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Foreign Arbitration Clauses and Foreign Forum Selection Clauses in Bills of Lading Governed by COGSA: *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*

I. INTRODUCTION

The Supreme Court's recent holding in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*[1] resolves a split in the circuit courts[2] over the enforceability of foreign arbitration clauses in maritime bills of lading governed by the Carriage of Goods by Sea Act (COGSA).[3] In addition, the majority opinion, in dictum, ostensibly overrules[4] the Second Circuit's decision in *Indussa Corp. v. S.S. Ranborg*,[5] the seminal case invalidating foreign forum selection clauses under COGSA.[6]

While there is no published scholarly commentary yet on the Supreme Court's decision in *Vimar Seguros*,[7] the decision has been interpreted by several federal and state courts. Many of these courts have focused on the holding as it affects foreign arbitration clauses.[8] A few, however, have relied on the Court's

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

2. *See infra* note 51.

3. 46 U.S.C. app. §§ 1300-1315 (1994).

4. *Vimar Seguros*, 115 S. Ct. at 2326 (declaring that "we cannot endorse the reasoning or the conclusion of the *Indussa* rule").

5. 377 F.2d 200 (2d Cir. 1967) (en banc).

6. *See infra* note 24 for cases that have followed *Indussa*.

7. There is, however, a Note on the First Circuit's decision: Mark S. Rubin, Note, *The Validity of Foreign Arbitration Clauses in Bills of Lading Governed by COGSA*: Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 19 TUL. MAR. L.J. 499 (1995).

8. *See, e.g.*, Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64 F.3d 993, 996 (5th Cir. 1995) (describing the *Vimar Seguros* holding as "enforcing a contractual provision mandating arbitration in Tokyo, Japan"); Morewitz v. West of Eng. Ship Owners Mut. Protection and Indem. Ass'n, 62 F.3d 1356, 1361 n.9 (11th Cir. 1995) (using *Vimar Seguros* to establish that "foreign arbitration clauses in bills of lading are not invalid under the Carriage of Goods by Sea Act"), *cert. denied*, 116 S. Ct. 915 (1996); Kanematsu Corp. v. M/V Gretchen W, 897 F. Supp. 1314, 1316 (D. Or. 1995) (describing *Vimar Seguros* as "concluding that the arbitration clause did not violate COGSA"); Lambdin v. District Court, 903 P.2d 1126, 1131 (Colo. 1995) (en banc) (explaining the defendant's claim that *Vimar Seguros* stands "for the proposition that a claimant does not forego substantive

comment about overturning *Indussa* and have extended *Vimar Seguros* to uphold foreign forum selection clauses.[9]

The broadest reading of *Vimar Seguros* to date is the Second Circuit's decision in *Effron v. Sun Lines Cruises*.[10] Traditionally, foreign forum selection clauses in bills of lading were only enforceable if they cleared two hurdles. First, the clauses could not violate COGSA.[11] Second, foreign forum selection clauses, like all forum selection clauses, had to pass the reasonableness test imposed by *M/V Bremen v. Zapata*[12] and *Carnival Cruise Lines, Inc. v. Shute*.[13] Because litigating abroad imposes a higher burden than does litigating in a domestic forum, the reasonableness of foreign forum selection clauses has traditionally been suspect. While *Vimar Seguros* only addressed the validity of foreign forum selection clauses under COGSA in dictum and did not address the reasonableness of these clauses at all, *Effron* read *Vimar Seguros* both as enforcing foreign forum selection clauses under COGSA and as eliminating "the foreign versus domestic distinction" for purposes of testing the reasonableness of a forum selection clause.[14]

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statutory rights by agreeing to arbitration").

9. *See* Effron v. Sun Line Cruises, Inc., 67 F.3d 7, 10 (2d Cir. 1995) (observing that "[i]n *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* the Supreme Court enforced a forum-selection clause contained in a form contract and rejected the foreign versus domestic distinction") (citation omitted); Nippon Fire & Marine Ins. Co. v. M.V. Egasco Star, No. 94 Civ. 6813, 1995 WL 577722, at *7 n.8 (S.D.N.Y. Sept. 29, 1995) (stating that *Vimar Seguros* "[o]verrul[ed] the Second Circuit's decision in Indussa Corp. v. S.S. Ranborg" and "held that COGSA does not nullify foreign forum selection clauses"); Dace Int'l, Inc. v. Apple Computer, Inc., 655 N.E.2d 974, 979 (Ill. App. Ct. 1995) (stating that *Vimar Seguros* "upholds the validity of a foreign forum selection clause").

10. 67 F.3d 7 (2d Cir. 1995).

11. *See infra* note 22 and accompanying text.

12. 407 U.S. 1, 17 (1972) ("[T]he serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause.").

13. 499 U.S. 585, 595 (1991) ("[F]orum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness.").

14. *Effron*, 67 F.3d at 10. The court's elimination of the foreign versus domestic distinction seems strange, considering that both the *Bremen* and *Carnival* Courts noted that the forum selection clauses in those cases did not imposa the inconvenience of litigating in a "remote alien forum." *Bremen*, 407 U.S. at 17 ("Wo are not dealing here with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum."); *Carnival*, 499 U.S. at 594 ("Florida is not a 'remote alien forum.'").

To follow the Second Circuit in holding that after *Vimar Seguros* the inconvenience of litigating in a forum outside the United States can have no bearing on the reasonableness of a forum selection clause would be especially

If courts interpret *Vimar Seguros*' dictum—that foreign forum selection clauses are enforceable under COGSA—to be a holding, as the *Effron* court did, then COGSA's goal of preventing shippers from inappropriately limiting their liability will be undermined.[15] To uphold the goals of COGSA, *Vimar Seguros* should be read narrowly; this Note explains why *Vimar Seguros* should interpreted as enforcing merely foreign arbitration clauses, not foreign forum selection clauses.

Part II of this Note provides historical background on the enforceability of foreign arbitration and forum selection clauses. Part III provides the pertinent facts of *Vimar Seguros*, while Part IV presents the reasoning of the Court. Part V distinguishes foreign arbitration clauses and foreign forum selection clauses, arguing that only the former are clearly enforceable under COGSA. Because important distinctions exist between foreign arbitration clauses and foreign forum selection clauses, this Note concludes that *Vimar Seguros* can and should be limited to requiring enforcement of foreign arbitration clauses under COGSA.

II. BACKGROUND

A. *Foreign Forum Selection Clauses*

While arbitration clauses are a relatively recent development, forum selection clauses have been used and litigated since the end of the last century and "have historically not been favored by American courts."[16] The Supreme Court first nullified a foreign forum selection clause in 1900[17] under the Harter Act,[18] which served as a precursor to COGSA in its

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problematic with consumer adhesion contracts, such as that upheld in *Carnival*. The Appellate Court of Illinois noted such a concern in its rejection of "the wide swipe of *Carnival*." Dace Int'l, Inc. v. Apple Computer, Inc., 655 N.E.2d 974, 979 (Ill. App. Ct. 1995). "We would hope that Honda, B.M.W. or Saab warranty claims might not be limited only to forums in Osaka, Munich or Stockholm." *Id.* at 978.

15. For a brief discussion of the history and goals of COGSA, see 1 THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE *TRAVAUX PRÉPARATOIRES* OF THE HAGUE RULES 3-23 (Michael F. Sturley ed., 1990).

16. *Bremen*, 407 U.S. at 9. Note, however, that recent Supreme Court decisions have favored enforcing reasonable forum selection clauses. *See infra* text accompanying notes 33-43.

17. Knott v. Botany Mills, 179 U.S. 69 (1900); *see also* Prince Steam-Shipping Co. v. Lehman, 39 F. 704 (S.D.N.Y. 1889) ("Such agreements have repeatedly been held to be against public policy, and void.").

18. 46 U.S.C. app. §§ 190-196 (1994).

attempt to define the relative liability of shippers and carriers through regulation of bills of lading.[19]

COGSA, enacted in 1936, was modeled after[20] both the Harter Act and the Hague Rules, an international convention establishing limits on the liability of shippers and carriers.[21] COGSA does not directly address forum selection clauses, but section 3(8) provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties 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.[22]

Courts have relied on section 3(8) to invalidate foreign forum selection clauses in bills of lading, reasoning that these clauses lessen the liability of the carrier. The unenforceability of forum selection clauses under COGSA has been a well established legal doctrine;[23] courts have consistently followed[24] the Sec-

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19. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 145, 149 (2d ed. 1975).

20. *See* 1 THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE *TRAVAUX PRÉPARATOIRES* OF THE HAGUE RULES, *supra* note 15, at 8-9.

21. International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233.

22. 46 U.S.C. app. § 1303(8) (1994).

23. *See* Carbon Black Export, Inc. v. The SS Monrosa, 254 F.2d 297, 300-01 (5th Cir. 1958) (It is a "universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced."), *cert. dismissed*, 359 U.S. 180 (1959); Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941, 942 (2d Cir. 1930) ("We may at the start lay aside the clauses in the bills of lading, which apparently were intended to confine any litigation over the contracts to a French court. . . . [I]t is of course well settled that they would not [be valid]." (citations omitted)); The Ciano, 58 F. Supp. 65 (E.D. Pa. 1944); Kuhnhold v. Compagnie Generale Transatlantique, 251 F. 387 (S.D.N.Y. 1918). *But see* William H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806, 808 (2d Cir.) (stating that "enforceability of such an agreement depends upon its reasonableness"), *cert. denied*, 350 U.S. 903 (1955), *and overruled in part by* Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967). *Muller* represents a second, less widely followed approach to foreign forum selection clauses in bills of lading. *See* C. Andrew Waters, *The Enforceability of Forum Selection Clauses in Maritime Bills of Lading: An Update*, 15 TUL. MAR. L.J. 29, 31 (1990). See *id.* at 30-31 for a fuller discussion of the pre-*Bremen* cases.

24. *See, e.g.*, State Establishment for Agric. Prod. Trading v. M/V Wesermunde, 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988); Conklin & Garrett, Ltd. v. M/V Finnrose, 826 F.2d 1441 (5th Cir. 1987); Sun World Lines

ond Circuit's decision in *Indussa Corp. v. S.S. Ranborg*,[25] which held that foreign forum selection clauses violate COGSA.

In *Indussa*, a New York corporation was the consignee of a load of nails and barbed wire that was being shipped from Belgium to San Francisco.[26] The bill of lading, issued by the Costa Rican concern which chartered the vessel, contained a forum selection clause limiting all disputes to the country of the carrier's principal place of business. The bill of lading gave no indication that the carrier's principal place of business was Norway and only gave a U.S. address for the Costa Rican charterer.[27] With an amount of only $2600 in dispute, the Second Circuit determined that "[f]rom a practical standpoint, to require an American plaintiff to assert his claim only in a distant court lessens the liability of the carrier quite substantially, particularly when the claim is small."[28]

The Second Circuit suggested that foreign forum selection clauses limit the liability of carriers under COGSA for three reasons: (1) the practical difficulties of pressing one's claim in a distant forum present a "high hurdle" to enforcing liability;[29] (2) liability is lessened if the foreign court applies "neither the Carriage of Goods by Sea Act nor the Hague Rules";[30] and (3) in all cases liability is potentially lessened because there is no guarantee that a foreign court will apply COGSA or the Hague Rules "in the same way as would an American tribunal subject to the uniform control of the Supreme Court."[31] According to the court, any potential lessening of liability would be sufficient under COGSA to render the clause unenforceable.[32]

The *Indussa* regime was first disturbed by the Supreme Court's holding in *M/V Bremen v. Zapata Off-Shore Co.*[33] In

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Ltd. v. March Shipping Corp., 801 F.2d 1066 (8th Cir. 1986); Union Ins. Soc'y v. S.S. Elikon, 642 F.2d 721 (4th Cir. 1981). *But see, e.g.*, Fireman's Fund Am. Ins. Cos. v. Puerto Rican Forwarding Co., 492 F.2d 1294 (1st Cir. 1974) (distinguishing *Indussa* to enforce a forum selection clause when the forum was in the United States); Roach v. Hapag-Lloyd, A.G., 358 F. Supp. 481 (N.D. Cal. 1973) (ignoring *Indussa* because the case involved indemnification for injury to a longshoreman, rather than for damage to cargo).

25. 377 F.2d 200 (2d Cir. 1967) (en banc).
26. *Id.*
27. *Id.* at 201.
28. *Id.* at 203.
29. *Id.*
30. *Id.* at 203-04.
31. *Id.* at 204.
32. *Id.*
33. 407 U.S. 1 (1972).

Bremen, the Court held that a forum selection clause in a maritime contract was "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[34] The *Bremen* Court cited the need to promote the continued expansion of international trade,[35] the importance of freedom of contract,[36] and the desirability of bringing the United States in line with the approach of other common-law countries.[37] *Bremen*'s holding, however, does not displace *Indussa*. Despite *Bremen*'s general support of reasonable forum selection clauses, it did not address the question of the enforceability of forum selection clauses in bills of lading and other documents governed by COGSA.[38]

In the most recent Supreme Court decision regarding forum selection clauses, *Carnival Cruise Lines, Inc. v. Shute*,[39] the Court enforced a forum selection clause in a consumer adhesion contract.[40] Instead of using both the "reasonable" and "freely negotiated" standards of *Bremen*, the Court used only a reasonableness test. It determined the reasonableness of the forum selection clause by looking at such factors as (1) the cruise line's "special interest in limiting the fora in which it potentially could be subject to suit";[41] (2) the "salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants . . . time and expense . . . and conserving judicial resources that otherwise would be devoted to deciding [the proper forum]";[42]

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34. *Id.* at 10.

35. *Id.* at 8-9 ("The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.").

36. *Id.* at 11 (observing that enforcing forum selection clauses "accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world"). The *Bremen* decision also stressed that the forum selection clause at issue was freely negotiated. "There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." *Id.* at 14 (footnote omitted).

37. *Id.* at 11 (noting that "[t]his approach is substantially that followed in other common-law countries including England").

38. *See id.* at 10 n.11 (noting that COGSA was not applicable).

39. 499 U.S. 585 (1991).

40. *Id.* at 587.

41. *Id.* at 593.

42. *Id.* at 593-94.

and (3) the resulting benefit to passengers of lower fares.[43] Like *Bremen*, however, *Carnival* did not overturn *Indussa* because *Carnival* dealt with a consumer contract, which falls outside the scope of COGSA.[44] Thus despite the endorsement of forum selection clauses in *Carnival* and *Bremen*,[45] the Supreme Court, prior to *Vimar Seguros*, had not discussed whether foreign forum selection clauses lessen a carrier's liability under COGSA.

B. Foreign Arbitration Clauses

Like foreign forum selection clauses, arbitration clauses were traditionally rejected by courts, which held that they were void for public policy reasons.[46] The adoption of the Federal Arbitration Act (FAA) in 1925,[47] however, mandated enforcement of arbitration clauses in contracts for interstate commerce, overturning the traditional rule against enforceability.[48] In 1985, the Supreme Court reaffirmed the importance of enforcing foreign arbitration clauses in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[49] In spite of the broad policy justifications for arbitration clauses that these cases presented and the express applicability of the FAA to maritime transactions,[50] some courts continued to follow *Indussa*'s reasoning, holding that foreign arbitration clauses were invalid under COGSA because they limited the liability of the shipper.[51] A

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43. *Id.* at 594.

44. *See* 46 U.S.C. app. § 1300 (1994).

45. *See supra* text accompanying notes 33-43.

46. *See In re* Pahlberg, 43 F. Supp. 761, 763 (S.D.N.Y.) (reviewing the history of judicial animosity towards enforcing arbitration clauses), *appeal dismissed*, 131 F.2d 968 (2d Cir. 1942).

47. 9 U.S.C. §§ 1-208 (1994).

48. *See* Albatross S.S. Co. v. Manning Bros., 95 F. Supp. 459, 462-63 (S.D.N.Y. 1951).

49. 473 U.S. 614, 631 (1985) (noting the Court's "strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes"); *see also* Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 482-84 (1989).

50. *See* 9 U.S.C. § 1 (1994).

51. Cases extending *Indussa* to invalidate foreign arbitration clauses include State Establishment for Agric. Prod. Trading v. M/V Wesermunde, 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988); Organes Enters. v. M/V Khalij Frost, 1989 A.M.C. 1460 (S.D.N.Y. 1989); Siderius, Inc. v. M.V. Ida Prima, 613 F. Supp. 916 (S.D.N.Y. 1985); Pacific Lumber & Shipping Co. v. Star Shipping, A/S, 464 F. Supp. 1314 (W.D. Wash. 1979).

Cases enforcing foreign arbitration clauses in bills of lading include Vimar Seguros y Reaseguros v. M/V Sky Reefer, 29 F.3d 727 (1st Cir. 1994), *aff'd*, 115 S.

split in the circuit courts over the enforceability of foreign arbitration clauses under COGSA thus emerged.

III. *VIMAR SEGUROS Y REASEGUROS*

The *Vimar Seguros* Court sought to resolve this split over the enforceability of foreign arbitration clauses. In the transaction giving rise to the *Vimar Seguros* case, Bacchus Associates (Bacchus), a New York fruit distributor, purchased a shipload of Moroccan lemons and oranges and arranged for it to be transported to Massachusetts by M/V Sky Reefer, a Panamanian ship owned by M.H. Maritima, S.A. and time-chartered to Nichiro, a Japanese company.[52] Nichiro issued a bill of lading to the Moroccan shipper, who subsequently tendered it to Bacchus.[53] When the shipment arrived in Massachusetts, Bacchus discovered that thousands of boxes of oranges had shifted, causing over one million dollars in damage.[54] Bacchus and its subrogated insurer, Vimar Seguros, sued Maritima in personam and M/V Sky Reefer in rem under the bill of lading in the District Court for the District of Massachusetts.[55]

The defendants moved to stay the action and force arbitration in Tokyo under the terms of the bill of lading and section 3 of the Federal Arbitration Act.[56] Bacchus and Vimar Seguros argued that the bill of lading was an adhesion contract and that both the foreign arbitration and forum selection clauses violated COGSA section 3(8) because they lessened the carrier's liability.[57]

Ct. 2322 (1995); Nissho Iwai Am. Corp. v. M/V Sea Bridge, 1991 A.M.C. 2070 (D. Md. 1991); Citrus Mktg. Bd. of Isr. v. M/V Ecuadorian Reefer, 764 F. Supp. 229 (D. Mass. 1990); Travelers Indem. Co. v. M/V Mediterranean Star, 1988 A.M.C. 2483, (S.D.N.Y. 1988); Mid South Feeds, Inc. v. M/V Aqua Marine, 1988 A.M.C. 437 (S.D. Ga. 1986).

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

53. *Id.*

54. *Id.*

55. *Id.*

56. 9 U.S.C. § 3 (1994) ("If any suit . . . be brought . . . upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit . . . is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.").

57. *Vimar Seguros*, 115 S. Ct. at 2325.

The district court rejected both arguments, retained jurisdiction pending arbitration, and certified for interlocutory appeal the question of whether COGSA section 3(8) "nullifies an arbitration clause contained in a bill of lading governed by COGSA."[58] The First Circuit affirmed the arbitration order but did not directly resolve the question of whether COGSA nullifies foreign arbitration clauses:

> We join those courts upholding the validity of foreign arbitration clauses in bills of lading subject to COGSA. In reaching this result, we are guided by our belief that the FAA alone governs the validity of arbitration clauses, both foreign and domestic, and consequently removes them from the grasp of COGSA.
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> . . . .
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> We recognize, however, that absent the FAA, COGSA might operate to nullify foreign arbitration clauses in bills of lading.[59]

IV. THE *VIMAR SEGUROS* COURT'S REASONING

In contrast to the First Circuit, the Supreme Court directly confronted the effect of COGSA on foreign arbitration clauses. In a seven-to-one decision,[60] the Court upheld the general enforceability of foreign arbitration clauses in bills of lading under COGSA.[61] Both the majority and the dissent focused on underlying policy concerns and the text or background of COGSA. Despite their differing conclusions, neither found it necessary to resolve the possible conflict between COGSA and the FAA, as the First Circuit had.[62] Justice Kennedy, writing for the majority, focused primarily on the statutory language of

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58. *Id.* at 2325-26.

59. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 29 F.3d 727, 731-32 & n.5 (1st Cir. 1994), *aff'd*, 115 S. Ct. 2322 (1995).

60. Justice Stevens was the lone dissenter. Justice Breyer took no part in the decision.

61. *Vimar Seguros*, 115 S. Ct. at 2325.

62. *Compare id.* (stating that "[o]ur holding that COGSA does not forbid selection of the foreign forum makes it unnecessary to resolve the further question whether the Federal Arbitration Act (FAA) would override COGSA were it interpreted otherwise") (citation omitted) *with* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 29 F.3d 727, 731-32 (1st Cir. 1994) (stating that when upholding the validity of foreign forum selection clauses in bills of lading, "we are guided by our belief that the FAA alone governs the validity of arbitration clauses, both foreign and domestic, and consequently removes them from the grasp of COGSA").

COGSA section 3(8), the precedent of *Carnival*,[63] the fact that the district court had retained jurisdiction, and the general internationalist policy of the Hague Rules.[64]

The majority first concentrated on the statutory interpretation of COGSA section 3(8). They noted that section 3 "establishes certain duties and obligations, separate and apart from the mechanisms for their enforcement" but does not mention forum selection clauses.[65] The majority interpreted the omission to mean that "[n]othing in this section . . . prevents the parties from agreeing to enforce [the] obligations [of section 3] in a particular forum."[66] The majority supported this interpretation by relying on the use of similar statutory interpretation in *Carnival*. There the Court held that the expense and inconvenience of litigation in a distant forum was not enough to "'lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction.'"[67]

The Court's second major argument was based on the fact that the district court had retained jurisdiction, giving it the opportunity to review the Tokyo arbitrator's choice of law.[68] While recognizing that the arbitrator might choose to apply Japanese law, which would probably lessen the carrier's liability in violation of COGSA, the Court found that this "mere speculation" was not enough to show current lessening of the carrier's COGSA liability.[69]

Finally, the majority asserted that its decision adhered to the internationalist goals of the Hague Rules.[70] The Court cited other common-law countries which have interpreted section 3(8) of the Hague Rules to allow foreign forum selection

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63. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

64. Justice O'Connor's concurrence provides a clear summary of most of the points of the majority holding. *See Vimar Seguros*, 115 S. Ct. at 2330 (O'Connor, J., concurring). The majority, however, focused more on the internationalist goals of the Hague Rules and the importance of bringing United States law into line with that of other nations than Justice O'Connor indicates. *See id.* at 2328.

65. *Id.* at 2327.

66. *Id.*

67. *Carnival*, 499 U.S. at 595-96 (quoting 46 U.S.C. app. § 183c).

68. *Vimar Seguros*, 115 S. Ct. at 2329-30.

69. *Id.* at 2330. "Were there no subsequent opportunity for review and were we persuaded that 'the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy.'" *Id.* (omission in original) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985)).

70. *Id.* at 2328.

clauses.[71] The Court focused on the benefits of conforming to an international commercial order and insisted that "skepticism over the ability of foreign arbitrators to apply COGSA or the Hague Rules . . . must give way to contemporary principles of international comity and commercial practice."[72]

V. SHOULD *VIMAR SEGUROS* OVERTURN *INDUSSA*?

The majority's reasoning, as far as foreign arbitration clauses are concerned, is quite sound and helped resolve a split in the circuits.[73] The majority, however, also purported to overrule the established precedent of *Indussa* by suggesting that foreign forum selection clauses are also enforceable under COGSA.[74] This suggestion, however, must be viewed as dictum. As Justice O'Connor's concurrence explains, the Court's discussion of foreign forum selection clauses was not necessary to decide the case at hand.[75] The contract at issue in *Vimar Seguros* contained a foreign arbitration agreement, not a "true" forum selection clause, such as those considered in *Indussa* and *Carnival*.[76] In fact, *Indussa* itself distinguishes arbitration clauses, indicating that its holding would probably not apply to them.[77] Likewise, rules governing foreign arbitration clauses should not be indiscriminately applied to foreign forum selection clauses. As David H. Taylor explains:

> Forum selection agreements constitute a private reordering of procedural principles within the existing procedural framework, while an arbitration agreement acts to remove an action from the judicial system. An arbitration agreement

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71. *Id.*

72. *Id.*

73. *See* cases cited *supra* note 51; *cf.* Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251, 1265-74 (1989) (stressing the importance of Supreme Court review of COGSA conflicts because of the particular need for domestic and international uniformity with COGSA and the possible problem of forum-shopping among conflicting circuits).

74. *Vimar Seguros*, 115 S. Ct. at 2326 (declaring that "we cannot endorse the reasoning or the conclusion of the *Indussa* rule itself").

75. *Id.* at 2331 (O'Connor, J., concurring). *But see id.* at 2333 n.7 (Stevens, J., dissenting) (asserting that the "distinction [between foreign forum selection clauses and foreign arbitration clauses] is of little importance").

76. *See id.* at 2330 (O'Connor, J., concurring).

77. Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, 204 n.4 (2d Cir. 1967) (en banc) ("Our ruling does not touch the question of arbitration clauses in bills of lading. . . . The validity of such a clause . . . has been frequently sustained.").

> does not reorder procedural principles. Instead, it removes an action from the reach of judicial procedural principles, an effect separate and distinct from that of a forum selection clause. . . . [J]udicial acceptance of the arbitration clause should not be considered authority for judicial acceptance of the forum selection clause.[78]

In addition, arbitration clauses are governed by the FAA, a specific statute that supersedes COGSA. Thus, the Supreme Court's COGSA analysis was unnecessary to arrive at the holding in *Vimar Seguros*.[79] The FAA, as a later-enacted and more specific statute, requires the enforcement of arbitration clauses whether or not they are valid under COGSA.[80] As a result, the Court had no need to determine whether arbitration clauses are valid under COGSA, much less whether foreign forum selection clauses are valid under COGSA. Thus the Court's comment on the enforceability of foreign forum selection clauses in bills of lading is merely dictum and need not be followed in future decisions.

The Court's claim to overrule *Indussa* and enforce foreign forum selection clauses is not only dictum, but also contradicts the policies behind COGSA and should be rejected as incorrect. Since a foreign forum selection clause was not at issue in *Vimar Seguros*, as it was in *Indussa*, the *Vimar Seguros* Court ignored many of the important distinctions between foreign forum selection clauses and foreign arbitration clauses. A closer examination of the merits of the arguments in *Indussa*, additional arguments on jurisdictional ouster, and the policy supporting arbitration clauses suggests that, unlike arbitration clauses, foreign forum selection clauses may indeed lessen liability as prohibited by COGSA. Thus, *Vimar Seguros* should be read only as requiring the enforcement of foreign arbitration clauses.

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78. David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 851-52 (1993).

79. This explains why the First Circuit and the Supreme Court reached the same conclusion as to the validity of the arbitration clause in *Vimar Seguros*, even though the First Circuit assumed arguendo that *Indussa* applied, whereas the Supreme Court ostensibly ruled that it did not.

80. *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 29 F.3d 727, 732 (1st Cir. 1994); Watson v. Fraternal Order of Eagles, 915 F.2d 235, 240 (6th Cir. 1990) (noting that the more specific statute controls); Davis v. United States, 716 F.2d 418, 428 (7th Cir. 1983) (stating that the later-enacted statute controls). *Indussa* itself suggests that the FAA should be given priority over COGSA. 377 F.2d 200, 204 n.4 (2d Cir. 1967).

A. Indussa's *Arguments*

Indussa presents three basic arguments to explain why foreign forum selection clauses lessen a carrier's liability under COGSA: (1) the practical difficulties of litigation abroad, (2) the possible failure of the foreign forum to apply COGSA, and (3) the possible failure of a foreign court to apply COGSA as an American court would.[81] The *Vimar Seguros* majority opinion addresses these points generally but does not pay careful attention to the different implications of these arguments for foreign forum selection clauses and foreign arbitration clauses. A closer examination of these arguments demonstrates that, unlike foreign arbitration clauses, foreign forum selection clauses lessen the liability of shippers and therefore violate COGSA.

1. *Practical difficulties of litigation abroad*

The Second Circuit expressed concern in *Indussa* about the practical difficulties foreign forum selection clauses create by requiring litigation abroad.[82] The majority argued that compelling litigation in a distant forum presents a "high hurdle" to enforcing liability, thus allowing carriers to obtain lower settlements than if they could be sued in a convenient forum.[83] The *Vimar Seguros* Court attempted to counter this argument by citing *Carnival*.[84] *Carnival*, however, did not address whether a foreign forum selection clause could actually lessen a carrier's liability. Instead, *Carnival* relied on a finding that the forum selection clause in that case "[did] not *purport* to limit petitioner's liability for negligence"[85] and that the inconvenience caused by forcing Washington residents to litigate in Florida did not "'lessen, weaken, or avoid *the right of any claimant to a trial*.'"[86] Thus *Carnival* is far from dispositive on the issue of whether a foreign forum selection clause limits a carrier's liability under COGSA.

In addition, the *Vimar Seguros* Court suggested that there is no "principled basis for distinguishing" between domestic forum selection clauses, such as the one in *Carnival*, and foreign forum selection clauses.[87] The Court gave the convenient

81. *See supra* text accompanying notes 29-31.
82. *Indussa*, 377 F.2d at 203.
83. *Id.*
84. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).
85. *Id.* at 596-97 (emphasis added).
86. *Id.* at 595-96 (quoting 46 U.S.C. app. § 183c) (emphasis added).
87. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322,

example of requiring a Seattle cargo owner to arbitrate in Vancouver, rather than in New York.[88] The Court ignored, however, the more troubling scenario of *Indussa*, in which a U.S. cargo owner faced litigation in Norway over a $2600 claim.[89] Since foreign fora are likely to be further from the cargo owner than domestic fora, litigation in a foreign forum imposes a higher burden on the cargo owner. In addition, the increased burden provides a principled basis for distinguishing foreign and domestic forum selection clauses that the *Vimar Seguros* Court ignored. This increased burden of litigating in a foreign forum potentially limits the liability of the shipper, thus violating COGSA and rendering foreign forum selection clauses unenforceable.[90]

2. *Possible failure of a foreign forum to apply COGSA*

Indussa's second argument against enforcing foreign forum selection clauses is based on the possibility that by applying its own version of the Hague Rules instead of COGSA, a foreign forum might reduce the carrier's COGSA liability, violating COGSA.[91] Rather than force courts "to forecast the result of litigation in a foreign court" and thus determine the actual lessening of liability under COGSA on a case-by-case basis, *Indussa* struck down the validity of all foreign forum selection clauses based on the potential lessening of liability.[92]

The majority in *Vimar Seguros* recognized the significant possibility of the lessening of liability[93] but claimed that a determination of the effect of the foreign forum's choice of law on liability was premature.[94] The majority focused on the fact

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2327 (1995).

88. *Id.* at 2327-28.

89. *See* Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, 201 (2d Cir. 1967) (en banc). For a summary of the facts in *Indussa*, see *supra* text accompanying notes 26-28.

90. Justice O'Connor, however, suggested that she does not wholly agree with this reasoning. Instead, she would read *Carnival* as precluding the "increased cost of litigating in a distant forum," by itself, from lessening liability for purposes of COGSA. *Vimar Seguros*, 115 S. Ct. at 2330 (O'Connor, J., concurring). This reading is questionable, however, since *Carnival* did not involve "a distant forum." *See Carnival*, 499 U.S. at 594 ("Florida is not a 'remote alien forum.'").

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

92. *Id.* at 202.

93. *Vimar Seguros*, 115 S. Ct. at 2329 ("This objection raises a concern of substance.").

94. *Id.*

that the district court had retained jurisdiction and claimed that "mere speculation that the foreign arbitrators might apply Japanese law which . . . might reduce [the carrier's] legal obligations" does not in itself lessen liability under COGSA.[95] As Justice O'Connor pointed out in her concurrence, however, the only reason that the majority was able to consider the choice-of-law question as being premature was because an arbitration clause, not a forum selection clause, was at issue.[96] Unlike "true" foreign forum selection clauses, arbitration clauses "do not divest domestic courts of jurisdiction."[97] Thus the majority's reliance on a domestic court's retaining jurisdiction is only appropriate in arbitration clause cases and should not be used as a rationale for striking down the *Indussa* rule for foreign forum selection clauses.

3. Possible failure of a foreign forum to apply COGSA in the same way as an American court

The Second Circuit's final argument for the unenforceability of foreign forum selection clauses is based on the lessening of liability due to the possible failure of a foreign forum to apply COGSA as an American court would. The *Vimar Seguros* majority framed this concern as an outdated parochial bias against foreign courts, as did the concurring opinion in *Indussa*.[98] The *Indussa* majority rejected this critique, explaining that they were holding "merely that Congress outlawed clauses prohibiting American courts from deciding causes otherwise properly before them."[99] For the *Indussa* majority, the issue was the permissibility of jurisdictional ouster, not the relative merits of domestic and foreign courts. By framing the question in terms of parochial bias, the *Vimar Seguros* majority ignored the real issue of jurisdictional ouster.

In summary, the *Vimar Seguros* Court ignored important distinctions between foreign and domestic fora and between foreign forum selection and foreign arbitration clauses. In ig-

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95. *Id.* at 2330.

96. *Id.* (O'Connor, J., concurring).

97. *Id.* (O'Connor, J., concurring).

98. *Compare id.* at 2329 (characterizing the motivation behind not enforcing foreign forum selection clauses as "insular distrust of the ability of foreign arbitrators to apply the law") *with* Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, 205 (2d Cir. 1967) (Moore, J., concurring) (describing the majority as "outlawing any other tribunal than our own").

99. *Indussa*, 377 F.2d at 204.

noring these distinctions, the Court failed to recognize that foreign forum selection clauses, unlike foreign arbitration clauses, violate COGSA because they potentially lessen the liability of the shipper. Thus, the Court erred in its dictum that foreign forum selection clauses are enforceable under COGSA.

B. Jurisdictional Problems Raised by Foreign Forum Selection Clauses

The Court also erred in failing to recognize *Indussa*'s underlying concern about foreign forum selection clauses: jurisdictional ouster.[100] Unlike foreign arbitration clauses, foreign forum selection clauses divest domestic courts of jurisdiction.[101] In divesting domestic jurisdiction, foreign forum selection clauses may deprive the claimant of the opportunity to have the shipper's liability fairly assessed for two reasons. First, the foreign forum selection clause may leave the claimant without a forum in which to prosecute its claim. As William Park recognized, "[o]ne overworked . . . judge may enforce a court selection clause to clear a crowded docket, while the equally overworked judge in the chosen court may refuse to accept the task of deciding the dispute."[102]

Second, in contrast to foreign arbitration clauses, foreign forum selection clauses may leave the claimant without accessible review of the foreign judgment. Whereas under foreign arbitration clauses a domestic court may retain jurisdiction pending the arbitration, the claimant has no such possibility under a foreign forum selection clause.[103] In addition, the claimant must initiate an additional domestic action to obtain recognition of the foreign judgment.

The *Vimar Seguros* Court claimed that there is sufficient opportunity for review of foreign decisions, citing the *Restatement (Third) of Foreign Relations Law of the United States*: "A court in the United States need not recognize a judgment of the court of a foreign state if . . . the judgment itself . . . is repugnant to the public policy of the United States . . . ."[104] But the

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100. *See supra* text accompanying notes 96-97. The concurrence, however, does raise this issue. *See Vimar Seguros*, 115 S. Ct. at 2330 (O'Connor, J., concurring) ("Foreign arbitration clauses of the kind presented here do not divest domestic courts of jurisdiction, unlike true forum selection clauses . . . .").

101. *See supra* text accompanying note 97.

102. William W. Park, *Illusion and Reality in International Forum Selection*, 30 TEX. INT'L L.J. 135, 145 (1995).

103. *See supra* text accompanying notes 96-97.

104. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES

Court ignored the Restatement's standard rule, which recognizes foreign judgments: "A final judgment of a court of a foreign state granting or denying recovery of a sum of money . . . is conclusive between the parties, and is entitled to recognition in courts in the United States."[105] Presumably, then, foreign judgments will be routinely enforced with only a modest review.[106] Even if a foreign judgment is repugnant to United States policy, American courts may choose to enforce the judgment to avoid questioning the public acts of a recognized foreign sovereign.[107]

The potential unavailability of the selected forum, the lack of comprehensive review, and the burden of enforcing a foreign

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§ 482(2)(d) (1986), *quoted in Vimar Seguros*, 115 S. Ct. at 2330.

105. *Id.* § 481.

106. Under the Restatement, however, there are several grounds for nonrecognition of foreign judgments:

> (1) A court in the United States may not recognize a judgment of the court of a foreign state if:
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> (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or
>
> (b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 481.
>
> (2) A court in the United States need not recognize a judgment of the court of a foreign state if:
>
> (a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;
>
> (b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;
>
> (c) the judgment was obtained by fraud;
>
> (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where the recognition is sought;
>
> (e) the judgment conflicts with another final judgment that is entitled to recognition; or
>
> (f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

Id. § 482.

107. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Underhill v. Hernandez, 168 U.S. 250 (1897); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 (1986):

> In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.

judgment—all resulting from jurisdictional ouster—may well lessen the liability of the shipper. Thus foreign forum selection clauses should be held unenforceable under COGSA, in spite of the majority's dictum in *Vimar Seguros*.

C. Policy Concerns Raised by Foreign Forum Selection Clauses

Foreign arbitration clauses are supported by strong policy considerations. Unlike forum selection clauses, arbitration agreements are protected by domestic statute[108] and international treaties.[109] These witness the strong domestic and international policies behind enforcing arbitration agreements, policies which do not support enforcement of forum selection clauses.[110] In addition, the Supreme Court has noted a "national policy favoring arbitration,"[111] but has never suggested there is a corresponding national policy favoring forum selection. Arbitration has the advantages of being a more efficient, more confidential, less expensive, and less adversarial form of dispute resolution than traditional court proceedings.[112] Thus

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108. Federal Arbitration Act, 9 U.S.C. §§ 1-208 (1994).

109. The major international treaty supporting arbitration agreements is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (commonly referred to as the New York Convention). *See also* W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 107-41 (1992); Park, *supra* note 102, at 168-71.

110. New York is the only jurisdiction that requires judges to enforce forum selection clauses. *See* N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 1989). Although neither domestic federal legislation nor international treaty enforces forum selection clauses, a Special Commission of the Hague Conference on Private International Law met in June 1994 "to consider an international convention regulating jurisdictional matters and the recognition of foreign judgments," which may lead to a treaty providing for enforcement of forum selection clauses. *See* Park, *supra* note 102, at 144.

The National Conference of Commissioners on Uniform State Laws approved a Model Choice of Forum Act in 1968, which allowsd for the enforcement of reasonable forum selection clauses, but this was withdrawn in 1975 due to its limited adoption and a constitutional concern under Overmeyer Co. v. Frick Co., 405 U.S. 174 (1971). MODEL CHOICE OF FORUM ACT (1968) (withdrawn 1975). *See generally* 77 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 219 (1968); 84 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 142 (1975).

111. Southland v. Keating, 465 U.S. 1, 10 (1984); *see also* Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) ("[D]ue regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.").

112. *See* David P. Pierce, Comment, *The Federal Arbitration Act: Conflicting Interpretations of its Scope*, 61 U. CIN. L. REV. 623, 624-25 (1992).

the *Vimar Seguros* Court correctly noted the significant domestic and international policies that support arbitration agreements, but it inappropriately assumed that these likewise support forum selection clauses.[113]

The Court not only erred in ignoring the concerns raised by *Indussa* and the distinct jurisdictional natures of arbitration clauses and forum selection clauses, but also misapplied policies supporting foreign arbitration clauses to defend foreign forum selection clauses. If the Court had instead clearly held that only foreign arbitration clauses are enforceable under COGSA, its opinion would have better reflected both the terms of COGSA and the reasons underlying a broad national policy favoring foreign arbitration clauses.

VI. CONCLUSION

The *Vimar Seguros* Court unnecessarily and inappropriately claimed to overrule *Indussa*,[114] the preeminent case invalidating foreign forum selection clauses under COGSA section 3(8). By trying to create a rule regarding foreign forum selection clauses when presented with a case based on a foreign arbitration clause, the Court provided an incomplete analysis.

First, the Court's reasoning did not entirely address *Indussa*'s concerns about foreign forum selection clauses: the practical difficulties of litigation abroad, the possible failure of a foreign forum to apply COGSA, and the possible failure to apply COGSA as an American court would. Second, by confusing foreign forum selection clauses and foreign arbitration clauses, the Court failed to confront the jurisdictional problems that arise exclusively with foreign forum selection clauses. Finally, the Court misapplied policy which only supports foreign arbitration clauses. Thus the Court's disapproval of *Indussa* in *Vimar Seguros* should legitimately be read as misguided dictum.

Elizabeth A. Clark

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

114. *See id.* at 2326 (declaring that "we cannot endorse the reasoning or the conclusion of the *Indussa* rule itself").