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VIMAR SEGUROS Y REASEGUROS V. M/V SKY REEFER: A CHANGE IN COURSE: COGSA DOES NOT INVALIDATE FOREIGN ARBITRATION CLAUSES IN MARITIME

by

C. CHRISTINE FAHRENBACK

I. INTRODUCTION

"By the mid-1980s, at least, it had become recognized that arbitration was the normal way of settlement of international commercial disputes."¹

In today's world of trade and commerce, disputes are inevitable, but people want to do business, not argue about it.² Disputes can lead to delayed shipments, complaints about product quality, and claims of party nonperformance.³ Because the issues of contractually based commercial disputes rarely involve complex legal issues, more parties are choosing to settle their disputes in the private, informal setting that commercial arbitration provides.⁴

In *Vimar Seguros Y Reasegueros, S.A. v. M/V Sky Reefer*,⁵ the U.S. Supreme Court changed its course in its interpretation of the Carriage of Goods Shipping Act⁶ (COGSA) by upholding a foreign arbitration clause.⁷ While the Court was making an effort to foster trade and cooperation,⁸ critics of this decision, which scuttled 28 years of precedent, suggest that it will have "a significant impact on the shipping industry, where claims of \$15 million or \$20 million for damaged cargo . . . are not unusual."⁹ Presently, however, attorneys and cargo insurance companies are in disagreement as to the specific ramifications of the holding.¹⁰

In the Court's recent decision to uphold a foreign arbitration clause found in a bill of lading,¹¹ the majority left no doubt that the United States' role as a trusted partner in multilateral endeavors, and beneficiary of international accords, is partly dependent upon the Court interpreting domestic legislation in such a fashion that it does not violate international agreements.¹² As a result of conflicting federal circuit court decisions, the increasing role of arbitration in international commercial disputes, and the United States' need to become less paternalistic,¹³ the United States Supreme Court granted *certiorari* to determine whether foreign arbitration clauses "lessen a carrier's liability" in a manner that COGSA prohibits.¹⁴ The conflict of this case revolved around the interpretation of COGSA and The Federal Arbitration Act.¹⁵

The purpose of this Note is to analyze the Supreme Court's reasoning in *Vimar Seguros Y Reasegueros, S.A. v. M/V Sky Reefer*, and to explore the case's domestic and international implications. Part II discusses the statutory history of COGSA and the Arbitration Act, and the lineage of cases preceding the Supreme Court's decision in this case.¹⁶ Part III looks at the specifics of the case, presenting the facts, procedural history, and reasoning

of the majority and dissent.¹⁷ Finally, the Note concludes with an analysis of the Court's decision to abandon precedent and depart into uncharted waters by upholding the foreign arbitration clause.¹⁸

II. BACKGROUND

A. The Federal Arbitration Act

Despite the recent popularity of arbitration procedures in contemporary contract negotiations,¹⁹ the traditional common law disposition toward such alternative dispute resolution was not favorable.²⁰ In 1925, Congress passed the Federal Arbitration Act²¹ in an effort to reverse centuries of judicial hostility toward contracts that required parties to arbitrate any future disputes.²²

The Arbitration Act was drafted in order to put arbitration agreements on an equal "footing" with other contracts, which cannot be avoided simply because they are no longer advantageous.²³

By the time Congress passed the Arbitration Act, nearly all the states had passed their own arbitration statutes, but this legislation had done little more than codify the negative common law attitude.²⁴ However, a growing dissatisfaction with judges and juries, along with the increased costs and delays associated with conventional litigation, had encouraged parties to look beyond traditional litigation for solutions to their contract disputes.²⁵ Not surprisingly, arbitration began to gather support as an alternative way to resolve disputes and has become known as one of the more important jurisprudential developments of the twentieth century.²⁶

Section 2 of the Act provides in part that in any maritime transaction arbitration clauses contained in a written agreement "shall be valid, irrevocable, and enforceable."²⁷ Courts have interpreted the Arbitration Act's broad language as evidence of a clear congressional intent to develop a public policy in favor of arbitration.²⁸ This provision is frequently cited as one of the most persuasive sections of the statute, and demonstrates Congress' increasing favoritism towards arbitration.²⁹

Additional evidence of Congressional intent to submit international disputes to arbitration emerged in 1970 when the United States ratified the United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards.³⁰ The Convention advocated and enumerated uniform standards for the enforcement of arbitration agreements and awards.³¹ The U.S. ratified the Convention because of the beneficial effects it would create in foreign commerce for the United States.³²

A second result of the United States' accession to the Convention was that arbitration would be recognized and enforced among all countries who ratified the Convention.³³ There is no similar statute for the recognition and enforcement of litigation and judgments in foreign countries.³⁴ This has important implications in the international commercial setting.³⁵ The absence of a similar convention for the recognition and

enforcement of foreign judgments makes arbitration not only attractive, but compelling for businesses involved in international trade.³⁶ The U.S. Supreme Court, however, has never faced the issue of subordinating COGSA, a long-standing policy protecting U.S. shippers, in the interest of the Arbitration Act.³⁷

B. The Carriage of Goods Shipping Act (COGSA)

The United States did not attempt to regulate bills of lading until 1893 when it passed the Harter Act,³⁸ which prohibits exculpatory clauses that relieve or lessen the carrier from liability.³⁹ Carriers, in exchange for their inability to lessen liability towards shippers, received a limitation on their liability for specific types of negligence that resulted in damaged cargo.⁴⁰ The passage of this act led to the International Convention for Unification of Certain Rules Relating to Bills of Lading,⁴¹ and eventually to the 1936 enactment of COGSA⁴² in the United States.⁴³ The Act, adopted with minor changes from the Hague Rules,⁴⁴ applies only to the carriage "to or from ports of the United States in foreign trade."⁴⁵ Thus, while COGSA governs international bills of lading, the Harter Act still governs domestic commerce involving the nation's waterways.

The conflict which surrounded forum selection clauses and, specifically foreign arbitration clauses, focused on the legislative intent behind COGSA section 3(8)'s "lessening of liability" clause.⁴⁶ Historically, the courts interpreted section 3(8) broadly to include not only the explicit obligations and procedures designed to correct abuses by carriers, but also the procedural enforcement methods.⁴⁷ Although COGSA, like the Arbitration Act, resulted from issues of international concern, the United States has stood alone in its broad interpretation of "lessening liability" to include foreign arbitration clauses, demonstrating a public policy directed at protecting American shippers.⁴⁸ However, recent case history suggests that the broad interpretation of COGSA and its sister statute, the Limitation of Liability Act,⁴⁹ may be falling subordinate to the emerging strength of forum selection clauses.⁵⁰

C. The Case History of the Interpretation of COGSA

Traditionally, federal and admiralty courts were reluctant to divest themselves of jurisdiction because there was a clause specifying another forum for litigation.⁵¹ However, by the mid 1900s federal courts were beginning to accept and enforce such clauses, although the circuits varied considerably in their degree of enforcement.⁵² A conflict had developed primarily between the Second and Fifth Circuits, with the Second Circuit being more likely than the Fifth Circuit to approve choice of forum clauses.⁵³ The Second Circuit relied on a "reasonableness test" to approve choice of forum clauses.⁵⁴ The test was set forth in *William H. Muller v. Swedish American Line Ltd.*,⁵⁵ despite the general state of the law disfavoring such clauses.⁵⁶ Even though a small minority of courts quickly followed the test set forth in *Muller*, it was soon overruled.⁵⁷

The line of cases holding that COGSA's language precludes the enforcement of forum selection clauses, because they effectively lessen liability, was significantly strengthened when *Indussa Corp. v. S/S Ranborg*⁵⁸ overruled *Muller*.⁵⁹ The Second Circuit Court held

that COGSA's application to a bill of lading was sufficient to preclude a forum selection clause from being valid.⁶⁰ The court further explained that it interpreted the congressional intent behind COGSA section 3(8) as invalidating any contractual provision in a bill of lading which would prevent a party from obtaining jurisdiction over a carrier in an American court, if the party would otherwise be able to obtain jurisdiction based on other procedural rules.⁶¹

It was not until 1972, when the U.S. Supreme Court ruled on *M/S Breman v. Zapata Off-Shore Co.*,⁶² that American law was substantially brought into accord with the law of other common law countries in holding that forum selection clauses were generally enforceable.⁶³ The United States Supreme Court ruled that forum selection clauses were *prima facie* valid, unless a party demonstrated that: (1) the contract was induced by misrepresentation or overwhelming bargaining power,⁶⁴ (2) enforcement did not meet a "reasonableness" test which it set forth,⁶⁵ or (3) enforcement would contravene a strong public policy of the United States.⁶⁶ The Court based its decision, in part, on an awareness of the globalization of the commercial market, which was taking place at the time of the decision.⁶⁷ The Majority felt that previous decisions voiding forum selection clauses reflected a "provincial attitude" towards the fairness of other tribunals.⁶⁸

The second blow to precedent came in *Shute v. Carnival Cruise Lines*.⁶⁹ Here, the Supreme Court extended the "reasonableness" test, expressed in *Breman*, to contracts which included boilerplate language printed on the reverse side of a passenger ticket for a cruise.⁷⁰ The Court quickly resolved the argument that the parties had not negotiated for the forum selection clause by relying on a "common sense" approach that suggested enforcement of such routine form contracts must be possible without showing actual bargaining.⁷¹ The Court also determined that the injured party failed to meet the level of "inconvenience" necessary to invalidate the clause set forth in *Breman*.⁷² Finally, turning to whether the agreement was statutorily prohibited by the Limitation of Liability Act,⁷³ the Majority held that it did not conflict if the statute was interpreted narrowly.⁷⁴ Justice Stevens filed a strong dissent, joined by Justice Marshall.⁷⁵

Thus, despite its benign attitude toward forum selection clauses, *Breman* has had precedential influence in international commercial agreements.⁷⁶ Since its decision in *Breman*, the Supreme Court has supported party autonomy by upholding arbitration clauses found in commercial contracts.⁷⁷ The holding in *Carnival Cruise Lines* extended *Breman* holding to parties of unequal bargaining power who were bound to a contract of adhesion and had no opportunity to negotiate the forum selection clause.⁷⁸ Despite the Court's portrayal of *Carnival Cruise Lines* as a refinement of *Breman*, it represented a significant expansion of the principles previously set forth by the Court, and strengthened the presumption that forum selection clauses are valid and enforceable.⁷⁹ Therefore, when *Vimar Seguros Y Reaseguros v. M/V Sky Reefer* was decided, most forum selection clauses were enforceable unless the protesting party could persuade the court that the clause was unreasonable or unfair.⁸⁰

III. STATEMENT OF THE CASE

A. The Facts

Plaintiff-petitioner Baccus Associates⁸¹ contracted with Galixie Negoce S.A.⁸² for the purchase of a shipload of Moroccan fruit.⁸³ Baccus then chartered the M/V Sky Reefer,⁸⁴ a refrigerated cargo ship, to transport the fruit from Morocco to Massachusetts.⁸⁵ As is customary in these transactions, Nichero, as the carrier, issued a form bill of lading to Galixie as shipper and consignee.⁸⁶ Among the rights and responsibilities set forth in the bill of lading were arbitration and choice-of-law clauses.⁸⁷ When the vessel reached Massachusetts and the hatches were opened, Baccus discovered that thousands of boxes of oranges were damaged, resulting in over \$1 million damages.⁸⁸ Baccus received \$733,442.90 compensation from Seguros.⁸⁹

B. Procedural History

Seguros and Baccus brought suit against Maritima and M/V Sky Reefer in the District Court of Massachusetts.⁹⁰ Maritima and M/V Sky Reefer moved to stay the action and compel arbitration in Tokyo, under clause 3 of the bill of lading and section 3 of the Arbitration Act.⁹¹ Petitioner and Baccus opposed the motion, arguing that the arbitration clause was void under COGSA section 3(8), and that it was a contract of adhesion.⁹² The district court rejected both arguments⁹³ and granted the motion to stay judicial proceedings, but refused to compel arbitration, believing it premature.⁹⁴ It also retained jurisdiction pending arbitration and certified the issue for interlocutory appeal.⁹⁵

The First Circuit affirmed the order to stay pending arbitration on different reasoning.⁹⁶ The First Circuit found that COGSA and the Arbitration Act were in conflict and could only be resolved by determining which one controlled based on two rules of statutory construction: order of enactment and specificity.⁹⁷ An appeal was made to the Supreme Court, and the Court granted *certiorari*.⁹⁸

C. U.S. Supreme Court Decision-Opinion of the Majority

The issue before the Court was whether a foreign arbitration clause in a bill of lading is invalid under COGSA, because it lessens liability in the manner that COGSA prohibits.⁹⁹ The Supreme Court, in a 7-1 decision,¹⁰⁰ held that COGSA does not forbid forum selection clauses.¹⁰¹ In the majority opinion, written by Justice Kennedy, the Court advanced its primary reason for affirming the lower court's decision as one based on a rule of statutory interpretation, which states "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each statute as effective."¹⁰² By establishing this rule of interpretation, the Court was able to give full effect to both statutes.¹⁰³

The remainder of the opinion addressed the petitioner's arguments to ensure that COGSA did not nullify foreign arbitration clauses.¹⁰⁴ The first argument was that a foreign arbitration clause lessened liability by increasing transaction costs¹⁰⁵ such as travel, passports, hotel, and associated expenses to produce witnesses and evidence necessary to

support the claim.¹⁰⁶ The Court struck down this argument and rejected the reasoning of the leading case for the invalidation of forum selection clauses.¹⁰⁷

In rejecting the petitioner's argument, the Court looked to the language of COGSA and found it only expressly prevents a lessening of specific liabilities, such as hold harmless clauses or liability arising from negligence, and does not address the separate question of the means and costs of enforcing that liability.¹⁰⁸ Additionally, the Majority supported its conclusion by citing *Carnival Cruise Lines*,¹⁰⁹ and the goals of the Brussels Convention,¹¹⁰ which served as the model for COGSA.¹¹¹ Finally, the Court discussed the negative political implications that would result from the interpretation of domestic legislation in such a manner that violated international agreements. Primarily, the Court was concerned that such an interpretation could result in being unable to gain the benefits of international accord, and that the United States could fail to have a role as a trusted partner in multilateral endeavors.¹¹²

The second argument the Petitioner advanced was that there was no guarantee that foreign arbitrators will apply COGSA.¹¹³ The Supreme Court declined to address this argument, dismissing it as "premature."¹¹⁴ Because this was an interlocutory appeal,¹¹⁵ it had not been established what law the arbitrators would apply, and therefore, if the petitioner would receive diminished protection.¹¹⁶ The Court, therefore, affirmed the First Circuit's reservation of judgment on the choice-of-law question.¹¹⁷ From a practical standpoint, however, this results in the district court acting as a court of appeals to the plaintiff if there is a misapplication of law which reduces the carrier's obligations to the cargo owner below the guarantees set forth in COGSA.¹¹⁸

D. Dissenting Opinion

The lone dissenter was Justice Stevens.¹¹⁹ He based his argument on what he called a "commonsense reading of 'lessening [of] liability'"¹²⁰ which, he said, must include anything that lessens the amount of recovery or the likelihood of any recovery at all.¹²¹ Supporting his interpretation of the purpose of COGSA section 3(8), Justice Stevens claimed that 3(8) was enacted in response to carriers' historic tendency to exploit the unequal bargaining power inherent in bills of lading, and their attempts to immunize themselves from liability for their fault.¹²²

Justice Stevens reconciled the discord between COGSA and the Arbitration Act by bringing to the forefront the exclusion clause found in the Arbitration Act, which states that the arbitration clause "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract."¹²³ He expanded his discussion and gave examples of situations such as mutual mistake, fraud, duress, impossibility, unconscionability or illegality under a separate federal statute where the Arbitration Act would fulfill its policy of eliminating the prior hostility to wards arbitration without imposing the burden of arbitration on the plaintiffs.¹²⁴ Concluding, Justice Stevens claimed that the Court's decision "drained [COGSA'S] words of much of their potency," and "compounds, rather than contains, the Court's unfortunate mistake in the *Carnival Cruise Case*."¹²⁵

IV. ANALYSIS

The Supreme Court's new reading of the Carriage of Goods Shipping Act enables the United States to make a bold statement in support of world commercial trade and its desire to become a trusted partner in the emerging world market.¹²⁶ The Court repeatedly used words such as "antique,"¹²⁷ "provincial"¹²⁸ and "parochial"¹²⁹ in explaining how the Court would appear if it continued to strike down foreign forum selection clauses.¹³⁰ Clearly, the Court is trying to cast off any negative connotations others may have about its present attitude toward foreign jurisdictions settling disputes which arise under domestic law.¹³¹

A. Statutory Interpretation 101

"It makes sense to invoke non-policy justifications for deciding cases only when judges are unable to determine the policy implications of a particular decision, or where the non-policy justifications actually serve to advance legitimate public policies . . ." ¹³² The Supreme Court engaged the canons of statutory construction to arrive at its result,¹³³ relying primarily on the canon which states that it is the duty of the courts to interpret statutes in a manner that enables them to coexist with each other, absent clearly defined congressional intent.¹³⁴ Accordingly, the Court established its holding as one of simple statutory interpretation.¹³⁵ The Court employed this method of interpretation as the basis for its decision due to the complexities and importance of the decision.¹³⁶ By invoking canons of interpretation, the Court is less prone to criticism and accusations of error¹³⁷ and avoids having to confront the competing claims within this case.¹³⁸

The legislative intent, which is the primary outside source to which the Court may look for statutory meaning under this canon of interpretation, only mentions "prevent[ing] abuses that were being practiced with damage resulting due to the negotiable character of the bill of lading."¹³⁹ The statute's silence towards any procedural limitations, such as choice-of-forum clauses, enabled the Court to limit the statute to the express substantive rules which define the carrier's liability,¹⁴⁰ rather than limit the procedural mechanisms for enforcing them.¹⁴¹ By applying this canon of statutory construction, and determining that there were no clear legislative intentions to the contrary, the Court was able to arrive at a result which gave full credence to both COGSA and the Arbitration Act, without having to make a ruling on presently competing policies.¹⁴²

B. Implications of the Result

The outcome of this case is another example of the Court compelling United States corporations into the world commercial economy via arbitration whether they are prepared or not.¹⁴³ The results of this compulsion are both positive and negative. One outcome which is of considerable importance is that the United States now interprets its version of COGSA and the Hague Rules similarly to most other countries by enforcing the arbitration clause.¹⁴⁴ Scholars believe that this is of primary importance because conflicts of interpretation of the Hague Rules destroy aesthetic symmetry in the legal order and impose real costs on the commercial system.¹⁴⁵

The Court's decision also recognizes that since the 1967 Second Circuit decision in *Indussa Corp. v. S/S Ranborg*,¹⁴⁶ "the world commercially has become smaller,"¹⁴⁷ and "less provincial regarding arbitration and . . . judicial proceedings in other places."¹⁴⁸ The Court embraces the belief that international travel, communications, and accessibility have reached a point in modern society that national borders do not pose a substantial barrier, and cannot be used to distinguish between domestic and foreign arbitration clauses.¹⁴⁹

Despite the Court's progress into the world commercial market, the negative impact of this decision resonates harshly at the domestic level, as Justice Stevens advanced in his dissent.¹⁵⁰ The first issue is the unusual disregard for precedent.¹⁵¹ The Court chose a novel reading of the statute, despite decades of uniform interpretation by both Courts of Appeals and scholarly commentators that choice-of-forum clauses are unenforceable against a shipper because it "relieve[s]" or "lessen[s]" the liability of the shipper.¹⁵² Federal courts have stated in the past that COGSA "was intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers, and the liabilities of underwriters who insure waterborne cargo."¹⁵³

By ignoring precedent, the Court strips away the predictability of contract dispute settlements upon which business people rely.¹⁵⁴ However, the demands of public policy cannot be ignored as a necessary reason for departure.¹⁵⁵ The Court's holding demonstrates that the public policy concerns of furthering the United States' position as a trusted partner in the world commercial market supersede the role which precedent plays in the American judiciary system.¹⁵⁶ This delicate topic may well explain why the Court chose to base its decision on statutory construction and interpretation.¹⁵⁷

The second implication of this case is the Court's disregard for the "common sense" reading of COGSA. Although neither the statute itself,¹⁵⁸ nor the legislative history,¹⁵⁹ provide any express language regarding the degree of protection which COGSA should provide American shippers, the statute does contain an "umbrella" phrase at the end of section 3(8) which has been historically interpreted as including contractual provisions that have the practical effect of lessening the injured party's damage award.¹⁶⁰ The applicable part of COGSA states that parts of a bill of lading which ". . . less[en] such liability otherwise than as provided in this chapter, shall be null and void and of no effect."¹⁶¹ John R. Allison, a leading commentator on this subject, has stated that regardless of the forum, it is hard to see how the holder of a bill of lading does not have some "lessening of liability" when forced to bring suit in some distant foreign country, although the difficulty would vary with the circumstances; Canada is not Pakistan.¹⁶² However, there must always be some palpable "lessening," for if the choice-of-forum clause is ever enforced, the result is that the litigant has been dismissed out of the United States court in which he has chosen to sue.¹⁶³ On most moderate-sized claims, compelling the shipper to the foreign forum is a practical immunization of the carrier from liability.¹⁶⁴

The overriding impact of the Court's decision is the bold statement it makes regarding the increasing emphasis American courts are placing on arbitration, especially in the

international commercial arena.¹⁶⁵ Presently, some scholars believe that the U.S. position in favor of commercial arbitration is among the strongest and most clearly expressed domestic public policies.¹⁶⁶ In addition to providing a means for dispute resolution, arbitration is defining new standards of conduct in international business,¹⁶⁷ and enhancing world peace and stability.¹⁶⁸ It is also important to recognize that arbitration, even in the international arena, does not exist completely outside the legal system.¹⁶⁹ Additionally, under the Convention, each nation retains the right to deny enforcement of any award that is adverse to the public policy of that country.¹⁷⁰

There are numerous reasons why companies choose to include arbitration clauses in an international commercial agreement, many of which vary from the reasoning behind using these clauses in a domestic contract.¹⁷¹ Among the most frequently cited benefits are enforceability, ability to select arbitrators, selection of language, flexible procedures, privacy, lower costs, speed, informality, and an increased likelihood of salvaging an important business relationship.¹⁷² Although arbitration has many advantages, the disadvantages should not go unrecognized. The foremost obstacles include the difficulty or inability to receive interim relief, a compromised result, limited discovery and lack of judicial review.¹⁷³ The decision of the Court in *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer* supports the federal courts' general intention to promote commercial arbitration through its broad interpretation of the viability of arbitration clauses.¹⁷⁴

V. CONCLUSION

In *Vimar Seguros Y Reaseguros, S.A. v. M/V. Sky Reefer*, the United States Supreme Court invoked a new reading of COGSA and reinforced the recent judicial emphasis on settling international commercial disputes through arbitration. Although the Court emphasized that the new reading was merely a result of applying basic canons of statutory interpretation, the implications of the decision are more vast.

While the new reading of COGSA necessarily reduces the protection once offered to American shippers, it aligns the U.S. courts' interpretation of the Hague Rules with other countries that were a party to the international convention. Looking at the growing need for international uniformity and enforcement of laws, this decision is another important step for the U.S. in its recent steps toward subordinating domestic interests in favor of international goals.

Finally, the Court's decision makes another bold statement encouraging arbitration as a means of resolving international commercial disputes. Because the Convention on the Recognition and Enforcement of Foreign Arbitral Awards imposes recognition and enforcement of foreign arbitral awards upon all ratifying countries, arbitration is becoming a safer alternative than the traditional judicial forum for the resolution of international disputes. Considering recent court judgments, legislative material, and academic journals, arbitration will continue to entrench itself as an important part of international commercial contracts.

1. Klaus P. Berger, *Party Autonomy in International Economic Arbitration: A Reappraisal*, 4 Am. Rev. Int'l Arb. 1, 7 (1993) (citing other commentators).
2. AM. ARBITRATION ASS'N, A GUIDE TO ARBITRATION FOR BUSINESS PEOPLE (1993), available at 1993 WL 495935, at *1.
3. *Id.*
4. *Id.* Generally, the disputes involve an evaluation of the facts and interpretation of the contract terms. *Id.*
5. [115 S. Ct. 2322 \(1995\)](#).
6. [46 U.S.C. app. §§ 1300-1315 \(1988\)](#). Section 3(8) of COGSA, found at 46 U.S.C. app. § 1303(8), states:

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 or obligations provided in this section, or *lessening such liability otherwise than as provided in this chapter*, shall be null and void and of no effect (emphasis added).
- Id.*
7. [Vimar Seguros, 115 S. Ct. at 2329](#).
8. *Id.* The Majority relied on the principles stated in *The Breman v. Zapata Off-Shore Co.* to support its decision. *Id.* at 2328. The principles included applying COGSA in a fashion that would give way to modern principles of international commercial practice, and failing to enforce foreign forum selection clauses had little place in businesses which were at one time local, but now operate in world markets. *The Breman v. Zapata Off-Shore Co.*, 92 S. Ct. 1907, 1914 (1972).
9. Dominic Bencivenga, *Court Ships Cargo Arbitration Actions Overseas*, N.Y.L.J., July 6, 1995, at 5.
10. *Id.* Specific statements by representatives include: Paul S. Edelman, Partner at Kreindler & Kreindler, claims it will have "tremendous repercussions . . . because now I am supposed to arbitrate any cargo problem in [the carrier's home country];" David W. Martowski, President of Transport Mutual Services, Inc. (insurer of 23 percent of the world's oceangoing ships for liability), expects "more cases to be settled . . . [and will] force people to take a much more realistic view of the merits of a case and settle on a more commercially realistic basis;" Chester D. Hooper, President of the Maritime Law Association of the United States, believes cargo companies could prevent shipping lines from including forum provisions because "it's basically a shipper's market," and they

could conduct business with a different carrier; and Mr. Bilski, of Royal Insurance, fears that claims will not be heard in a timely manner, and "may cost the American economy billions of dollars." *Id.*

11. A bill of lading is "a document evidencing receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods" [U.C.C. § 1-201\(6\)](#). Bills of lading regulate transactions between the carriers and shippers who transport goods by sea. *Id.* See GRAND GILMORE & CHARLES BLACK, JR., THE LAW OF ADMIRALTY § 3-1 (2d ed. 1975); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 9-8 (1987). A common carrier, usually a ship owner or a ship operator, who accepts different shipments of goods from many different independent shippers, issues a bill of lading to the shipper as a receipt and contract for the transport of the goods. *Id.*

12. [Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2329 \(1995\)](#). This overriding concern cautioned the Court against interpreting COGSA in a manner which nullified arbitration clauses based on inconvenience to the plaintiff or distrust in the ability of foreign arbitrators to apply the appropriate law. *Id.*

13. See generally [id. at 2325-30](#).

14. *Id.* at 2323. See also *Carbon Black Export, Inc. v. The S/S Monrosa*, 254 F.2d 297 (5th Cir. 1958) (holding a forum selection clause to be unenforceable because agreements in advance of controversy which ousted courts of jurisdiction were contrary to public policy and unenforceable), *cert. dismissed*, 359 U.S. 180 (1959); *William H. Muller & Co. v. Swedish Am. Line Ltd.*, 224 F.2d 806 (2d Cir. 1955) (holding a forum selection clause enforceable under a "reasonableness" test, despite the present law strongly disfavoring such clauses), *cert. denied*, 350 U.S. 903 (1955), *rev'd* 377 F.2d 200 (2d Cir. 1967).

15. [9 U.S.C. §§ 1 -16 \(1994\)](#) [hereinafter Arbitration Act].

16. See *infra* notes 19-81 and accompanying text.

17. See *infra* notes 82-139 and accompanying text.

18. See *infra* notes 140-75 and accompanying text.

19. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985) (Arbitration Act leaves no room for discretion); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (all doubts resolved in favor of arbitration); *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 507 (1974) (parties are free to decide that a present dispute should be submitted for arbitration); *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 404 (1967) (congressional purpose that arbitration not be delayed).

20. Rita M. Cain, *Commercial Disputes and Compulsory Arbitration*, 44 *BUS. LAW.* 65, 66, (1988); Ludwig Von Zumbusch, Comment, *Arbitrability of Antitrust Claims under German, U.S. and EEC Law: The International Transaction Criterion and Public Policy*, 22 *TEX. INT'L L.J.* 291, 292 (1987). The precise reasons for the common law hostility toward arbitration are unknown, but is believed to trace back to the English judges' almost complete reliance on fees from cases for their income. John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodations of Conflicting Public Policies*, 64 *N.C. L. REV.* 219, 224 (1986). A second reason often cited may have been the centuries-long struggle by the early courts for jurisdiction. *Id.* For a view of arbitration in its historical context, see F. KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS, AND ACHIEVEMENTS* (1948); Frank D. Emerson, *History of Arbitration Practice and Law*, 19 *CLEV. ST. L. REV.* 155 (1970); Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 *YALE L.J.* 595 (1927).

21. [9 U.S.C. §§ 1-16 \(1994\)](#).

22. H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924). Mr. Graham's report, from the House Committee on the Judiciary, stated that "the need for the law [arose] from an anachronism of our American law." *Id.* He continued to explain that centuries ago jealousy in the English courts initiated the judicial hostility toward arbitration. *Id.* This jealousy continued for so long that it became "firmly embedded in English common law and was adopted by American courts." *Id.* In the Committee's opinion, based on statements from the Court, "the precedent was too strongly fixed to be overturned without legislative enactment." *Id.* The Arbitration Act goes much farther than simply validating arbitration clauses. Allison, *supra* note 20, at 227. It actually mandates the active involvement of federal courts in implementing the Act's "pro-arbitration" policy. *Id.* Examples include the federal district court's requirement to stay litigation on any issue within the scope of the arbitration clause, and to issue an order compelling arbitration upon the application of either party. *Id.* at 227-28. *See generally* *Sherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (parties are free to decide that a present dispute should be submitted for arbitration).

23. S. REP. NO. 362, 68th Cong., 1st Sess. 2-3 (1924). Congress drafted several specific statements in the Arbitration Act in an effort to accomplish its objectives. First, the Act makes arbitration provisions included in contracts, and agreed to prior to a dispute, "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract." [9 U.S.C. § 2 \(1988\)](#). Next, Congress authorized a federal court to stay litigation if the claims presented are referable to arbitration under the agreement in writing for such arbitration. [9 U.S.C. § 3 \(1988\)](#). Additionally, the Act gives a federal court jurisdiction over a petition by a party to compel arbitration under a contract in the event another party refuses to arbitrate according to the terms of the contract. [9 U.S.C. § 4 \(1988\)](#).

24. Allison, *supra* note 20, at 226. Under early English common law, the courts were adverse to the idea of non-judicial forums. LON L. FULLER & MELVIN A. EISENBERG,

BASIC CONTRACT LAW 432-34 (1972). Consequently, arbitration agreements contravened public policy, because they ousted the courts of jurisdiction and, therefore, were unenforceable. *Id.* The rule and attitude came to the United States with the common law. *See generally* Thomas E. Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L.J. 33, 39 (1984).

25. Roscoe Pound, *Jurisprudence* 359 (1959).

26. Allison, *supra* note 20, at 219. This is demonstrated not only by the enactment of the Arbitration Act, but also by the subsequent expansive interpretation by the courts. *Id.*

27. [9 U.S.C. § 2 \(1988\)](#). Section 2 of the Act states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id. The Arbitration Act enables courts to confirm arbitral awards, stay legislation pending the outcome of arbitration, and enforce domestic arbitration agreements. *Id.* For discussions of the Arbitration Act, see Allison, *supra* note 20, at 373; Cain, *supra* note 20, at 65.

28. Lauri Newton, Comment, *Arbitration and Antitrust: A Leg Up For International Arbitration*, 25 WASHBURN L.J. 536 (1986). Due to the expressed congressional intent, courts have concluded that the strong public policy in favor of arbitration requires that such agreements be liberally interpreted and, when in doubt, resolved in favor of arbitration. *Id.* *Cf.* *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (Arbitration Act leaves no room for discretion); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (all doubts resolved in favor of arbitration); *Prima Paint Corp. v. Flood & Conklin Mfg.*, 363 U.S. 395, 404 (1967) (congressional purpose that arbitration not be delayed).

29. Cain, *supra* note 20, at 66. In addition, Congress empowered federal courts to stay litigation in certain situations, and to compel arbitration when a party refuses to arbitrate according to the terms of the contract. *Id.*

30. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517. The Convention was completed on June 10, 1958, in New York City, NY. *Id.* Initially, the U.S. did not ratify the Convention. *Id.* Early ratifiers included France, Russia, Morocco, India, Egypt, Czechoslovakia, and the Federal

Republic of Germany. [W. Lawrence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 10 \(1995\).](#)

As of April 1994, ninety-six nations had ratified the Convention, making it the cornerstone upon which the value of international arbitral awards is based. *Id.* The United States resisted signing on to the convention due to conflicting domestic policies.

Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1970: Hearings on S. 3274 Before the Subcomm. on Foreign Relations, 91st Cong., 2nd Sess. (1970) (statement of Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law, accompanied by Herman Marcuse, Department of Justice) [hereinafter *Hearings on S. 3274*]. The Convention was amended and codified as an addition to 9 U.S.C. §§ 201-208 (1994).

31. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, S. Exec. Doc. No. 702, 90th Cong. 2d Sess. (1968). The United States' accession to the Convention established the present public policy limiting narrow judicial interpretations of the Convention, and encouraging the use of international arbitration agreements. *See generally* Hans Harnik, *Recognition and Enforcement of Foreign Arbitral Awards*, 31 AM. J. COMP. L. 703 (1983).

32. *Hearings on S. 3274, supra* note 30.

33. The Convention specifically requires each contracting state to recognize arbitral awards as binding, and to enforce them according to the rules of the proper territory. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, Article III.

34. Craig, *supra* note 30, at 2.

35. *Id.* Because there is no international court for the resolution of private international disputes, arbitration has become a popular method for the participants of international commerce to resolve disputes. *Id.* The process, although not international, is at least internationalized, in that awards will ordinarily be recognized and enforced among members of the Convention. *Id.* *See also* Nicolas deB. Katzenbach, *Business Executives and Lawyers in International Trade, in SIXTY YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE* 67, 67-68 (ICC Int'l Court of Arbitration ed., 1984). In international matters, the existence of predictable commercial results is less than in domestic agreements. *Id.* For those who are not experts in international transactions, an understanding of the advantages of arbitration is a necessity. *Id.*

36. Craig, *supra* note 30, at 2.

37. In *Indussa Corp. v. S.S. Ranborg*, Judge Friendly, of the Second Circuit Court of Appeals, predicted that when the issue of arbitration had to be decided separately from choice-of-forum clauses for litigation, the Arbitration Act would prevail if there were any inconsistencies between it and COGSA by virtue of its later reenactment date. 377 F.2d 200, 204 n.4 (2d Cir. 1967).

38. *See* ch. 105, 27 Stat. 445 (1893) (codified as amended at 46 U.S.C. app. §§ 190-196 (1994)). *See generally* GILMORE & BLACK, *supra* note 11, at § 3-1; Schoenbaum, *supra* note 11, at § 9-8.

39. [46 U.S.C. § 190 \(1988\)](#). *See* H.R. REP. NO. 1988, 52d Cong., 1st Sess. 3 (1982) (prohibiting carriers from inserting certain provisions into bills of lading which lessen liability).

40. *See* 46 U.S.C. app. § 192 (1988); H.R. REP. NO. 1988, *supra* note 39, at 3 (permitting carriers to insert into bills of lading reasonable exemptions from liability).

41. Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155 [hereinafter Hague Rules]. The United States was the leader of regulatory legislation for bills of lading, but several British dominions enacted similar laws shortly thereafter. ARNOLD W. KNAUTH, *THE AMERICAN LAW OF OCEAN BILLS OF LADING* 118 (4th ed. 1953). In 1924, an international diplomatic convention was called by Belgium to encourage all maritime nations to adopt a uniform set of rules, known as the Hague Rules, governing all bills of lading. *Id.*

42. Ch. 229, 49 Stat. 1207 (1936) (codified at 46 U.S.C. app. §§ 1300-1315 (1988)).

43. *See* GILMORE & BLACK, *supra* note 11, at § 3-24. The subsequent adoption of the Hague Rules by most of the major maritime countries gave shippers and carriers the assurance that most aspects of bills of lading would receive similar treatment, regardless of the country. Kenneth M. Klemm, Note, *Forum Selection in Maritime Bills of Lading under COGSA*, 12 FORDHAM INT'L L.J. 459, 463 (1989).

44. The express changes made in the Hague Rules are minor, but reflect some of the domestic policy bias in favor of protecting shippers. David Michael Collins, Comment, *Admiralty International Uniformity and the Carriage of Goods by Sea*, 60 TUL. L. REV. 165, 174 (1985). Some of the changes include limiting carriers' exemptions from liability if suffered as a result of reasonable deviation when loading or unloading, during strikes or lockouts. *Id.*

45. 46 U.S.C. app. § 1312 (1988). Foreign Trade is defined as "the transportation of goods between the ports of the United States and ports of foreign countries." *Id.*

46. 46 U.S.C. app. § 1303(8) (1988) The entire section reads:

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, arises from negligence, fault, or failure in the duties and obligations provided in this section, or lessening of liability otherwise than as provided in this chapter shall be null and void and of no effect.

Id.

47. See *Conklin & Garret, Ltd. v. M/V Finnrose*, 826 F.2d 1441 (5th Cir. 1987) (holding that a contractual obligation to sue overseas lessens the liability of the carrier); *Union Ins. Soc'y of Canton, Ltd. v. S/S Elikon*, 642 F.2d 721 (4th Cir. 1981) (reversing a district court on the grounds that it failed to give sufficient weight to the application of COGSA); *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (holding jurisdiction clauses invalid under COGSA); *Carbon Black Export, Inc. v. The S/S Monrosa*, 254 F.2d 297 (5th Cir. 1958) (holding agreements in advance of controversy whose purpose is to oust the courts of jurisdiction are contrary to public policy and unenforceable); *General Motors Overseas Operation v. S/S Goettingen*, 225 F. Supp. 902 (S.D.N.Y. 1964) (refusing to enforce forum selection clauses when COGSA applied).

48. Edward P. Gilbert, Comment, *We're All In the Same Boat: Carnival Cruise Lines, Inc. v. Shute*, 18 BROOK. J. INT'L L. 597, 626 (1992). The general rule in England is that forum clauses are prima facie valid. *Id.* Spain, Italy, Mexico, and Cuba also favor these clauses without much discrimination. *Id.* Other countries, on the other hand, still favor choice of forum clauses, but require that neither party have a link to the country (Germany and Belgium), or, in the converse, that such a clause will not be enforced if neither party has a connection to the country (Netherlands). See also Michael Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 774 (surveying other countries' interpretation of § 3(8) of the Hague Rules). Conflicts of interpretation are an inherent result of countries ratifying a unified code of rules. *Id.* at 732. The court is greatly influenced by the country's substantive domestic policy when faced with deciding among multiple interpretations. *Id.* at 733.

49. 46 U.S.C. app. § 181-196 (1988). The Limitation of Liability Act provides the same protection to passengers of cruise ships as COGSA does to the owners of cargo being shipped on cargo ships.

50. See *Shute v. Carnival Cruise Lines*, 499 U.S. 585 (1991) (interpreting the Limitation of Liability Act narrowly in order to allow the arbitration clause to stand).

51. Bruce Archer Denning, *Choice of Forum Clauses in Bills of Lading*, 2 J. MAR. L. & COM. 17 (1970). The early cases date back to 1889, when a New York district court held a provision void in a charter specifying that a port of discharge would be the only place where disputes could be settled. *Prince Steam-Shipping Co. v. Lehman*, 39 F. 704 (S.D.N.Y. 1889). The court stated: "such agreements have repeatedly been held to be against public policy, and void. The provision being void, it makes no difference which party seeks to take advantage of it; being void, it is of no avail to either party." *Id.*

52. See generally *Carbon Black Export, Inc. v. The S/S Monrosa*, 254 F.2d 297 (5th Cir. 1958) (holding a forum selection clause to be unenforceable because agreements in advance of controversy which ousted courts of jurisdiction were contrary to public policy and unenforceable), *cert. dismissed*, 359 U.S. 180 (1959); *William H. Muller & Co. v.*

Swedish Am. Line Ltd., 224 F.2d 806 (2d Cir. 1955) (holding a forum selection clause enforceable under a "reasonableness" test, despite the present law strongly disfavoring such clauses), *cert. denied*, 350 U.S. 903 (1955), *rev'd* 377 F.2d 200 (2d Cir. 1967).

53. C. Andrew Waters, *The Enforceability of Forum Selection Clauses in Maritime Bills of Lading: An Update*, 15 TUL. MAR. L.J. 29, 31 (1990).

54. The "reasonableness test" emphasized that the forum named in the contract was the most practical locale in which to litigate, and was, therefore, enforceable. *Muller*, 224 F.2d at 808.

55. 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955). In *Muller*, Wm. H. Muller & Co. was the consignee of a shipment of cocoa beans being transported by the Swedish American Lines from Sweden to Philadelphia. *Id.* at 806-07. The vessel was lost at sea. *Id.* at 807. Found in the bill of lading was a clause that required any claim against the carrier to be decided in the Swedish courts. *Id.* Despite the contention that the forum selection clause lessened the carrier's liability, the court enforced it based on the fact that it was reasonable. *Id.* The Swedish forum was found reasonable because the lost vessel was Swedish built and owned, all of the crew resided in Sweden, and the majority of the evidence available was in Sweden. *Id.* at 807-08.

56. Waters, *supra* note 53, at 29.

57. *See Amicale Indus., Inc. v. S/S Rantun*, 259 F. Supp. 534 (D.S.C. 1966) (forum selection clause reasonable and therefore valid); *Aetna Ins. Co. v. The Satrustegi*, 171 F. Supp. 33 (D.P.R. 1959) (forum selection clause neither lessened or relieved carrier of liability).

58. 377 F.2d 200 (2d Cir. 1967).

59. Waters, *supra* note 53, at 35. The holding that COGSA does not preclude forum selection clauses was no longer binding, regardless of its rationale. *Id.*

60. *Indussa*, 377 F. 2d at 202. The court reasoned that if the clause was held valid, any dispute would be decided in Norway, the country where the carrier had its principal place of business. *Id.* at 203-04. The court noted that even if the foreign court applied the Hague Rules, it might apply them in a manner inconsistent with American tribunals. *Id.*

61. *Id.* at 204. Buried in a footnote, Judge Friendly specifically stated that this decision did not address the question of arbitration. *Id.* at 204 n.4. In his opinion, an arbitration would be held valid, because based on the basic canon of statutory interpretation that when two statutes are inconsistent, the later-enacted statute prevails. *Id.* The Arbitration Act was enacted into positive law in 1947, whereas COGSA was enacted in 1936. *Id.*

62. 407 U.S. 1 (1972). In this case, a deep-sea oil rig belonging to Zapata, an American corporation, was damaged in a storm in the Gulf of Mexico while being towed to the

Adriatic Sea by the Breman, which was owned by a German corporation. *Id.* at 2. As a result of a severe storm, the rig was damaged and was towed to the nearby Tampa, Florida port. *Id.* at 3. The contract submitted to Zapata contained a provision stating that any dispute arising between the parties would have to be heard before the London Court of Justice. *Id.* A Zapata vice president reviewed the contract and made several changes, but never questioned the choice of forum clause. *Id.* at 3. Ignoring its contract promise to litigate any disputes in the English courts, Zapata brought an action in admiralty against Unterweser, the owner of the Breman, in the United States District Court in Tampa. *Id.* at 3-4. Unterweser moved for dismissal based on the forum selection clause. *Id.* at 4.

63. *Id.* at 10. The U.S. Supreme Court held that forum selection clauses are prima facie valid, and should be enforced unless the resisting party can show that enforcement is unreasonable under the circumstances. *Id.* For a listing of decisions which the Supreme Court cited supporting the common law countries' approach, see *id.* at 11 n.12.

64. *Id.* at 14 n.16. The negotiations had been made between two sophisticated businessmen familiar with the industry. In their negotiations, several changes had been requested in the contract, but the choice-of-forum clause had never been questioned. Considering these facts, the first criteria was not met.

65. *Id.* at 16. The Court resurrected the reasonableness test from *Muller*. Although "reasonable" was never explicitly defined, Chief Justice Burger, writing for the Majority, expressed the view that a claim of serious inconvenience would not render the clause unreasonable and unenforceable. *Id.* at 16. This criteria was quickly dismissed because it was a freely negotiated contract which contemplated the forum at the time of execution. *Id.* at 17.

66. *Id.* at 15. See *Boyd v. Grand Trunk W.R. Co.*, 338 U.S. 263, 265 (1949). The Court did not have to determine if this clause contravened the public policy set forth in COGSA, because the facts of the case removed it from the scope of the Act.

67. *M/S Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 8 (1972). "The barrier of distance that once tended to confine a business concern to a modest territory no longer does so." *Id.* The Court continued by stating that the judicial resistance to the lessening of a court's power from forum selection clauses no longer had a place in an era where businesses, which were once local, now operate in world markets. *Id.* at 12.

68. *Id.*

69. 499 U.S. 585 (1991). In this case, Mr. and Mrs. Shute, a Washington couple, took a cruise on the Carnival Cruise Lines, a Florida based cruise line. *Id.* Included on the back of the passenger ticket was a clause designating Florida courts as the situs for the resolution of any disputes. *Id.* The Shutes boarded in Los Angeles, and while in international waters, Mrs. Shute slipped on a deck mat where she sustained injuries. *Id.*

70. *Id.* at 591. The pertinent boilerplate language found on "contract page 1" of each ticket stated in part:

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

Id. at 587.

71. *Id.* at 593. The opinion further stated that it would be "unreasonable" to expect that any cruise line would negotiate the terms of a forum selection clause. *Id.* The *Breman* reasonableness test, discussed *supra* note 65, was then further refined "to account for the realities of form . . . contracts." *Id.* Three factors led the Court to conclude that the clause was reasonable under the circumstances. First, "the cruise line has a special interest in limiting the fora in which it potentially could be subject to suit . . . because . . . it is not unlikely that a mishap on a cruise ship could subject the cruise line to litigation in several different fora." *Id.* Second, the clause established a definite forum for litigation and "dispelled any confusion about where suits arising from contracts must be brought and defended, sparing litigants time and expense . . . and conserving judicial resources" *Id.* Third, "it stands to reason that passengers who purchase tickets containing a forum selection clause . . . benefit in the form of reduced fares" *Id.* at 594.

72. *Id.* at 585. The Court held that the Shutes had not met "the heavy burden of proof" required to have the clause set aside for inconvenience. *Id.*

73. [46 U.S.C. app. §§ 181-196 \(1988\)](#).

74. *Shute v. Carnival Cruise Lines*, 499 U.S. 585, 596-97 (1991). The Court, looking to congressional intent, suggested that the statute had been enacted in response to passenger-ticket situations which limited the ship owner's liability for negligence. *Id.* at 596. The Court distinguished the clause at hand from the aim of the statute, because it still permitted for judicial resolution of the claim, and it did not limit Carnival Cruise Line's liability for negligence. *Id.*

75. *Id.* at 597. Justice Stevens believes that forum selection clauses are "designed to put a thumb on the carrier's scale of justice." *Id.* at 598. Considering this analogy, the clause was invalid under the terms of the Limitation of Vessel Owners Liability Act, which prevents carriers from expressly limiting ship owners' liability for negligence towards their passengers. *Id.*

76. Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 56 (1992).

77. See [Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 \(1991\)](#) (enforcing arbitration agreement over protest it violated the Age Discrimination in Employment Act (ADEA)); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (enforcing arbitration despite claims it violated federal securities law); *Mitsubishi Motors Corp. v. Solor Chrysler-Plymouth, Inc.*, 473 U.S. 614, 615 (1985) (upholding arbitration despite claim that it violated federal antitrust laws).

78. Robert T. Lemon, *Recent Supreme Court Decisions in Maritime Law*, 5 U.S.F. MAR. L.J. 1, 126 (1992).

79. *Id.* at 129.

80. *Id.* at 134. To have the clause stricken from a contract, the party had to sustain a "heavy" burden of proof that the forum selection clause was unfair. *Id.* The Court set forth, in *Breman*, that "serious inconvenience" was inadequate to render the clause unenforceable. *M/S Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972).

81. Baccus Associates is a New York partnership that distributes fruit at wholesale throughout the northeastern United States [hereinafter Baccus]. *Vimar Seguros Y Reaseguros v. M/V Sky Reefer*, No. 91-13345 WF, 1993 WL 137483, at *2 (D. Mass. Apr. 19, 1993). The case was brought by Baccus' marine cargo insurer Vimar Seguros y Reaseguros's name.

82. Galixie is a Moroccan fruit distributor [hereinafter Galixie].

83. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, No. 91-13345 WF, 1993 WL 137483, at *2 (D. Mass. Apr. 19, 1993).

84. The Vessel was owned by M.H. Maritima, S.A., a Panamanian company, and time-chartered to Nichiro Gyogyo Kaisha, Ltd., a Japanese company.

85. *Vimar Seguros*, [115 S. Ct. at 2325 \(1995\)](#).

86. *Id.*

87. *Id.* Clause 3 of the form was entitled "Governing Law and Arbitration," and provided:

(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.

Id.

88. *Id.* at 2325.

89. *Id.* Seguros was Bacchus' marine cargo insurer. *Id.* As a result, Seguros became subrogated *pro tanto* to Bacchus' rights. *Id.*

90. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, No. 91-13345 WF, 1993 WL 137483, at *1 (D. Mass. Apr. 19, 1993).

91. *Id.* Section 3 of the Arbitration Act requires courts to stay proceedings pending arbitration. *Id.*

92. *Id.* Section 3(8) prohibits "lessening of liability" by carriers. *Id.* at *2. Bacchus and Seguros argued that the inconvenience and costs associated with a proceeding in Japan would lessen liability in a manner which COGSA prohibited. *Id.* at *1.

93. *Id.* at *2. The district court looked to another district court opinion with similar facts for support. *Citrus Marketing Board of Israel v. M/V Ecuadorian Reefer*, 754 F. Supp. 229 (D. Mass. 1990) (holding that under the Supreme Court's interpretation of the Arbitration Act under *Mitsubishi*, an arbitration clause incorporated into a bill of lading was enforceable and did not conflict with COGSA). The court was also unpersuaded that arbitration clauses in bills of lading constitute a contract of adhesion. *Id.* The court found evidence suggesting that Bacchus was alert to the issue of arbitration in advance of the shipment. *Id.*

94. *Id.* at *5. The court refused to grant an injunction compelling arbitration until Seguros outrightly refused to arbitrate. *Id.* The court was confident that once the Order resolved the enforceability of the arbitration clause, the party would willingly proceed to arbitration as described in the bill of lading. *Id.*

95. *Vimar Seguros Y Reaseguros v. M/V Sky Reefer*, 29 F.3d 727, 728 (1st Cir. 1994). The controlling question certified by the court was "whether COGSA § 3(8) nullifies an arbitration clause contained in a bill of lading governed by COGSA." *Id.*

96. *Id.* at 732.

97. *Id.* Because the Arbitration Act was reenacted into positive law in 1947 and COGSA was enacted in 1936, the Arbitration Act was more recent. *Id.* Also, the court found that the Arbitration Act specifically validated arbitration clauses found in bills of lading, whereas COGSA did not mention arbitration clauses or forum selection clauses. *Id.* The court also noted in dicta the emerging strong federal policy favoring arbitration. *Id.* See generally *Watt v. Alaska*, 451 U.S. 259 (1981) (more recent statute prevails); *Northern Boarder Pipeline Co. v. Jackson County*, 512 F. Supp 1261 (D. Minn. 1981) (more specific statute controls).

98. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 571 (1994).

99. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, [115 S. Ct. 2322, 2324 \(1995\)](#).

100. Justice Kennedy delivered the opinion of the Court, in which Chief Justice Rehnquist, and Justices Scalia, Souter, Thomas, and Ginsberg joined. Justice O'Connor filed an opinion concurring in the judgment. Justice Stevens filed a dissenting opinion. Justice Breyer took no part in the consideration or decision of the case.

101. [Id. at 2330](#). Specifically, the Court held that choice of forum clauses found in bills of lading "are not invalid under COGSA in all circumstances," leaving room to invalidate under different facts. *Id.*

102. [Id. at 2326](#).

103. [Id.](#)

104. [Id.](#)

105. [Id.](#)

106. *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 1995 WL 242268, at *12 (U.S. Oral Arg. Mar. 20, 1995).

107. *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (1967) (en banc). Since its decision in 1967, the courts of appeals, without exception, have invalidated foreign forum selection clauses under COGSA § 3(8). Other cases had also extended the holding to foreign arbitration clauses. *Cf.* *State Establishment for Agric. Prod. Trading v. M/V Westermunde*, 838 F.2d 1576 (11th Cir. 1988).

108. [Vimar Seguros, 115 S. Ct. at 2327 \(1995\)](#).

109. 499 U.S. 585 (1991). Under *Carnival Cruise Lines*, the Court looked to the forum selection clause for any indication that it attempted to limit the cruise line's liability. *Id.* at 596-97. Finding that it did not, the clause was enforced. *Id.* The clause was upheld despite arguments that the cost and inconvenience of traveling thousands of miles across the country lessened or weakened the plaintiffs' ability to recover its losses. *Id.* at 603.

110. Specifically, the Court was concerned that interpreting COGSA as disparaging the authority of other forums for dispute resolution was completely contrary to the goals of the convention. [Id. at 2328](#).

111. [Id.](#) In its discussion of the parties to the Convention, the Court stated that sixty-six countries are now parties to the Convention and none, except the United States, interpret the meaning to prohibit foreign forum selection clauses. [Id.](#)

112. [Id.](#) These concerns directly conflict with interpreting COGSA to nullify foreign arbitration clauses.

113. *Id.* at 2329. The petitioners argued that the Japanese version of the Hague Rules provides the carrier with a defense based on the acts or omissions of the stevedores hired by the shipper, while COGSA makes non-delegable the carrier's obligation to stow the goods below. *Id.*

114. [Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2329 \(1995\)](#).

115. An interlocutory appeal is "an appeal of a matter which is not determinable of the controversy, but which is necessary for a suitable adjudication of the merits." BLACK'S LAW DICTIONARY 815 (6th ed. 1991). Interlocutory appeals are governed by the Interlocutory Appeals Act, in which section (a) covers appeals of right and section (b) covers discretionary appeals, which may only be heard upon judicial discretion. [28 U.S.C. § 1292 \(1994\)](#). Section 1292(b) applies where: (1) the district judge who makes the interlocutory order is "of the opinion that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion . . .," and also believes that an immediate appeal from the order may "[m]aterially advance the ultimate termination of litigation . . .;" and (2) the court of appeals then agrees (at its discretion) to take the case. *Id.* The U.S. Supreme Court has certified, but not yet decided, what the scope of jurisdiction is pursuant to [28 U.S.C. § 1292\(b\)](#) in an interlocutory appeal. *Yamaha Motor Corp. v. Calhoun*, [115 S. Ct. 1998 \(1995\)](#). Presently, courts disagree whether appellate jurisdiction extends to the entire order from which the appeal is prosecuted and not limited to the controlling legal issue certified by the lower court. RICHARD GIVENS, MANUAL OF FEDERAL PRACTICE 645 (4th ed. 1991). For examples of courts that extend jurisdiction to the entire order, see *Swint v. Chambers County Comm'n*, [115 S. Ct. 11 \(1994\)](#); *United States v. Stanley*, 483 U.S. 669 (1987); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 755-57 (1986) (court of appeals reviewing district court's ruling on request for preliminary injunction properly reviewed merits as well); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172-83 (1974) (court of appeals reviewing district court's order allocating costs of class notification also had jurisdiction to review ruling on methods of notification); *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 578 (1954) (court of appeals reviewing order granting motion to dismiss properly reviewed order denying opposing party's motion to remand); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940) (court of appeals reviewing order granting preliminary injunction also had jurisdiction to issue order denying motions to dismiss); *Daily v. National Hockey League*, 987 F.2d 172 (3d Cir. 1993) (where certified question was whether ERISA claim recluded dismissal of action under Princess Linda doctrine, court was entitled to determine whether Princess Linda doctrine would apply in any event); *In re Cinematronics*, 916 F.2d 1444 (9th Cir. 1990) (certified order permitted jury trial in "core" bankruptcy proceeding; court of appeals could properly consider whether the proceeding was in fact "core" in nature); *Civil Aeronautics Bd. v. Tour Travel Enter.*, 605 F.2d 998 (7th Cir. 1979). *But see* *Herbert v. Lando*, 441 U.S. 153 (1979) (scope of appellate review is limited to the question certified); *In re Traffic Ass'n-Eastern R.R.*, 627 F.2d 631 (2d Cir. 1980) (court reluctant to use jurisdiction acquired under [28 U.S.C. § 1292\(b\)](#) to dispose separately of an unrelated appeal from a discretionary order). Although the Court refused to respond to

the "choice of law" issue that the appellant raised, based on the case law, it appears that this was a discretionary decision, and the Court could have ruled on the issue if it chose.

116. [Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2329 \(1995\)](#).

117. [Id. at 2330](#).

118. [Id.](#) The District Court retained jurisdiction over the case to ensure that a proper choice-of-law was made by the arbitrators. [Id.](#) However, the arbitrators must first address the question. [Id.](#)

119. [Id. at 2331 \(Stevens, J., dissenting\)](#).

120. [Id. at 2334](#).

121. [Id.](#)

122. [Id.](#) Stevens continued to discuss the nature of a bill of lading as a "form document, prepared by the carrier, who presents it on a take-it-or-leave-it basis," and that there "[i]s no arms-length negotiation over the bill's terms." [Id.](#)

123. [9 U.S.C. § 2 \(1988\)](#).

124. [Vimar Seguros, 115 S. Ct. at 2337 \(Stevens, J., dissenting\)](#).

125. [Id.](#) Justice Stevens also had a strong dissent in *Carnival Cruise Lines*. 499 U.S. 585, 596 (1991).

126. *See generally Vimar Seguros*, [115 S. Ct. at 2322](#).

127. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* 1995 WL 242268, *10 (U.S. Oral Arg. Mar. 20, 1995). During the oral argument, the Court offered its opinion about the argument the plaintiff was being "dragged around the world," especially when the plaintiff is a sophisticated marine insurer. *Id.* The Court described the argument as "a little bit antique" *Id.*

128. *Id.* at *13. The Court was not interested in hearing arguments from *Indussa*. *Id.* In its opinion, the world has become commercially smaller and less provincial towards arbitration and even judicial proceedings in other places. *Id.*

129. [Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2328 \(1995\)](#). Using additional language from *Breman*, the Court stated, "The expansion will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under laws of our courts." [Id.](#)

130. *Id.*

131. *Id.* Using language from *Mitsubishi Motors Corp. v. Solor Chrysler-Plymouth*, the Court stated "if international arbitral institutions are to take a central place in the international legal order, national courts need to shake off the old judicial hostility to arbitration, and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign transnational tribunal." *Id.*

132. Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 656 (1992).

133. *Vimar Seguros*, 115 S. Ct. at 2326. Canons enable the court to draw inferences from its language, format, and subject matter, especially when judges are faced with indeterminate statutory language and inconclusive legislative history. Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 746 (1992). These rules aid both the court and the legislature. *Id.* at 748. From the judiciary's perspective, the canons promote judicial efficiency and reduce the costs of deciding cases. *Id.* From the legislature's standpoint, they serve as "off-the-rack" provisions that spare legislators the time and associated expenses of anticipating all the possible interpretations of the statute. *Id.* The problem arises over which canons the various courts will apply when interpreting statutes. *Id.* at 749. This problem is reflected in the decisions of the appellate and Supreme Court. *Id.*

134. *Vimar Seguros*, 115 S. Ct. at 2326. This popular statutory canon is frequently invoked when two statutes are *in pari materia* when there are multiple statutes with the same subject. *See* Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir. 1971); Union of Elec. Radio & Mach. Workers, AFL-CIO v. NLRB, 289 F.2d 757 (App. D.C. 1960); Miller v. United States, 615 F. Supp 160 (E.D. Ky. 1985). When construing ambiguous enactments, it is proper to consider acts passed in subsequent sessions, even where the acts do not refer to one another. *See* Boston Sand & Gravel v. United States, 278 U.S. 41 (1928); Tiger v. Western Inv. Co., 221 U.S. 286 (1911); Vane v. Newcombe, 132 U.S. 220 (1889).

135. *Vimar Seguros*, 115 S. Ct. at 2326. For discussion of factors used for statutory construction, see Frederick J. de Sloovere, *Textual Interpretations of Statutes*, 11 N.Y.U. L. REV. 538 (1934), reprinted in 2B SUTHERLAND STATUTORY CONSTRUCTION 315 (5th ed. 1992) (The courts must choose a satisfactory meaning which will bear in view: (1) the complete judicial process; (2) the justice of the individual case; (3) the establishment of a fair rule for future cases; (4) the subject matter of the statute; (5) the interest of society in certainty and predictability; (6) the history of the legislation and other extrinsic information concerning the conditions surrounding the enactment of the legislation; (7) the mischief which this statute sought to remedy; and (8) the purpose of the language of the statute.).

136. Macey & Miller, *supra* note 132, at 657.

137. *Id.* at 658.

138. *Id.* at 665. Although, on first impression, it appears that the Justices simply do not want to deal with the complex issues and policies imbedded in this case, it may, instead be a result of the present contradiction within the U.S. between values. *Id.* In earlier eras, when all people could agree on certain values, judges were less likely to ground their decisions in content-independent justifications, such as the canons of statutory construction. *Id.* at 666. When such a legal culture contains internal contradictions, it becomes exceedingly difficult for judges to reconcile the competing claims and avoid "taking sides" among the competing claims of interest groups. *Id.*

139. S. REP. NO. 742, 74th Cong., 1st Sess. (1935) (statement of Sen. White).

140. The statute clearly includes invalidating provisions, such as hold harmless clauses and express limitations on liability. [46 U.S.C. app. § 1303\(8\) \(1988\)](#).

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

142. *Id.* at 2326. The general presumption that Congress intends to comply with international law is powerful enough to influence the interpretation of ambiguous statutes and ambiguous legislative history. Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1163 (1990).

143. *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (enforcing arbitration despite claims it violated federal securities law); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (upholding arbitration despite claim that it violated federal antitrust laws); *Alberto-Culver Co. v. Scherk*, 417 U.S. 506 (1974) (enforcing arbitration of claims under § 10(b) of the Securities Exchange Act).

144. *See Gilbert, supra* note 48 at 626; *Sturley, supra* note 48, at 776-96. There are, however, some countries that do not recognize foreign forum selection clauses, but have specific provisions to that effect in their domestic versions of the Hague Rules. *See, e.g., Sea-Carriage of Goods Act 1924 § 9(2)* (Australia).

145. *Sturley, supra* note 48, at 736. *Sturley* continues by claiming that a survey of different national courts reveals how the domestic law of the country plays a major role in how each court interprets the Hague Rules. *Id.* As a result of the vast laws throughout the world, interpretations differ significantly from country to country. *Id.*

146. 377 F.2d 200 (2d Cir. 1967). *See supra* text and accompanying notes 58-61 for discussion on *Indussa*.

147. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 1995 WL 242268, at *13. (U.S. Oral Arg. Mar. 20, 1995). *See generally* Frederick M. Abbott, *Regional Integration Mechanisms in the Law of the United States: Starting Over*, 1 IND. J. GLOBAL LEGAL

STUD. 155 (1993) (regional trading markets have accelerated the globalization of markets such as the EC or NAFTA; a natural result of these arrangements is that countries harmonize or approximate the laws of one another).

148. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 1995 WL 242268, at *13. (U.S. Oral Arg. Mar. 20, 1995).

149. *Id.* Justice Stevens' dissent argued that *Carnival Cruise* could be reconciled with *Vimar Seguros* by limiting the enforcement of forum selection clauses to domestic boundaries. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322, 2335 (1995) (Stevens, J., dissenting). The Majority pointed out that, for many United States citizens, many domestic fora are more distant than foreign fora. [Id. at 2335 n.13.](#)

150. *See generally Vimar Seguros*, 115 S. Ct. at 2331 (Stevens, J., dissenting).

151. *See generally* *Casey v. Planned Parenthood*, [112 S. Ct. 2791, 2808 \(1992\)](#) (The rule of "stare decisis" is not an "inexorable command," and when necessity demands a departure from precedent, there is not obligation to follow prior decisions; in this case the U.S Supreme Court set forth questions to help determine the value of precedent including: (1) whether the central rule of the leading case has been found workable; and (2) whether the law's growth in the intervening years has left the leading case's rule a "doctrinal anachronism discounted by society.).

152. [Id. at 2332.](#) *See* *Indussa Corporation v. S.S. Ranborg*, 377 F.2d. 200 (2d Cir. 1967) (holding jurisdiction clause in bill of lading invalid under COGSA); *Carbon Black Export, Inc. v. The S/S Monrosa*, 254 F.2d 297 (5th Cir. 1958) (holding forum selection clause unenforceable); *M.G. Chem. Corp. v. M/V sun Castor*, 1978 AMC 1756 (D. Alaska 1977) (holding COGSA's application to bills of lading sufficient to preclude enforcement of a forum selection clause); *The Ciano*, 58 F. Supp. 65 (E.D. Pa. 1944) (provision stipulating disputes to be determined in Gijon, Spain, was invalid and against public policy because it was an attempt to oust federal courts of their jurisdiction); *Kuhnhold v. Compagnie Generale Transatlantique*, 251 F. 387 (S.D.N.Y. 1918) (holding provision which limited adjudication of disputes to French court invalid); *Prince Steam-Shipping Co. v. Lehman*, 39 F. 704 (S.D.N.Y. 1889) (forum selection provisions are against public policy and void).

153. *Union Ins. Soc'y. of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 723 (4th Cir. 1981).

154. *Cf. Colonial Trust Co. v. Flanagan*, 344 Pa. 556 (1942). "The doctrine of 'stare decisis' is a salutary one, and should not ordinarily be departed from where decision is of long standing and rights have been acquired under it, unless considerations of public policy demand it." *Id.* at 561.

155. *Id.* at 557.

156. *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, [115 S. Ct. 2322, 2330 \(1995\)](#).

157. Macey & Miller, *supra* note 132, at 655. These two authors argue that it makes sense to use nonpolicy justifications, such as canons of statutory interpretation, to advance legitimate public policies or when judges are unable to determine the policy implications of a particular decision. *Id.*

158. [46 U.S.C. app. §§ 1300-1316 \(1988\)](#).

159. S. REP. NO. 742, 74th Cong., 1st Sess. (1935).

160. *See Conklin & Garret, Ltd. v. M/V Finnrose*, 826 F.2d 1441 (5th Cir. 1987) (holding that a contractual obligation to sue overseas lessens the liability of the carrier); *Union Ins. Soc'y of Canton, Ltd. v. S/S Elikon*, 642 F.2d 721 (4th Cir. 1981) (reversing a district court on the basis that it failed to give sufficient weight to the application of COGSA); *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (holding jurisdiction clauses invalid under COGSA); *Carbon Black Export, Inc. v. The S/S Monrosa*, 254 F.2d 297 (5th Cir. 1958) (holding agreements in advance of controversy whose purpose is to oust the courts of jurisdiction are contrary to public policy and unenforceable); *General Motors Overseas Operation v. S/S Goettingen*, 225 F. Supp. 902 (S.D.N.Y. 1964) (refusing to enforce forum selection clauses when COGSA applied).

161. [46 U.S.C. app. § 1303\(8\) \(1988\)](#).

162. Charles L. Black, Jr., *The Breman, COGSA and the Problem of Conflicting Interpretation*, 6 VAND. J. TRANSNAT'L L. 365, 368-69 (1973).

163. *Id.*

164. *Id.*

165. John R. Allison, *Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market*, 18 N.Y.U. J. INT'L L. & POL. 361, 379 (1986).

166. *Id.* at 367. Although the Supreme Court supports arbitration of international disputes, it recognizes that the efficiency and effectiveness of arbitration of some types of international disputes has yet to be proven. *See generally Mitsubishi Motors Corp. v. Solor Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (acknowledging that the potential of arbitration for efficient disposition of legal disagreements arising from commercial disputes has not been tested); Markham Bell, *Dispute Resolution: Controlling the process in Arbitration*, 752 PRAC. L. INST. CORP. L. AND PRAC. HANDBOOK SERIES 285, 287 (1991) (parties that choose to arbitrate improve their chances that an award will be enforced both in the country which rendered the decision and in other countries where enforcement may be sought).

167. Michael R. Voorhees, *International Commercial Arbitration and the Arbitrability of Antitrust Claims: Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 14 N. Ky. L. Rev. 65, 88 (1987). There are several major trends which are emerging in international commercial arbitration including: (1) good faith behavior in contracting; (2) arbitration as an important mechanism for defining right and obligations resulting from new contractual forms; (3) arbitration as a determination and valuation of damages; (4) determination of jurisdiction, as no longer limited by formal definitions; (5) the survival of particular contractual obligations, despite the failure of others; and (6) the importance of arbitration when contracting with government agencies. *Id.*

168. *Id.* at 89.

169. Zumbusch, *supra* note 20, at 323. Arbitration is based on contract law, which, in order to be valid and enforceable, must meet the requirements of the particular jurisdiction. *Id.* Therefore, the notion that arbitration is separate and independent from the national legal system is mistaken. *Id.* This, however, protects the parties from arbitrariness and other forms of undue influence. *Id.*

170. The Convention on the Recognition and Enforcement of the Foreign Arbitral Awards, art. V, para. 2(b), June 10, 1958, 21 U.S.T. 2517, 2520.

171. Allison, *supra* note 165, at 5. *See also* Craig, *supra* note 30, at 7 (in order to get effective and predictable resolutions in international commerce, arbitration is essential; it is fair to say that arbitration in international matters is the norm, not the exception).

172. *See* Peter D. Ehrenhaft, *Effective International Commercial Arbitration*, 9 LAW & POLY INT'L BUS. 1191, 1194 (1977) (contending that arbitration is informal, quick, private, convenient, and inexpensive); Daniel M. Kolkey, *Dispute Resolution and International Commercial Agreements*, 676 PRAC. L. INST. COM. L. & HANDBOOK SERIES 527 (1993); Lee Loevinger, *Antitrust Issues as Subjects of Arbitration*, 44 N.Y.U. L. REV. 1085, 1089 (1969) (proposing three advantages to arbitration: economy, expertise, and expedition); Steven A. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A.J. 78, 79 (Feb. 1985) (asserting that arbitration is faster, less costly, more private, more informal, more confidential than litigation); Lawrence Perlman & Steven C. Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW 215, 218-25 (1983) (arguing that arbitration minimizes problems of forum shopping, concurrent jurisdiction, and limited access to pretrial discovery inherent in international litigation); Armen Vartian, *Choice of Confirmation Forum in International Commercial Arbitration Agreements*, 21 TEX. INT'L L.J. 67, 72 (1985) (when the parties have agreed to arbitrate, there is little chance that the award will not be enforced; when the parties have not agreed, the situation is less certain). *But see* Henry P. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 61 (1982) (arguing that the advantages of speed, time, informality and economy attributed to domestic arbitration are reversed in the international arena); Richard Lempert, *Companies Seeking Further Alternatives to Litigation Abroad*, LEGAL

TIMES, Mar. 28, 1983, at 1, 8 (noting that international arbitration can be longer and more expensive than litigation).

173. Kolkey, *supra* note 172, at 529.

174. *Id.* at 534. In the Committee's view, the provisions of S. 3274 will serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both the U.S. and foreign courts. H.R. REP. NO. 1181, 91st Cong., 2d. Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3601, 3602.