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Enforceability of Foreign Arbitration Clauses under the Carriage of Goods by Sea Act after Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, The

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THE ENFORCEABILITY OF FOREIGN ARBITRATION CLAUSES UNDER THE CARRIAGE OF GOODS BY SEA ACT AFTER *VIMAR SEGUROS Y REASEGUROS, S.A. v. M/V SKY REEFER*

I. INTRODUCTION

The Carriage of Goods by Sea Act (COGSA)[1] regulates the terms of ocean carriage by governing the rights, responsibilities, liabilities and immunities rising out of bills of lading. Specifically, §1303(8) of the Act voids any clause in a bill of lading that attempts to limit the liability of a carrier for acts of negligence.[2] In June, 1995 the Supreme Court, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,*[3] decided that foreign arbitration clauses contained in maritime bills of lading do not limit liability as prohibited by COGSA.[4] This decision rejects precedent and is inconsistent with the purpose of COGSA.

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1. 46 U.S.C. § 1300-15 (1994) (commonly called the Carriage of Goods by Sea Act or COGSA).

2. The statute provides:

> (8) Limitation of liability for negligence
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> 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. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

46 U.S.C. app. § 1303(8)(1994) (commonly known as COGSA).

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

4. *Id.* at 2330.

II. THE SUPREME COURT'S DECISION

A. *Facts*

Bacchus Associates (Bacchus), a New York fruit distributor, contracted with Galaxie Negoce, S.A. (Galaxie), a Moroccan fruit supplier, to purchase a shipload of fruit and chartered the M/V Sky Reefer to transport it from Morocco to Massachusetts.[5] Nichiro Gyogyo Kaisha, Ltd, a Japanese company, chartered the ship from M.H. Maritima, S.A.[6] When Nichiro received the cargo, they issued a form bill of lading to Galaxie, as shipper. After the ship set sail, Galaxie presented the bill of lading to Bacchus.[7] The bill of lading contained a foreign forum selection clause that provided for arbitration of disputes in Tokyo.[8] Bacchus found that between Morocco and Massachusetts the oranges sustained over $1 million in damage. Bacchus was compensated by their insurer Vimar Seguros y Reaseguros (Vimar Seguros), who then brought suit against M/V Sky Reefer under the bill of lading. M/V Sky Reefer moved to stay the action and compel arbitration. Vimar Seguros opposed the motion on the grounds that the foreign arbitration clause violated COGSA.[9]

B. *Majority Opinion*

In *Vimar*, the majority affirmed the Court of Appeals decision which held that the foreign arbitration clause in the bill of lading did not violate COGSA by limiting the liability of the carrier.[10] The Court asserted three major reasons for not invalidating the foreign arbitration clause.

First, Justice Kennedy stated that there is nothing in the language of the statute itself that prevents the parties from agreeing on a particular forum in which to settle disputes.[11] He pointed out that in other sections of COGSA, the legislature was very specific in outlining the

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5. *See id.* at 2325.
6. *See id.*
7. *See id.*
8. The bill of lading stated:

> Clause 3: Governing Law and Arbitration
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> (1) The contract evidenced by or contained in this Bill of Lading shall be governed by the Japanese law.
>
> (2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of the Japan Shipping Exchange, Inc., in accordance with the rules of TOMAC and any amendment thereto, and the award given by the arbitrators shall be final and binding on both parties.

Vimar, 115 S. Ct. at 2325.

9. *See id.*
10. *Id.* at 2330.
11. *Id.* at 2327.

responsibilities and liabilities of a carrier and ship.[12] A carrier cannot alter these obligations in such a way that limits their liability under COGSA. However, §1303(8) is only a general prohibition against limiting liability and does not reject forum selection clauses.[13]

Next, the majority rejected the argument that an increase in cost and inconvenience to litigate an action in a foreign jurisdiction limits the ability of Vimar Seguros to recover.[14] The Court based their decision on *Carnival Cruise Lines, Inc. v. Shute*.[15] In *Carnival*, the court upheld a forum selection clause that required the purchasers of a cruise ticket in Washington to litigate a claim in Florida. They upheld the clause, stating that the clause "does not purport to limit petitioner's liability for negligence."[16]

The Court went on to iterate that if the lessening of liability was based on "costs and inconvenience to the cargo owner, there would be no principled basis for distinguishing national from foreign arbitration clauses."[17] They used the example that a Seattle cargo owner having to arbitrate in New York faces more burdens than the same owner being required to arbitrate in Vancouver.[18] They also stated that it was against the policy of the statutes to make the courts weigh case by case the burdens on a particular party in respect to their situation.[19] The Court used as further support the fact that no other countries have interpreted the Hague Rules[20] as prohibiting foreign forum selection clauses.[21]

Finally, the majority asserted that if the U.S. courts interpreted COGSA to invalidate foreign arbitration clauses, they would essentially be "disparag[ing] the authority or competence of international forums for dispute resolution"[22] and showing a "distrust of the ability of foreign arbitrators to apply the law."[23] The Court looked to its earlier

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12. *Id.*; *see also* 46 U.S.C. app. § 1303 (1975).

13. *See Vimar*, 115 S. Ct. at 2327.

14. *Id.*

15. 499 U.S. 585 (1991).

16. *Id.* at 596-97.

17. *Vimar*, 115 S. Ct. at 2327.

18. *Id.* at 2327-28.

19. *Id.* at 2328.

20. Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading, 51 Stat. 233 (1924).

21. *Vimar*, 115 S. Ct. at 2328 (stating that COGSA is based on the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading to which 66 countries are parties). *See* Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729, 776-96 (1987).

22. *Vimar*, 115 S. Ct. at 2328.

23. *Id.* at 2329.

decision in *M/S Bremen v. Zapata Off-Shore Company*[24] where they upheld a foreign forum selection clause and stated that resistance to foreign forum selection clauses "has little place in an era when . . . businesses once essentially local now operate in world markets."[25] The Court also turned to the Federal Arbitration Act (FAA),[26] which was enacted "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced."[27]

C. *Dissenting Opinion*

In his dissenting opinion, Justice Stevens asserted that the majority's holding was against precedent. He reviewed the history of litigation over limitation of liability clauses and noted that even before the enactment of the Harter Act,[28] clauses in bills of lading limiting liability were "contrary to public policy, and consequently void."[29]

The Harter Act was passed by Congress in 1893, and contained a section which prohibited the limiting of liability due to negligence in bills of lading.[30] Justice Stevens pointed out that the Court in *Knott v.*

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24. 407 U.S. 1 (1972).

25. *Vimar*, 115 S. Ct. at 2328 (quoting M/S Bremen v. Zapata Off-Shore Company, 407 U.S. 1, 12 (1972)). The Court also says in *Bremen*: "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." 407 U.S. at 9. *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

26. 9 U.S.C. § 201 (1976) (known as the Federal Arbitration Act (FAA), the FAA became the codifying U.S. legislation on the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, (1970)).

27. *Vimar*, 115 S. Ct. at 2329 (quoting Scherk v. Alberto-Culver Co., 417 U.S. at 520, n. 15 (1974)). *See also* Allied-Bruce Terminix Cos. v. Dobson, 115 S.Ct. 834 (1995); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

28. 46 U.S.C. § 190-96 (1975) (the precursor to COGSA and more commonly referred to as the Harter Act as stated in the text).

29. *Vimar*, 115 S. Ct. at 2331 (quoting Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 442 (1889)).

30. The section's language is as follows

> Stipulations relieving from liability for negligence:
>
> 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 United States 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 and all 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.

Botany Worsted Mills[31] held a foreign choice of law clause, which designated English law, invalid because it relieved the carrier from liability.[32]

In contrast, COGSA is broader than the Harter Act in prohibiting clauses that limit liability.[33] This is evident in *Indussa Corp. v. S.S. Ranborg*[34] where the district court held a foreign choice of law clause unenforceable because "to require an American plaintiff to assert his claim only in a distant court lessens the liability of the carrier quite substantially."[35] Subsequently, there have been many court decisions and "scholarly recognition"[36] that have followed *Indussa* and recognized foreign choice of law provisions as violating COGSA.[37]

The dissent also argued that the majority's interpretation of §1303(8) of COGSA went against the purpose of the statute.[38] COGSA §1303(8) was enacted to correct the inequality of bargaining power that is present in bills of lading.[39] Carriers present bills of lading to shippers with no negotiations and the shipper must agree if he wants to transport his cargo. A carrier can put a clause in the bill of lading, limiting his liability, and the shipper would not be able to recover.[40] Justice Stevens stated that the cost for the shipper to litigate a claim in a foreign forum would make the shipper less likely to litigate that claim and consequently, choose to settle and as a result, most likely receive less compensation than that issued by a court. This would, in effect, limit the liability of the carrier.[41]

The dissent also criticized the majority's reliance on *Carnival Cruise Lines, Inc. v. Shute*.[42] He contended that the use of *Carnival* was "misplaced" and that the case did not apply to the situation before the court.[43] The judge reasoned that *Carnival* dealt with a domestic fo-

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46 U.S.C. § 190 (1975)(also known as the Harter Act).

31. 179 U.S. 69 (1900).

32. *Vimar*, 115 S. Ct. at 2332.

33. *See id.*

34. 377 F.2d 200 (2d Cir. 1967).

35. *Vimar*, 115 S. Ct. at 2333 (quoting Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, 203 (2d Cir. 1967)).

36. *Vimar*, 115 S. Ct. at 2333.

37. *See* State Establishment for Agricultural Product Trading v. M/V Wesermunde, 838 F.2d 1576 (8th Cir 1988). *See also* G. GILMORE & C. BLACK, LAW OF ADMIRALTY 125, n. 23 (1957); G. GILMORE & C. BLACK, LAW OF ADMIRALTY 145-47 (2d ed. 1975).

38. *Vimar*, 115 S. Ct. at 2334.

39. *See id.*

40. *See id. See also* United States v. Farr Sugar Corp., 191 F.2d 370, 374 (2d Cir. 1951), *aff'd* 343 U.S. 236 (1952).

41. *See Vimar*, 115 S. Ct. at 2335.

42. 499 U.S. 585 (1991).

43. *Vimar*, 115 S. Ct. at 2335.

rum selection clause, not a foreign clause. Also, COGSA did not apply in that case because it was based on a passenger ticket and no carriage of goods was involved.[44]

Finally, the dissent rejected the idea that failure to enforce foreign arbitration clauses under COGSA would conflict with the FAA.[45] The FAA was "designed to over turn the traditional common law hostility to arbitration clauses."[46] It requires that the courts enforce arbitration clauses just as they would enforce other contract clauses.[47] Justice Stevens stated that *Vimar* dealt with a contract that was not freely negotiated (an adhesion contract) and since the FAA seeks to enforce freely negotiated contracts, the purpose of the FAA would be upheld by the invalidation of the foreign arbitration clause in this case.[48]

The dissent continued to say that if the FAA intends to put arbitration clauses in the same boat as other contract clauses, they are invalidated in the same situations as ordinary contract clauses.[49] Examples of these situations include fraud, forgery, mutual mistake, impossibility, unconscionability and illegality.[50] The dissent put the current case in the last category; illegality. If the clause "lessens liability" under COGSA, it violates a federal statute and thus makes the clause illegal and void under general contract theory.[51] Consequently, the purposes of both COGSA and the FAA are upheld by invalidating the foreign arbitration clause.

III. ANALYSIS OF THE COURT'S DECISION

The majority opinion in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* goes against long standing precedent and violates the general purposes of both COGSA and the FAA. Consequently, I propose that the dissenting opinion is more on point and the majority opinion's applicability should be limited.

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44. *See id.*

45. *Id.* at 2337.

46. *Id.*

47. *See id.* The relevant section of the FAA reads as follows: "A written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1988).

48. *Vimar*, 115 S. Ct. at 2337.

49. *Id.*

50. *See id.*

51. *See id.*

A. Decision is Against Precedent

Throughout history carriers have tried to limit their liability for acts of negligence by inserting special clauses. However, the United States courts have held that clauses limiting liability are contrary to public policy. The U.S. Supreme Court, in *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*[52], invalidated an antiliability clause that relieved the carrier from responsibility for damages caused by "barratry of master or mariners, and all perils of the seas, rivers or navigation."[53] In *Liverpool*, Phenix Insurance Company claimed a right to subrogation for the loss of their client's goods shipped on one of Liverpool's ships. The goods were damaged when the ship became stranded due to a bad storm.[54] The Court in *Liverpool* held that the reason the clause was invalid was due to unequal bargaining power between the parties.[55] At this time there was no statutory law regulating limitation of liability clauses in bills of lading. However, as *Liverpool* shows, the courts upheld that hose type of clauses were considered against public policy even before there was a specific statute prohibiting limitation of liability.

Several years later in 1893, the Harter Act[56] was enacted. Section 190 of this Act[57] prohibited a carrier from inserting clauses limiting their liability in their bills of lading. The Supreme Court upheld this prohibition in *Knott v. Botany Mills.*[58] In that case Botany Worsted Mills, a New Jersey corporation, contracted with James Knott to transport wool on his ship from Buenos Ayres to New York. En route to New York, the wool sustained damage from the drainage off of wet sugar that was also on the ship.[59] The bill of lading contained a clause designating a foreign forum.[60] Applying the Harter Act, the Court held that "the express provision of the act of Congress overrides and nul-

52. 129 U.S. 397 (1889).

53. *Id.* at 437.

54. *See id.* at 435.

55. The clause reads as follows:

> The carrier and his customer do not stand upon a footing of equality. The individual customer has not real freedom of choice. He cannot afford to higgle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents, and in most cases he has not alternative but to do this, or to abandon his business.

Id. at 441.

56. 46 U.S.C. § 190-96 (1975).

57. 46 U.S.C. § 190.

58. 179 U.S. 69 (1900).

59. *See id.* at 70.

60. "This contract shall be governed by the law of the flag of the ship carrying the goods, except that general average shall be adjusted according to York-Antwerp Rules, 1890." *Id.* at 70.

lifies the stipulations of the bill of lading that the carrier shall be exempt from liability for such negligence, and that the contract shall be governed by the law of the ship's flag."[61] The bill of lading also had a clause that exempted the carrier from liability for "negligence of masters or mariners; sweating, rust, natural decay, leakage, or breakage, and all damage arising from the goods by stowage."[62] This was the clause that caused the Court to apply the Harter Act and eventually to determine the choice of forum clause invalid.[63]

The law used for foreign arbitration clauses is the same as that used for foreign choice-of-law clauses.[64] Since the Court's decision in *Knott*, the lower courts have held that foreign choice of law clauses in bills of lading are invalid under the Harter Act.[65] These courts have also held that the same kind of clauses are invalid under COGSA.[66] The leading case in this area is *Indussa Corp. v. S.S. Ranborg*.[67] Indussa, a New York corporation, contracted with the S.S. Ranborg to transport a shipment of nails and barbed wire from Belgium to San Francisco. The shipment was damaged by rust during the transport.[68] The Second Circuit held that the foreign choice of law clause designating the carrier's principal place of business[69] as the forum for all claims was invalid under COGSA.[70] The important part of this opinion stated that even though Norway's law was substantially similar to COGSA, the shipper could not be sure that the foreign court would apply United States law.[71] This concern, along with the potential liability limitations provided by inconvenience on the shipper, convinced the court to invalidate the foreign choice of forum clause.[72]

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61. *Id.* at 77.

62. *Id.* at 70.

63. *Id.* at 77.

64. *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2326 (1995). *See also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974); State Establishment for Agricultural Product Trading v. M/V Wesermunde, 838 F.2d 1576, 1580-81 (8th Cir. 1988).

65. *See* Conklin & Garrett, Ltd. v. M/V Finnrose, 826 F.2d 1441 (5th Cir. 1987); Union Ins. Soc. of Canton, Ltd. v. S.S. Elikon, 642 F.2d 721 (4th Cir. 1981); Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2nd Cir. 1967). *See also* G. GILMORE & C. BLACK, LAW OF ADMIRALTY 125, n. 23 (1957).

66. *See Vimar*, 115 S. Ct. at 2332.

67. 377 F.2d 200 (2nd Cir. 1967).

68. *See id.* at 200-01.

69. The clause language is as follows: "Any dispute arising under this Bill of Lading shall be decided in the country where the Carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein." *Id.* at 201.

70. *Id.* at 204.

71. *Id.* at 203-04. *See also* GILMORE & BLACK, *supra* note 65.

72. *Indussa*, 377 F.2d at 203-04. *See also* GILMORE & BLACK, *supra* note 65.

In 1981, the Fourth Circuit in *Union Insurance Society of Canton, Limited v. S.S. Elikon*[73] held that a forum selection clause that explicitly invoked COGSA, but required the application of German law,[74] was invalid. This case dealt with a contract to ship air conditioners from Newport News to the Port of Kuwait on the Persian Gulf and the damage that resulted during their transport.[75] The court looked at the lack of bargaining power through the use of a preprinted form,[76] the inability to be certain that United States law would be applied,[77] and the fact that the bill of lading was printed in English.[78] The court also stated that the general policy of enforcing forum selection clauses must be pushed aside by the "specific policy enunciated by Congress through COGSA."[79]

Recently, in *Conklin & Garrett, Ltd. v. M/V Finnrose*,[80] the Fifth Circuit court held a foreign forum selection clause[81] which required disputes to be decided in Finland, but that also explicitly stated that COGSA applied,[82] violated COGSA. This claim came about when

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73. 642 F.2d 721 (4th Cir. 1981).

74. The content of the two clauses is as follows:

> 1. This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, 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 or liabilities under said Act. The provisions stated in said Act shall (except as 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 or misdelivery, or loss or damage to the goods occurring while the goods are not in the actual custody of the Carrier . . . .20. All actions under this contract shall be brought before the Court of Bremen, Federal Republic of Germany add 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.

Id. at 722 n.1.

75. *See id.* at 722.

76. *Id.* at 724.

77. *Id.*

78. *Union*, 642 F.2d at 726.

79. *Id.* at 725.

80. 826 F.2d 1441 (5th Cir. 1987).

81. The clause language is as follows: "Any dispute arising under this bill of lading shall be decided in Finland and Finnish law shall apply except as provided elsewhere herein." *Id.*

82. The clause is as follows: "Notwithstanding any provisions found elsewhere in this B/L, insofar as the . . . carriage covered by this . . . contract is performed within the territorial limits of the United States it shall be subject to the provisions of the Carriage of Goods by Sea Act . . . which shall be deemed to be incorporated herein." *Id.*

Conklin & Garrett contracted with the M/V Finnrose to transport a merry-go-round. The merry-go-round was damaged during its transport from the United Kingdom to Florida.[83] This court, as the court in *Elikon*, looked at the inequality of bargaining power and the statutory language of COGSA to hold the clause invalid.[84]

Subsequently, the Eleventh Circuit held in *State Establishment for Agricultural Product Trading v. M/V Wesermunde*[85] that a clause requiring arbitration in England for loss of cargo shipped by United States shipper from Florida to Jordan violated COGSA.[86] The cargo of 82,073 cases of fresh eggs was damaged by fire.[87] The court held the clause invalid because the only party that related to the English forum was the charterer, and they were not named in the action.[88] This limited the carrier's liability by providing for a forum that had no relationship to the contract in dispute.

In addition to the above court cases upholding the unenforceability of foreign choice-of-forum clauses, scholars have noted that this kind of clause violates COGSA. Gilmore and Black, in their treatise *Law of Admiralty*, criticized the enforcement of foreign choice-of-forum clauses. They wrote:

> The stipulation for suit abroad seems also to offend Cogsa, most obviously because it destroys the shipper's certainty that Cogsa will be applied. Further, it is entirely unrealistic to look on an obligation to sue overseas as not 'lessening' the liability of the carrier. It puts a high hurdle in the way of enforcing that liability.[89]

Gilmore and Black also endorsed the Second Circuit's decision in *Indussa*, and added this comment:

> Cogsa allows a freedom of contracting out of its terms, but only in the direction of increasing the shipowner's liabilities, and never in the direction of diminishing them. This apparent onesidedness is a commonsense recognition of the inequality in bargaining power which both Harter and Cogsa were designed to redress, and of the fact that one of the great objectives of both Acts is to prevent the impairment of the value and negotiability of the ocean bill of lading. Obviously, the latter result can never ensue from the increase of the carrier's duties.[90]

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83. *See id.* at 1441.

84. *Id.* at 1444.

85. 838 F.2d 1576 (11th Cir. 1988).

86. *Id.* at 1582.

87. *See id.* at 1578.

88. As the court specifically said: "[A] provision requiring arbitration in a foreign country that has no connection with either the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict with COGSA's general purpose of not allowing carriers to lessen their risk of liability." *Id.* at 1581.

89. GILMORE & BLACK, *supra* note 65.

90. G. GILMORE & C. BLACK, LAW OF ADMIRALTY 145-47 (2d ed. 1975).

Charles L. Black, in a law journal article, disparages the *Bremen* decision while singing the praises of *Knott*.[91] In his opinion:

> American courts are bound to hold choice-of-forum and choice-of-law clauses invalid in COGSA bills, inbound or outbound, for reasons specially applicable to COGSA (because they arise from its text) and not shaken by *Bremen*. The latter case does not require the Supreme Court to overrule, either literally or in effect, either the considered holdings of two of the best admiralty Courts of Appeals, or its own four-squared precedent in *Knott v. Botany Mills*.[92]

The decision in *Vimar* goes against precedent. As shown by the cases above, foreign choice-of-forum clauses (and as a result foreign arbitration clauses) violate COGSA based on the following factors: (1) the shipper can not be sure that the foreign court will apply United States law;[93] (2) the inconvenience and transaction costs to the shipper to arbitrate in a foreign forum limits the liability of the carrier;[94] and (3) the inequality of bargaining power between the shipper and the carrier.[95] The court in *Vimar* went against these principles and held the foreign arbitration clause in the contract enforceable.

B. Decision is Against Purpose of COGSA and FAA

The purpose of COGSA is to remedy the "inequality of bargaining power inherent in bills of lading and [to limit the] carrier's historic tendency to exploit that inequality whenever possible to immunize themselves from liability for their own fault."[96] The whole value to the carrier of foreign arbitration clauses, as with choice-of-forum clauses, is to limit their liability.[97] This is accomplished by the fact that bills of lading are effectively adhesion contracts that the recipient is required to accept with all terms, or to do without.[98] The shipper has no "real

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91. Charles L. Black, *The Bremen, COGSA and the Problem of Conflicting Interpretation*, 6 VAND. J. TRANSNAT'L L. 365 (1973).

92. *Id.* at 369.

93. *See* Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, 203 (2d Cir. 1967). *See also* Union Insurance Society of Canton, Ltd v. S.S. Elikon, 642 F.2d 721 (4th Cir. 1981).

94. *See Indussa*, 377 F.2d at 203-04. *See also* State Establishment for Agricultural Product Trading v. M/V Wesermunde, 838 F.2d 1576 (11th Cir. 1988). *See also* GILMORE & BLACK, *supra* note 65; GILMORE & BLACK, *supra* note 90.

95. *See* Union Ins. Society of Canton, Ltd. v. S.S. Elikon, 642 F.2d 721, 724; *see also* Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 441 (1889); Conklin & Garrett, Ltd. v. M/V Finnrose, 826 F.2d 1441, 1444 (5th Cir. 1987); GILMORE & BLACK, *supra* note 90.

96. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2334 (1995).

97. *See* Black, *supra* note 91, at 366.

98. *See Vimar*, 115 S. Ct. at 2334; *see also* Black, *supra* note 91, at 368; Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 441 (1889).

freedom of choice" and is not on a level playing field with the carrier.[99] Thus, the carrier can insert a clause limiting their liability, and the shipper would have no recourse.[100] These foreign arbitration clauses effectively limit the carrier's liability by increasing the costs of litigating a claim.[101] For example, the costs of using a Japanese forum to arbitrate a claim would greatly overshadow the amount that would be recovered.[102] As a result many shippers would choose not to file a claim instead of risking the loss of a large amount of money.[103] In effect the clause has not only lessened the carrier's liability, but has "relieved" it of all liability dealing with negligence.[104]

In addition to violating the purpose of COGSA, the enforcement of foreign arbitration clauses goes against the purpose of the FAA.[105] The purpose of the FAA is to reject the court's traditional animosity towards arbitration clauses[106] and to uphold "freely-negotiated" arbitration agreements.[107] To this end the FAA has made enforceable arbitration clauses in maritime transactions subject to their enforceability under ordinary contract law.[108]

This provision of the FAA makes foreign arbitration clauses subject to the same law as all other contract clauses.[109] If this is the case, then an arbitration clause can be invalidated if it was acquired through fraud,[110] mutual mistake, impossibility, unconscionability or illegali-

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99. *See Phenix*, 129 U.S. at 441.

100. The court stated: "Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all its twenty-eight lengthy paragraphs." United States v. Farr Sugar Corp., 191 F.2d 370, 374 (2d Cir. 1951), *aff'd*, 343 U.S. 236 (1952).

101. *See Vimar*, 115 S. Ct. at 2335.

102. *See id.*

103. *See id.*

104. *See id.*

105. *See* 9 U.S.C. § 201 (1975).

106. *See* Mastrobouono v. Shearson Lehman Hutton, Inc, 115 S. Ct. 1212, 1215 (1995) (quoting Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834 (1995)).

107. *See Vimar*, 115 S. Ct. at 2337.

108. The relevant section is as follows: "A written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1988).

109. *See Vimar*, 115 S. Ct. at 2337; *see also* Allied-Bruce Terminix Companies, Inc v. Dobson, 115 S. Ct. 834 (1995); Mastrobouono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995); Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989).

110. *See Vimar*, 115 S. Ct. at 2337; *see* Scherk v. Alberto-Culver Company, 417 U.S. 506, 519 n.14 (1974).

ty.[111] Illegality can mean that the clause violates a federal statute.[112] If a foreign arbitration clause "lessens" the liability of the carrier, it violates COGSA.[113] Thus, since COGSA is a federal statute, the clause is illegal and unenforceable under general contract theory and under the FAA.[114]

Additionally, the FAA requires foreign arbitration clauses to be enforceable under general contract theory, and to be "freely negotiated"; it would stand to reason that a foreign arbitration clause in a bill of lading would be unenforceable.[115] The courts have continuously recognized that bills of lading are usually adhesion contracts and that the shipper usually has no chance to negotiate terms to his advantage.[116] Thus, since bills of lading are not "freely negotiated", it would not violate the FAA to strike down foreign arbitration clauses that are contained in the bills.[117]

IV. SUBSEQUENT DECISIONS

Despite the above criticisms, the Supreme Court's decision in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* has been applied by lower courts to validate arbitration clauses under COGSA.[118] Recently, the United States District Court in Oregon used *Vimar* to bind a consignee to a foreign arbitration clause in a bill of lading.

In *Kanematsu Corp v. M/V Gretchen W*,[119] Kanematsu contracted to purchase 37,000 tons of corn from Louis Dreyfus Corporation (Dreyfus), who arranged to ship the corn from Louisiana to Japan. Dreyfus chartered the M/V Gretchen W from Hyundai, and Dreyfus and Hyundai entered into a bill of lading.[120] The bill of lading provided for arbitration of any disputes in London, England.[121] When the ship-

111. *See Vimar*, 115 S. Ct. at 2337.

112. *See id.*

113. *See* 46 U.S.C. § 1303 (1994) (known as COGSA).

114. *See Vimar*, 115 S. Ct. at 2337.

115. *See id.*

116. *See id.*; *see also* United States v. Farr Sugar Corp., 191 F.2d 370 (2d Cir. 1951).

117. *See Vimar*, 115 S. Ct. at 2337.

118. For other non-COGSA decisions applying *Vimar*, *see* Effron v. Sun Line Cruises, Inc., 67 F.3d 7 (2d Cir. 1995); Nippon Fire & Marine Ins. Co., Ltd. v. M.V. Egasco Star, 899 F. Supp. 164 (S.D.N.Y. 1995); Aviall, Inc. v. Ryder System, Inc., 913 F. Supp. 826 (S.D.N.Y. 1996); Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64 F.3d 993 (5th Cir. 1995); Morewitz v. West of England Ship Owners Mut. Protection and Indemnity Ass'n (Luxembourg), 62 F.3d 1356 (11th Cir. 1995).

119. 897 F. Supp. 1314 (D. Or. 1995).

120. *See id.* at 1315.

121. The relevant clause is as follows: "All terms, conditions and provisions of the Strike, Knighterage Clause No. 6 and Arbitration Clause of the "Centrocon" charter party would apply." The Centrocon charter provides that "all disputes from time to time arising out of this

ment of corn arrived in Japan, it was discovered to be damaged by exposure to water and heat.[122] Kanematsu then sued M/V Gretchen W under the bill of lading. The District Court stayed Kanematsu's action pending the decision in *Vimar*, since the issues in that case were the same. Citing the decision in *Vimar*, the District Court upheld the arbitration clause in the bill of lading despite Kanematsu's argument that they were only a consignee, unlike the petitioner in *Vimar*.[123]

The court rejected the "consignee" argument for three reasons. First, the lower court judge in that case had previously found that Dreyfus had acted as an agent for Kanematsu, thus binding them to the bill of lading.[124] Second, the court said that under *Vimar*, the fact that Kanematsu did not sign the bill of lading or directly consent to its conditions does not free it from the terms of the bill of lading.[125] Third, the fact that Kanematsu brought a suit for damaged goods under the terms of the bill of lading means that they consented to all of the conditions of the bill of lading.[126] Thus, even though Kanematsu did not expressly agree to the bill of lading, it is bound by its terms. The court also rejected Kanematsu's argument that this result would be inequitable based on the fact that: (1) Kanematsu was familiar with the grain trade;[127] (2) Kanematsu was a Japanese importer and would not be inconvenienced by resolving the dispute in London instead of the U.S.;[128] (3) the London arbitration would be conducted by people familiar with the grain trade;[129] and (4) the District Court retained enforcement jurisdiction to assure a decision consistent with COGSA.[130]

Another United States District Court in Virginia has also used the Court's decision in *Vimar* to validate a forum selection clause in a bill of lading. As mentioned above, the same law is used for foreign arbitration clauses as is used for foreign choice of law clauses.[131] In *Pasztory v. Croatia Line*,[132] Pasztory contracted to have $80,000

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contract shall . . . be referred to the final Arbitrament of two Arbitrators carrying on business in London."

Id.

122. *See id.*

123. *See* Kanematsu Corp. v. M/V Gretchen W, 897 F. Supp. 1314, 1315-16 (D.Or. 1995).

124. *See id.* at 1316.

125. *Id.* at 1317.

126. *See id.*; *see also* All Pacific Trading Inc. v. M/V Hanjin Yosu, 7 F.3d 1427, 1432 (9th Cir. 1993), cert denied., __U.S.__, 114 S. Ct. 1301, 127 L.Ed. 2d 653 (1994).

127. *See Kanematsu*, 897 F. Supp. at 1317.

128. *See id.*

129. *See id.*

130. *See id.*

131. *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2326 (1995).

132. 918 F. Supp 961 (D.Va. 1996).

worth of his furniture and personal affects shipped from Italy to Norfolk, Virginia. The ship was owned by Malta Cross and operated by Croatia Line. Pasztory also contracted with Security Storage to take the furniture from Norfolk to his residence in Locust Dale, Virginia.[133] The bill of lading contained a forum selection clause that required all disputes to be pursued in the District Commercial Court in Rijeka, Croatia.[134] Somewhere en route from Italy to Locust Dale, the furniture sustained $50,000 worth of damage. Pasztory then brought suit in Virginia under the bill of lading. After going through the history of cases supporting and invalidating forum selection clauses, the court enforced the forum selection clause based on section 3(8) of COGSA[135] and the fact that Croatia recognizes and enforces the Hague Rules upon which COGSA is modeled. Thus, meaning that Croatia would not follow a standard less than that of COGSA.[136]

V. CONCLUSION

The Supreme Court's decision in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* flies in the face of precedent and also violates the purposes of both COGSA and the FAA. Even though Justice Stevens stated in his dissent that the court's decision in this case "leaves in doubt the validity of choice-of-law clauses",[137] lower courts have already started applying *Vimar* as overruling the *Indussa* line of cases and as primary authority for the proposition that arbitration clauses are enforceable under the Carriage Of Goods by Sea Act.

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133. *See id.* at 963.

134. The forum selection clause is as follows:

> 23. LAW AND JURISDICTION
> Insofar as anything has not been dealt with by terms and conditions of this Bill of Lading, Croatian law shall apply. Croatian Law shall also be applied in interpreting the terms and conditions hereof. All actions arising under this Bill of Lading shall be brought before the District Commercial Court in Rijeka to the exclusion of the jurisdiction of the courts of any other place, unless the Carrier appeals to another jurisdiction or voluntarily submits himself thereto.

Id. at 963 n.2.

135. *Id.* at 966. *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2327 (1995). ("Nothing in [this section] . . . suggests that the statute prevents the parties from agreeing to enforce these obligations in a particular forum.")

136. *See Pasztory*, 918 F. Supp. at 966.

137. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2334 (1995).