, will get less net recovery of losses. If the amount of a claim is a small one, there may be a deficit considering the expenses for proceedings; as a result, the cargo owner is reluctant to file a claim abroad. The U.S. courts had decided cases by applying “relieving or lessening” based on this logic that if a foreign forum or arbitration abroad would result in “relieving or lessening” a liability of the carrier, then it was against the COGSA.

Regarding the domestic arbitration, there was an issue for the relationship between exclusive jurisdiction of the federal admiralty court and arbitration. Before enactment of the COGSA in 1936, arbitration cases *Red Cross* (1924)⁽⁷²⁾ and *Dreyfus* (1932)⁽⁷³⁾ affirmed domestic arbitration as agreed in a charter-party, though the COGSA does not cover the charter-party. In *Red Cross*, under the situation where the State of New York enacted the Arbitration Law of 1920 at the time before the FAA of 1925, the issue was whether the State Arbitration Law might apply to a maritime related dispute. The Court of Appeals of New York, the highest State court, reversed the Appellate Division’s order for arbitration stating that as the controversy was one of admiralty, under Article 3, Section 2 of the federal Constitution, the State had no power to compel the parties to proceed to arbitration. The U.S. Supreme Court granted *certiorari* but reversed the judgment of the State Court. The U.S. Supreme Court stated that in admiralty, agreements to submit controversies to arbitration were valid. Reference of maritime controversies to arbitration had long been common practice. The insertion in a charter-party of a provision for such settle-

72. *Red Cross*, *supra* note 19.

73. *Dreyfus*, *supra* note 21.

ment of disputes arising thereunder was practiced, at least, as early as the eighteenth century. New York Arbitration Law does not attempt either to modify the substantive maritime law or to deal with the remedy in courts of admiralty. As the constitutionality of the remedy provided by New York for use in its courts is not based on the practice or procedure which may prevail in admiralty, the Court has no occasion to consider whether the unwillingness of the Federal courts to give full effect to executory agreements for arbitration can be justified. In *Dreyfus*, after the enactment of the FAA of 1925, the constitutionality of the FAA was raised as an issue in comparison with the exclusive federal admiralty and maritime jurisdiction under Article 3, Section 2 of the federal Constitution. The U.S. Supreme Court upheld the constitutionality of the FAA by referring to the long common practice of arbitration in admiralty, and the authorization by the Congress for courts to direct arbitration. The Court cited the holding of *Red Cross* that in admiralty, agreements to submit controversies to arbitration were valid, and reference of maritime controversies to arbitration had long been common practice. The general power of the Congress to provide remedies in matters falling within the admiralty jurisdiction of the Federal courts, and to regulate their procedure, was indisputable. It was well settled that the Congress, in providing appropriate means to enforce obligations cognizable in admiralty, may draw upon other systems. The Congress had authorized the courts to direct the parties to proceed to arbitration in accordance with a valid stipulation of a maritime contract, and to enter a decree upon the award found to be regular and within the terms of the agreement.

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After the enactment of the COGSA, there arose some confusion for allowing arbitration. In *Uniao de Transportadores*,⁽⁷⁴⁾ the Court first affirmed the consistency of the FAA with the COGSA by reviewing the

74. *Uniao de Transportadores*, *supra* note 26.

relationship between both Acts, and granted arbitration in Lisbon by two Portuguese by limiting the particular case of facts. Arbitration abroad, however, was hardly granted under the COGSA. In *Pacific Lumber*,⁽⁷⁵⁾ arbitration in London was not granted for the reason that the bill of lading was not freely negotiated and the clause was a foreign forum clause, then the case was governed by the COGSA. In *State Establishment*,⁽⁷⁶⁾ arbitration in London was not granted for absent actual notice of a foreign arbitration clause when the bill of lading was signed. The Court also added that the place of arbitration did not have any connection with performance or making of bill of lading, which would conflict with the general purpose of the COGSA not allowing carriers to lessen their risk of liability.

Through the leading cases of *the Bremen*, *Mitsubishi Motors*, *Carnival Cruise* and *the M/V Sky Reefer*,⁽⁷⁷⁾ the situation has changed to allow arbitration abroad. In the *Nissho Iwai*,⁽⁷⁸⁾ arbitration clause, arbitration to be held in Tokyo, was held valid. The Court held that the Harter Act and the COGSA did not intend to make null and void arbitration clauses. *Kanematsu*,⁽⁷⁹⁾ waited for the U.S. Supreme Court decision on *the M/V Sky Reefer*, held that because a cargo owner was bound by the conditions of the bill of lading, and under *the M/V Sky Reefer*, the bill of lading's foreign arbitration clause did not conflict with the COGSA, the cargo owner had to arbitrate its dispute in London.

3) A forum selection clause and arbitration clause are not the same as mentioned above. The courts, however, had taken an analogous analysis

75. *Pacific Lumber*, *supra* note 43.

76. *State Establishment*, *supra* note 51.

77. *The Bremen*, *supra* note 42. *Mitsubishi Motors*, *supra* note 13. *Carnival Cruise*, *supra* note 53. *M/V Sky Reefer*, *supra* note 3.

78. *Nissho Iwai*, *supra* note 56.

79. *Kanematsu*, *supra* note 59.

whether to confirm the clauses. During these forty years, the courts had drifted in deciding the jurisdictional issue whether to confirm a foreign forum clause. In *Muller*,⁽⁸⁰⁾ the Swedish court jurisdiction was upheld under the jurisdiction clause, which was not unreasonable, considering that most of the evidence as to unseaworthiness would be more readily available in a Swedish court; the ship was constructed in Sweden, owned by Swedes and crews resided there. The Second Circuit first noted that Section 3(8) of the COGSA did not expressly invalidate the jurisdictional agreement contained in the bill of lading, nor might the Act properly be interpreted to invalidate such agreement. The COGSA contains no express grant of jurisdiction to any particular courts, nor any broad provisions of venue. Three years later, however, the Fifth Circuit in *S.S. Monrosa*⁽⁸¹⁾ took another view denying exclusive jurisdiction in Italian courts in a bill of lading, under the situation that the ship was owned by Italians, witnesses were residing in Italy because the survey of the cargo was made upon arrival at Genoa. The Fifth Circuit distinguished this case *in rem* suit⁽⁸²⁾ from *Muller*, in which a ship had been lost at sea. The U.S. Supreme Court granted *certiorari*, because of an indicated conflict in principle between the Fifth Circuit's view in *S.S. Monrosa* and those taken by the Second Circuit, primarily in *Muller*, but five months later dismissed it with four dissents, stating that the grant was improvident.⁽⁸³⁾ The dissenters stated

80. *Muller*, *supra* note 30.

81. *S.S. Monrosa*, *supra* note 32.

82. The Court mentioned in note that it was of no importance that the ship owner posted a bond to release the *S.S. Monrosa*. See *Thyssen*, *supra* note 65.

83. See Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 Tex. L.Rev. 1251 (1989). (This questionable use of *certiorari* jurisdiction results from the lack of an accepted standard for granting review when the courts of appeals diverge in their interpretations of federal law. at 1252. The Court has decided only two COGSA cases in the half-century since the Act's enactment. at 1256. See *Herd v. Krawill*, *supra* note 36; *US v. Atlantic Mut. Ins.*, 343 U.S. 236 (1952); *cf. S.S. Monrosa* (dismissing writ of *certiorari* as improvidently granted.)

that avoidance of the decision now on a question which was obviously bound to recur seemed to be both unsatisfactory and unsound judicial administration. This dissenters' forecast proved true before long. The Second Circuit in *Indussa* overruled *in banc* the decision of *Muller* as being inconsistent with the COGSA.⁽⁸⁴⁾ In *Indussa*, the forum was the carrier's principal place of business under the law of the country, *i.e.*, Norway and Norwegian law; however, the bill of lading was subject to the COGSA. The Court stated that the language of the COGSA would seem to forbid an American court from a holding that might cause a bill of lading to be subjected to foreign rather than American law in litigation. Requiring an American plaintiff to claim only in a distant court "lessened" the liability of the carrier quite substantially, particularly when the claim was small, in this case \$2,600. Such a clause put "a high hurdle" in the way of enforcing liability. One judge noted that using this approach, he found no necessity to proclaim the superiority of American courts, American law and the ample adequacy of American awards. The epoch-making case of *the Bremen*⁽⁸⁵⁾ was decided in 1972 admitting the London forum selection clause. *S.S. Elikon*⁽⁸⁶⁾ distinguished it from *the Bremen*, in which the forum selection clause was well negotiated, whereas the governing law of German laws and German forum selection clause in the bill of lading in this case was preprinted, and also the bill of lading was subject to the COGSA. The forum clause was an adhesion contract with one-sided form provision. The Fourth Circuit also reviewed *Indussa*, and reversed the District Court's decision of declining jurisdiction solely on the basis of the foreign selection clause in the bill of lading. In *the M/V Finnrose*,⁽⁸⁷⁾ where the

84. *Indussa*, *supra* note 39.

85. *The Bremen*, *supra* note 42.

86. *S.S. Elikon*, *supra* note 45.

87. *M/V Finnrose*, *supra* note 48.

governing law was Finnish laws and Finland forum selection clause in the bill of lading, and was also covered by the COGSA, the Fifth Circuit examined cases of *the Bremen*, *S.S. Monrosa*, *Indussa*, *S.S. Elikon*,⁽⁸⁸⁾ and distinguishing them from *the Bremen*, which was not a COGSA case, as inapposite, concluded that in view of the statutory language of the COGSA and also considering the pertinent authorities, the District Court erred in declining jurisdiction.

In 1991 came *Carnival Cruise*,⁽⁸⁹⁾ with Florida forum selection clause in form passage contracts, to which the U.S. Supreme Court granted *certiorari*, and by refining the analysis of *the Bremen*⁽⁹⁰⁾ concluded that the choice of a forum clause in the contract was valid. The Court noted that specifying the fora in form passage contracts may be useful for avoiding any confusion for bringing and defending suit, sparing litigants the time and expense, and resulted in reducing fares of tickets for passengers, and held that specifying Florida court was reasonable because Carnival Cruise had a principal place of business in Florida, many of its cruises ran Florida port, and passengers were given notice of the forum clause.

4) *The M/V Sky Reefer*⁽⁹¹⁾ may be viewed as a cumulative result of the precedents of *the Bremen* and *Carnival Cruise*⁽⁹²⁾ in maritime arbitration, even though these two precedents are not arbitration cases but forum selection cases.

The provision of prohibiting “relieving and lessening of liability” in the COGSA had precluded the enforcement of the forum selection clause.

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88. *The Bremen*, *supra* note 42. *S.S. Monrosa*, *supra* note 32. *Indussa*, *supra* note

39. *S.S. Elikon*, *supra* note 45.

89. *Carnival Cruise*, *supra* note 53.

90. *The Bremen*, *supra* note 42.

91. *M/V Sky Reefer*, *supra* note 3.

92. *The Bremen*, *supra* note 42. *Carnival Cruise*, *supra* note 53.

Once *Muller* in 1955 held Swedish forum clause, *S.S. Monrosa* distinguishing from it to hold a forum selection clause to be unenforceable, and *Indussa* overruled *Muller*, then *S.S. Elikon* and *M/V Finnrose*⁽⁹³⁾ were on the same line as *Indussa*. *The M/V Sky Reefer* in 1995, forty years after *Muller*, upheld a foreign arbitration clause in maritime transactions. Though *the Bremen* made a turning point for foreign forum clauses, the Circuit Courts have tried to distinguish from it, and then *Carnival Cruise* was the second wave following-up to refine the analysis of *the Bremen* in evaluating the reasonableness of the forum clause.⁽⁹⁴⁾ In *the Bremen*, the U.S. Supreme Court addressed the enforceability of a forum clause of negotiated agreement between two business corporations, and in *Carnival Cruise*, for a forum selection clause in a form passage contract of non-negotiated tickets between parties of imbalanced bargaining powers, the Court added economic aspects in litigation and fares of tickets, basically maintaining “the reasonableness of the forum clause”.⁽⁹⁵⁾

Since its decision in *the Bremen*, and through *Mitsubishi Motors* as was influenced by *the Bremen* in an arbitration agreement of international trade, the U.S. Supreme Court has supported party autonomy by uphold-

93. *Muller*, *supra* note 30. *S.S. Monrosa*, *supra* note 32. *Indussa*, *supra* note 39. *S.S. Elikon*, *supra* note 45. *M/V Finnrose*, *supra* note 48.

94. *Carnival Cruise*, *supra* note 53. 499 U.S. at 593

95. Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts after Carnival Cruise: A Proposal for Congressional Reform*, 67 Wash. L.Rev. 55 (1992). (The Court’s most recent pronouncement holds the promise of turning forum selection agreements from instruments of freedom to instruments of economic oppression. at 59) However, the Court maintains “the reasonableness” of the forum clause. See 499 U.S. at 593-4. C. Christine Fahrenback, Note: *M/V Sky Reefer: A Change in Course: COGSA Does Not Invalidate Foreign Arbitration Clauses in Maritime*, 29 Akron L.Rev. 371 (1996). (Despite the Court’s portrayal of *Carnival Cruise* as a refinement of *the Bremen*, it represented a significant expansion of the principles previously set forth by the Court, and strengthened the presumption that forum selection clauses are valid and enforceable. at 382)

ing a forum clause and an arbitration clause found in international commercial contracts.

5) Under the FAA and federal policy, an arbitration agreement is enforced as the parties agreed. Arbitration is a matter of contract. In maritime transactions as are reviewed here, a contract by way of bill of lading, usually terms in the preprinted form, includes an arbitration clause or incorporates an arbitration clause in a charter-party into the bill of lading by clear reference thereto. Incorporation of an arbitration clause in the charter-party and in a bill of lading by reference is usually acceptable as a customary practice; however, it is subject to a specific method to be recognized by the holder of the bill of lading such as actual or constructive notice of the charter-party to the holder. *Pacific Lumber*⁽⁹⁶⁾ illustrated the case, where the bill of lading was received by a shipper after the ship had sailed, the bill of lading was held to be an adhesion contract, imposing terms by a carrier unilaterally and never agreed to by the shipper. The clause was held to violate the COGSA.

An arbitration agreement is binding on the parties who agreed or signed. As exception to this contract theory, non-parties may be bound by the agreement to arbitrate. For example, a bill of lading with an arbitration clause was issued by a carrier, when the goods were loaded on a ship, to a shipper, who transfers it to a consignee through an arrangement of issuing a letter of credit by a bank for a payment of the goods.⁽⁹⁷⁾ Depending on the fact for the person loading the goods on a ship, a shipper and a consignee may be separate or the same entity. In a case where a shipper and a consignee are separate and the consignee is just a transferee of the bill of

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96. *Pacific Lumber*, *supra* note 43.

97. A shipper is a cargo owner who loads the goods on a ship. A consignee is the party designated to receive the shipped goods from the carrier.

lading for not negotiating its terms, if a dispute arises between the carrier and the consignee after the bill of lading was transferred to the consignee, is the consignee bound by the arbitration clause in the bill of lading ? *Kanematsu*⁽⁹⁸⁾ illustrated this situation, taking agency theory for the relationship between a shipper and a consignee. The consignee Kanematsu was held to be bound by the bill of lading, which was negotiated between the carrier and the shipper, who acted as an agent for the consignee.⁽⁹⁹⁾ Another situation is shown by *Steel Warehouse v. Abalone Shipping*,⁽¹⁰⁰⁾ where Steel Warehouse, a consignee, filed a suit against a shipper, ship owner and others for damage of cargo. An arbitration clause in the charter-party was incorporated in the bill of lading, which Steel Warehouse did not negotiate. The U.S. Court of Appeals for the Fifth Circuit held that a plain language of the bill of lading⁽¹⁰¹⁾ made it clear to incorporate the terms of the charter-party including an arbitration clause. Steel Warehouse was a sophisticated party. The arbitration clause of the type at issue was standard operating procedure in this line of business, and the bill of lading at

98. *Kanematsu*, *supra* note 59.

99. See Bagot, Jr. and Henderson, *Not Party, Not Bound ? Not Necessarily: Binding Third Parties to Maritime Arbitration*, 26 Mar. Law. 413 (2002). (Traditionally, there are five theories of agency and contract law that constitute exceptions to the signature requirement. The exceptions are common law principles of agency and contract, and specifically include: agency, estoppel, alter ego/ veil piercing, incorporation by reference and assumption.)

100. 141 F.3d 234 (5th Cir.), *reh'g denied*, 1998 U.S. App. LEXIS 18509 (5th Cir. 1998). Steel Warehouse entered a steel coils purchase contract with Mathan, which shipped the steel coils on *the M/V Vical*, owned by Abalone, under time charter to Panoceanica. A charter-party was agreed between Panoceanica and Mathan for voyage charter of *the M/V Vical*. A bill of lading was presented by Mathan to a bank for payment, then delivered to Steel Warehouse. When the ship arrived at New Orleans, steel coils were damaged by rust. Steel Warehouse sued against a shipper, ship owner and others.

101. Bill of lading: Freight Payable as per Charter-Party dated 21 October 1994, All Terms and Conditions of which are incorporated in this B/L.

issue was on a common, internationally recognized form. If the charter-party clause was properly incorporated, Steel Warehouse should have known what was around the corner, given the totality of the circumstances. Given the facts, proper incorporation yields constructive notice. The arbitration clause⁽¹⁰²⁾ in the charter-party was broad, it was not limited to owner and charterers, but also applied to a consignee. Thus, the court takes a two-step analysis for applying terms of a charter-party to a third party. The first step is whether the terms of the charter-party actually incorporate into the bill of lading, *i.e.*, the bill of lading clearly refers to the charter-party, and there is actual notice or constructive notice of the incorporation. The second step is whether the arbitration clause is broad, and if so, it applies to a third party.⁽¹⁰³⁾

Though cases will be studied reflecting the facts of each case, the main stream for an international arbitration clause in maritime transactions may be considered settled under the COGSA,⁽¹⁰⁴⁾ at least an agreement on arbitration by the parties may be recognized and enforceable to be held in the U.S.

102. Arbitration clause: All disputes from time to time arising out of this contract shall ... be referred to final arbitration in London.

103. See Bagot, Jr. and Henderson, *supra* note 99. Lisa Beth Chessin, *The Applicability of an Arbitration Clause Contained in a Bill of Lading to Third Parties: Steel Warehouse v. Abalone Shipping*, 23 Mar. Law. 575 (1999).

104. In 1993, however, the U.S. Maritime Law Association began to draft a new law concerning a forum selection clause effectively contemplating to overturn the decision of *the M/V Sky Reefer*, and a revised draft was submitted to be known as the "Senate COGSA '99", which provides that: notwithstanding a provision in a contract of carriage or other agreement to which this subsection applies that specifies a foreign forum for litigation or arbitration of a dispute to which this Act applies, a party to the contract or agreement, at its option, may commence such litigation or arbitration in any appropriate forum in the U.S. if one or more of the following conditions exist: *

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Conclusion

During the long history of international maritime transactions, settlement of disputes by arbitration or litigation was at the mercy of the waves under common law and enactment of the Harter Act and the COGSA. Under the common law era, settlement of a dispute was not so restricted. Under the era these Acts were enacted to forbid “relieving or lessening” a carrier’s liability, and international fora for settlement of dispute were limited. The reasoning for the limitation was that adding burdens to cargo owners, and American parties, by incurring expenses and inconveniences for settlement of disputes abroad would lessen or relieve carriers’ liability, which appeared curiously unconvincing. The U.S. Supreme Court in *the M/V Sky Reefer* correctly holds that the statute 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, *i.e.*, excluding increases in the transaction costs of litigation.⁽¹⁰⁵⁾ More than twenty years were needed to steer to the right route since *the Bremen*, which held that the historical judicial resistance to foreign forum selection clause had little

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- * i) The port of loading or the port of discharge is, or was intended to be in the U.S.,
 or
 ii) The place where the goods is received by a carrier or the place where the
 goods is delivered to a person authorized to receive them is, or was intended to
 be in the U.S., or
 iii) The principal place of business or, in absence thereof, the habitual residence
 of the defendant is in the U.S., or
 iv) The place where the contract was made is in the U.S., or
 v) A forum specified for litigation or arbitration under a provision in the contract
 of carriage or other agreement is in the U.S.

See William Tetley, *The Proposed New U.S. Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law*, 30 J. Mar. L. & Com. 595 (1995). Axel Gehringer, *After Carnival Cruise and Sky Reefer: An Analysis of Forum Selection Clauses in Maritime and Aviation Transactions*, 66 J. Air. L. & Com. 633 (2001).

105. *M/V Sky Reefer*, *supra* note 3. 515 U.S. at 534.

place in an era when ... business once essentially local now operated in world markets. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, the U.S. court insists on a parochial concept that all disputes must be resolved under U.S. laws in U.S. courts.⁽¹⁰⁶⁾

The U.S. Supreme Court recognizes the goal of the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading of 1924, and under which none has been interpreted to prohibit foreign forum selection clauses. Arbitration to be held abroad under the parties' agreement is enforceable. Party autonomy under the COGSA is recognized and expanded in the sphere of maritime transactions.

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106. *The Bremen*, *supra* note 42. 473 U.S. at 9, 12. *Mitsubishi Motors*, *supra* note 13.