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## Forum Selection in Maritime Bills of Lading Under COGSA

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# Forum Selection in Maritime Bills of Lading Under COGSA

Kenneth M. Klemm

## **Abstract**

This Note argues that forum selection should not be invalid per se in bills of lading governed by COGSA. Part I reviews the history of COGSA including previous legislation that regulated bills of lading. Part II examines the decisions by the courts on forum selection in maritime bills of lading. Part III argues that a forum non conveniens analysis in the context of a valid forum selection clause provides courts with the necessary discretion to decide whether or not to accept jurisdiction of a case. The Note concludes that forum selection clauses in COGSA bills of lading should be valid unless the enforcement of such a clause is unreasonable in the context of a forum non conveniens analysis.

## NOTES

### FORUM SELECTION IN MARITIME BILLS OF LADING UNDER COGSA

#### INTRODUCTION

Bills of lading regulate the transactions between the carriers and shippers who transport goods by sea.<sup>1</sup> The Carriage of Goods by Sea Act ("COGSA")<sup>2</sup> governs bills of lading for cargo shipped to or from the United States.<sup>3</sup> Under COGSA, a court will not enforce a clause in a bill of lading that lessens or relieves a carrier's liability.<sup>4</sup> Some federal courts hold that forum selection clauses that choose a foreign country in which to litigate or arbitrate a dispute lessen a carrier's liability.<sup>5</sup> Several other federal courts, however, do not accept this absolute view toward forum selection clauses.<sup>6</sup> Moreover, most federal

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1. See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 3-1 (2d ed. 1975); T. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 9-8 (Prac. ed. 1987). The maritime world separates the transport of goods by sea into two categories: common carriage and private carriage. *Id.* A common carrier, usually a shipowner or someone who operates a ship, accepts different shipments of goods from independent shippers. *Id.* The common carrier issues a bill of lading to the shipper as a receipt and a contract for the transport of goods. G. GILMORE & C. BLACK, *supra*, § 3-1. A carrier, however, may enter a charterparty, a special contract of hire for the transport of specific goods, to perform private carriage. W. TETLEY, *MARINE CARGO CLAIMS* 9-10 (3d ed. 1988). Under this type of shipping arrangement, the charterparty governs the transport of the cargo. T. SCHOENBAUM, *supra*, § 9-6. If this charterer accepts independent shipment of goods from other cargo owners, then he becomes a common carrier of cargo and usually issues a bill of lading to govern these shipments. T. SCHOENBAUM, *supra*, § 9-11. Thus, both a bill of lading and a charterparty may govern the maritime shipment of goods. *Id.* § 9-2.

2. 46 U.S.C. §§ 1300-1315 (1982 & Supp. IV 1986).

3. *Id.* § 1312; see *infra* note 59 (providing text of this section).

4. 46 U.S.C. § 1303(8); see *infra* notes 63-68 and accompanying text.

5. See, e.g., *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441 (5th Cir. 1987) (COGSA sec. 3(8) did not allow enforcement of forum selection clause calling for settlement of disputes in Finland under Finnish law); *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721 (4th Cir. 1981) (choice of forum clause selecting a German court not enforceable in light of COGSA's specific policy); *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (forum selection clause requiring the settlement of any disputes to be decided in Norway held invalid under COGSA).

6. See, e.g., *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (forum selection clause providing for litigation of any dispute in London under non-COGSA bill of lading held valid unless unreasonable); *North River Ins. Co. v. Fed Sea/Fed Pac Line*, 647 F.2d 985 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) (provision calling for settlement of disputes in Canadian court held valid where COGSA incorporated

courts agree that the doctrine of *forum non conveniens* applies to determine the reasonableness of an alternate forum for the settlement of shipper's claims.<sup>7</sup> Nevertheless, the alternate forum chosen by the parties to a bill of lading receives little, if any, consideration in the courts that hold forum selection to be invalid per se under COGSA.<sup>8</sup>

This Note argues that forum selection should not be invalid per se in bills of lading governed by COGSA. Part I reviews the history of COGSA including previous legislation that regulated bills of lading. Part II examines the decisions by the courts on forum selection in maritime bills of lading. Part III argues that a *forum non conveniens* analysis in the context of a valid forum selection clause provides courts with the necessary discretion to decide whether or not to accept jurisdiction of a case. This Note concludes that forum selection clauses in COGSA bills of lading should be valid unless the enforcement of such a clause is unreasonable in the context of a *forum non conveniens* analysis.

### I. CARRIAGE OF GOODS BY SEA: AN INTERNATIONAL EFFORT AT REGULATING BILLS OF LADING

An ocean-going carrier issues a bill of lading to a shipper as a receipt for the goods to be shipped and as a contract for the transport and delivery of the goods by a common carrier.<sup>9</sup> The United States did not begin to regulate bills of lading until the late 1800s when it enacted the Harter Act (the "Act"),<sup>10</sup>

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into bill of lading); *Fireman's Fund Am. Ins. Cos. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294 (1st Cir. 1974) (clause in bill of lading providing for any action to be brought in New York City court held valid).

7. See, e.g., *Conklin & Garrett*, 826 F.2d at 1444 (remanded for consideration of *forum non conveniens*); *S.S. Elikon*, 642 F.2d at 725-26 (COGSA would not preclude district court from dismissing case under *forum non conveniens*); *Indussa*, 377 F.2d at 204 (not foreclosing possibility of applying doctrine of *forum non conveniens* to action under bill of lading subject to COGSA).

8. See *S.S. Elikon*, 642 F.2d at 725-26 (COGSA suggests a preference for a U.S. forum); T. SCHOENBAUM, *supra* note 1, § 9-18 (application of *forum non conveniens* exceedingly rare where COGSA applies).

9. See *supra* note 1 and accompanying text.

10. See ch. 105, 27 Stat. 445 (1893) (codified as amended at 46 U.S.C. §§ 190-196 (1982 & Supp. IV 1986)); R. WILLIAMSON & C. WITHERS PAYNE, CARRIAGE OF GOODS BY SEA ACT, 1924, at 1-2 (1934) (passing of Harter Act one of early results of involved conditions and exemptions from liability contained within bills of lading during 1800s).

which prohibits exculpatory clauses that relieve the carrier from liability.<sup>11</sup> In exchange for this prohibition, carriers received a limitation on their liability for certain types of negligence resulting in damage to cargo.<sup>12</sup> The Harter Act spurred the development of the International Convention for Unification of Certain Rules Relating to Bills of Lading (the "Hague Rules")<sup>13</sup> and, eventually, COGSA in the United States.<sup>14</sup>

#### A. *The Harter Act*

The passage of the Harter Act in 1893 marked an early attempt by Congress to regulate the private carriage of cargo.<sup>15</sup> Previously, the courts applied common law to this type of ocean transport.<sup>16</sup> Under common law, carriers often included unreasonable exceptions for negligence in bills of lading.<sup>17</sup> In passing the Harter Act, Congress sought to limit the negligence exceptions used by private carriers to escape

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11. 46 U.S.C. § 190; see H.R. REP. NO. 1988, 52d Cong., 1st Sess. 3 (1892) (prohibiting carriers from inserting certain provisions into bills of lading); see also G. GILMORE & C. BLACK, *supra* note 1, § 3-24.

12. See 46 U.S.C. § 192; H.R. REP. NO. 1988, *supra* note 11, at 3 (permitting carriers to insert reasonable exemptions from liability into bills of lading); G. GILMORE & C. BLACK, *supra* note 1, § 3-24.

13. Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155 [hereinafter Hague Rules].

14. See G. GILMORE & C. BLACK, *supra* note 1, § 3-24.

15. See *id.*; R. WILLIAMSON & C. WITHERS PAYNE, *supra* note 10, at 1-2.

16. See *Knott v. Botany Mills*, 179 U.S. 69, 71-72 (1900) (prior to enactment of the Harter Act, courts determined exemptions permitted in contracts of carriage); G. GILMORE & C. BLACK, *supra* note 1, § 3-23.

17. See, e.g., *Liverpool and Great W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889) (bill of lading clause exempted carrier from liability for negligence caused by its servants); *Rubens v. Ludgate Hill S.S. Co.*, 20 N.Y.S. 481, 487 (N.Y. Sup. Ct. 1892), *aff'd*, 143 N.Y. 629, 37 N.E. 825 (1894) (provision in bill of lading relieved carrier of liability for damage to cargo caused by negligence of employees or improper stowage); see also *C.A. Seguros Orinoco v. Naviera Transpapel, C.A.*, 677 F. Supp. 675, 681 (D.P.R. 1988) (before enactment of the Harter Act, carriers stipulated numerous exceptions for liability to cargo damage); H.R. REP. NO. 1988, *supra* note 11, at 1-3 (prior to Harter Act, courts interpreted clauses that carriers included in bills of lading); G. GILMORE & C. BLACK, *supra* note 1, § 3-23. The owners of steamship lines included exemptions from liability for loss or damage of cargo caused by the negligence of employees; defect in hull, machinery, or fittings of a vessel even when occurring before the receipt of goods on board a ship; and the admission of water into a vessel. H.R. REP. NO. 1988, *supra* note 11, at 2. The common law implied into every contract the warranty of seaworthiness by a shipowner. The *Caledonia*, 157 U.S. 124 (1895); T. SCHOENBAUM, *supra* note 1, § 9-23. This warranty constituted an obligation on the part of the shipowner to include the proper manning, equipping, and supplying of the vessel. G. GILMORE & C. BLACK, *supra* note 1, § 3-27.

liability.<sup>18</sup>

The Harter Act permits carriers to insert into bills of lading reasonable clauses that exempt them from liability for cargo loss or damage.<sup>19</sup> The Act, however, prevents the inser-

COGSA sec. 3(1) addresses and changes the carrier's duty to supply a seaworthy ship by providing as follows:

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

- (a) Make the ship seaworthy;
- (b) Properly man, equip, and supply the ship;
- (c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

46 U.S.C. § 1303(1) (1982 & Supp. IV. 1986). Thus, the requirement of due diligence under COGSA sec. 3(1) replaces the warranty duty to provide a seaworthy ship at common law. G. GILMORE & C. BLACK, *supra* note 1, § 3-27. Moreover, COGSA sec. 4(1) defines the due diligence requirement further by stating:

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this Appendix. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

46 U.S.C. § 1304(1) (1982 & Supp. IV 1986).

Therefore, where the unseaworthiness causes a loss, the carrier's negligence in failing to exercise due diligence must have caused the damage in order for the shipper to recover. G. GILMORE & C. BLACK, *supra* note 1, § 3-27. Moreover, the duty to provide a seaworthy ship ends when the vessel "breaks ground." *Mississippi Shipping Co. v. Zander & Co. (The Del Sud)*, 270 F.2d 345 (5th Cir. 1959); see T. SCHOENBAUM, *supra* note 1, § 9-23.

18. H.R. REP. NO. 1988, *supra* note 11, at 1-3; see G. GILMORE & C. BLACK, *supra* note 1, §§ 3-23 to 3-24. The report from the Committee on Interstate and Foreign Commerce noted that "an imperative duty rests upon Congress to pass such legislation as may be necessary to remove from [ocean] trade all unnecessary burdens and restrictions." H.R. REP. NO. 1988, *supra* note 11, at 1. The Harter Act represented

more than a decade of groping for the formula which would express in a satisfactory manner the desired distinction between faults which a shipowner should be forbidden to avoid by contract, and faults (consisting of errors of judgment and carelessness during the voyage), as to which he should be allowed exoneration . . .

A. KNAUTH, *THE AMERICAN LAW OF OCEAN BILLS OF LADING* 118 (4th ed. 1953).

19. 46 U.S.C. § 190 (1982). The first section of the Harter Act, reads as follows:

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

tion of certain clauses that relieve or lessen a carrier's liability.<sup>20</sup> In *Knott v. Botany*,<sup>21</sup> the U.S. Supreme Court prohibited a provision calling for the law of the ship's flag to apply in any dispute.<sup>22</sup> The Court found the particular clause to mean England and would not enforce it because the courts in England would have upheld another clause that exempted the carrier from liability for negligence.<sup>23</sup> The Harter Act represents a compromise between the interests of shippers and carriers, enacted by Congress to address clauses such as the one in *Botany Mills*, which became necessary due to the change in shipping upon the introduction of steam-powered vessels.<sup>24</sup>

The advent of the steamship into ocean transport in the 1800s brought with it a few large and powerful corporations that owned these steamships.<sup>25</sup> These few corporations constituted a shipping oligopoly on the Atlantic seaboard of the United States and dictated the terms included in bills of lading.<sup>26</sup> Previously, the masters of sailing vessels provided ship-

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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.

*Id.*

20. *Id.*; see H.R. REP. NO. 1988, *supra* note 11; G. GILMORE & C. BLACK, *supra* note 1, § 3-24.

21. 179 U.S. 69 (1900).

22. *Id.* at 74-77.

23. *Id.* at 74-77. The Supreme Court held that sec. 1 of the Harter Act, 46 U.S.C. § 190, "overrides and nullifies the stipulations of the bill of lading . . . that the contract shall be governed by the law of the ship's flag." 179 U.S. at 77. The flag of a ship defines the nationality that a state confers on a vessel. See T. SCHOENBAUM, *supra* note 1, § 2-20. This state enacts and enforces the laws used to protect the crew and passengers aboard a ship as well as other matters. *Id.* The vessel involved in the *Botany Mills* cargo dispute flew the English flag, and the bill of lading called for the law of England to govern the contract. *Botany Mills*, 179 U.S. at 70. The Court, however, noted explicitly that it did not rule on all choice of law stipulations in bills of lading. *Id.* at 72. The Supreme Court voided these two particular clauses, which would have permitted the carrier to escape liability for its negligence and, thus, violate the first section of the Harter Act. *Id.* at 77.

24. H.R. REP. NO. 1988, *supra* note 11, at 1.

25. H.R. REP. NO. 1988, *supra* note 11, at 1. The report concluded that "almost the entire carrying of grain and flour from the United States to Europe has been absorbed by steam vessels belonging to a few large and powerful corporations . . ."

*Id.*

26. *Id.* The British steamers dominated most important ocean trades by 1900. G. GILMORE & C. BLACK, *supra* note 1, § 11-4. The slow recognition of the practicality of steam navigation by the U.S. shipping interests during the 1800s caused the

pers with bills of lading that contained reasonable clauses exempting the carriers from liability for causes such as the perils of the sea and public enemies.<sup>27</sup> The owners of steamships, however, used their control over ocean transport to impose unreasonable conditions on U.S. shippers for the shipment of goods.<sup>28</sup>

In England, the courts generally upheld contractual provisions in bills of lading that exempted the carrier from liability.<sup>29</sup> Most U.S. courts held that such limitations of liability for negligence violated public policy.<sup>30</sup> Because of the dominance of the British merchant marine during this period, many U.S. shippers were subjected to English laws that gave effect to these negligence exceptions contained within the bills of lading.<sup>31</sup> Many U.S. shipping agents also wrote clauses into bills of lading that specifically provided for the application of Eng-

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U.S. shipping industry to lag behind the British. *Id.* Moreover, the hazards created to U.S. vessels by Confederate cruisers during the Civil War further exacerbated the problem by causing many shipowners to sail under the British flag. *Id.* Thus, by the end of the century the Committee on Interstate and Foreign Commerce noted that "it is not overstating the facts when we say that these steamship companies have now as complete a monopoly of this trade—at least from the Atlantic seaboard—as if there were no other craft afloat." H.R. REP. NO. 1988, *supra* note 11, at 1; *see also* G. GILMORE & C. BLACK, *supra* note 1, § 11-4.

27. *See* H.R. REP. NO. 1988, *supra* note 11, at 1. The Committee characterized such clauses as "fair and reasonable." *Id.* One court noted that the excuse of perils of the sea (also known as *force majeure* or acts of God) may be defined as "those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence." *The Guilta*, 218 F. 744, 746 (2d Cir. 1914); *see* T. SCHOENBAUM, *supra* note 1, § 9-27. A public enemy usually means a country hostile or a country at war with the ship's flag country. G. GILMORE & C. BLACK, *supra* note 1, § 3-34.

28. *See* H.R. REP. NO. 1988, *supra* note 11, at 1. The British ships issued most of the bills of lading containing these exoneration clauses in order to take advantage of the more liberal law toward negligence exceptions that existed in their country. G. GILMORE & C. BLACK, *supra* note 1, § 3-23.

29. H.R. REP. NO. 1988, *supra* note 11, at 3; G. GILMORE & C. BLACK, *supra* note 1, § 3-23; *see, e.g., In re Missouri S.S. Co.*, 42 Ch. D. 321, 329 (1889) (enforcing clause that exempted carrier for negligence under English common law).

30. *See, e.g., Liverpool and Great W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 461 (1889) (clause exculpating carrier from liability for negligence caused by its servants held invalid). *But see Rubens v. Ludgate Hill S.S. Co.*, 20 N.Y.S. 481, 487 (N.Y. Sup. Ct. 1892); *aff'd*, 143 N.Y. 629, 37 N.E. 825 (1894) (enforcing clause that relieved carrier of liability for damage to cargo caused by improper stowage). *See generally* G. GILMORE & C. BLACK, *supra* note 1, § 3-23.

31. H.R. REP. NO. 1988, *supra* note 11, at 2-3; G. GILMORE & C. BLACK, *supra* note 1, § 3-23; *see supra* note 26.



lish law.<sup>32</sup> The British control over shipping left U.S. shippers with little choice but to agree to these clauses, which essentially rendered the bills of lading contracts of adhesion.<sup>33</sup>

The differences between the common laws of the United States and England in the treatment of exemption clauses, before the introduction of international uniformity in maritime bills of lading, provided grounds for Congress to concern itself with the protection of U.S. shippers.<sup>34</sup> Thus, through the Harter Act, the United States became one of the first nations to address the problems that the advent of the steamship brought to international commerce.<sup>35</sup>

### B. *The Hague Rules*

After the United States enacted the Harter Act, several British dominions enacted similar legislation to provide protections for their own shippers.<sup>36</sup> The English courts, however, treated these national statutes, which copied the Harter Act, as merely an additional clause in a voluntary bill of lading.<sup>37</sup> The "Harter Act clauses," as the English courts named them, often conflicted with the provisions of the negotiated bills of lading.<sup>38</sup> Subsequently, the International Law Association (the "ILA") and the Comité Maritime International (the "CMI"), a group formed by the ILA, took the lead in address-

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32. See H.R. REP. NO. 1988, *supra* note 11, at 2. One such clause provided that "[t]he liability of the carrier, under this bill of lading, shall be governed by the law of England, with reference to which law this contract is made." *Id.* Much of the cargo damage litigation took place in England under English law because of the preponderance of marine insurance and ship-owning interests in that country. See A. KNAUTH, *supra* note 18, at 122.

33. See H.R. REP. NO. 1988, *supra* note 11, at 1-2. A contract of adhesion usually is a "take-it-or-leave-it" proposition dictated by an enterprise with disproportionately strong economic power. E. FARNSWORTH, *CONTRACTS* § 4.26 (1982).

34. See H.R. REP. NO. 1988, *supra* note 11, at 1-3; G. GILMORE & C. BLACK, *supra* note 1, §§ 3-23 to 3-24.

35. See H.R. REP. NO. 1988, *supra* note 11, at 1 (Congress found it necessary to remove burdens from trade that did not exist in former times before advent of the steamship); R. WILLIAMSON & C. WITHERS PAYNE, *supra* note 10, at 1-2 (passing of Harter Act one of early results of involved conditions and exceptions to liability that developed in bills of lading).

36. See R. WILLIAMSON & C. WITHERS PAYNE, *supra* note 10, at 2. These British dominions included Australia in 1904, Fiji in 1906, New Zealand in 1908, and Canada in 1910. *Id.*; see also A. KNAUTH, *supra* note 18, at 122.

37. A. KNAUTH, *supra* note 18, at 122.

38. *Id.*

ing the international regulation and standardization of maritime bills of lading.<sup>39</sup>

The CMI spent several years of preparatory work and, in 1921, the ILA adopted the Hague Rules, a set of principles to govern international maritime bills of lading through voluntary adoption of these rules into these documents.<sup>40</sup> The representatives of the shipping world and major maritime nations met at conferences between 1921 and 1924 to consider these rules further, and they worked to internationalize the compromise reached between the shipper's interests and the carrier's interests that the Harter Act represented in the United States.<sup>41</sup> In 1924, under CMI auspices in a diplomatic convention called by Belgium, representatives from various governments convened to adopt the Hague Rules for mandatory use in all bills of lading and invited all maritime nations to adopt these rules.<sup>42</sup>

The Hague Rules provide for the standardization of most of the provisions contained in a bill of lading.<sup>43</sup> The drafters of this international agreement, however, did not intend for it to impose all the restrictions of a complete international code.<sup>44</sup> The Hague Rules, therefore, unify certain rules but continue to allow shippers and carriers the freedom to contract in areas not addressed by the agreement.<sup>45</sup> In these areas,

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39. T. SCHOENBAUM, *supra* note 1, § 9-7. The ILA and the CMI have contributed to the unification of international maritime law by promoting international conventions and agreements in this area. See COMITÉ MARITIME INTERNATIONAL, INTERNATIONAL CONVENTIONS ON MARITIME LAW (1987); G. GILMORE & C. BLACK, *supra* note 1, § 11-13. The International Law Association formed the CMI in 1896 to work on maritime matters in more intimate contact with shipowners, shippers, underwriters, and bankers than was possible under the general forms of the organization. A. KNAUTH, *supra* note 18, at 123. The CMI's membership as of 1986 consisted of some forty-one countries including the United States, Canada, Japan, India, Australia, New Zealand, most of the European maritime nations, and some Latin American maritime nations. N. HEALY & D. SHARPE, CASES AND MATERIALS ON ADMIRALTY 331 n.11 (2d ed. 1986).

40. Hague Rules, *supra* note 13; see T. SCHOENBAUM, *supra* note 1, § 9-7.

41. T. SCHOENBAUM, *supra* note 1, § 9-7.

42. Hague Rules, *supra* note 13.

43. Hague Rules, *supra* note 13; see H.R. REP. NO. 2218, 74th Cong., 2d Sess. 7 (1936) (legislation will eliminate hundreds of different bill of lading forms); A. KNAUTH, *supra* note 18, at 136.

44. See A. KNAUTH, *supra* note 18, at 137.

45. Hague Rules, *supra* note 13; see G. GILMORE & C. BLACK, *supra* note 1, § 3-25; A. KNAUTH, *supra* note 18, at 137. COGSA permits a freedom of contracting in the

however, the Hague Rules article 3(8) prohibits a carrier from relieving or lessening its liability.<sup>46</sup> This article provides courts in different nations with some flexibility to permit or prohibit clauses depending on their reasonableness in the context of this international agreement and commercial freedom.<sup>47</sup>

The subsequent adoption of the Hague Rules by most of the world's major maritime countries provides shippers and carriers with the assurance that most provisions in a bill of lading will receive the same treatment in the courts of these nations.<sup>48</sup> Thus, the Hague Rules provide uniformity in the United States as well as abroad in the regulation of maritime bills of lading.<sup>49</sup>

### C. *The Carriage of Goods by Sea Act of 1936*

Congress passed the U.S. Carriage of Goods by Sea Act in 1936<sup>50</sup> and the United States ratified the Hague Rules on June 29, 1937, subject to reservations.<sup>51</sup> The provisions of COGSA follow the Hague Rules except for certain differences,<sup>52</sup> and,

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direction of increasing a carrier's liabilities. G. GILMORE & C. BLACK, *supra* note 1, § 3-25.

46. Hague Rules, *supra* note 13, art. 3(8), 51 Stat. at 250-51, T.S. No. 931, at 22, 120 L.N.T.S. at 187. Article 3(8) of the Hague Rules 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 goods arising from negligence, fault, or failure in the duties and obligations provided in this article, or lessening such liability otherwise than as provided in this convention, 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.

*Id.*

47. See *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 12 (2d Cir. 1969) (COGSA permits parties to agree upon exceptions outside of statute only to increase a carrier's liability); A. KNAUTH, *supra* note 18, at 137.

48. See A. KNAUTH, *supra* note 18, at 136. Knauth notes that a driving force behind the Hague Rules "was the need of assurance that at least the greater number of questions posed by a bill of lading shall receive the same answer in the courts of all nations." *Id.*

49. See *C.A. Seguros Orinoco v. Naviera Transpapel, C.A.*, 677 F. Supp. 675, 681 (D.P.R. 1988); A. KNAUTH, *supra* note 18, at 136-37.

50. PUB. L. No. 521, 49 Stat. 1207 (1936) (codified as amended at 46 U.S.C. §§ 1300-1315 (1982 & Supp. IV 1986)).

51. See Hague Rules, *supra* note 13, 51 Stat. at 269-75, T.S. No. 931, at 35-49.

52. See Hague Rules, *supra* note 13, 51 Stat. at 269-74, T.S. No. 931, at 44-49. (Secretary of State's memorandum outlining textual differences between Hague Rules and COGSA); G. GILMORE & C. BLACK, *supra* note 1, § 3-24. COGSA, for ex-

like article 3(8) of the Hague Rules, COGSA section 3(8) controls the additions to a bill of lading permitted under the statute.<sup>53</sup>

The Committee of the Merchant Marine and Fisheries of the House of Representatives, which recommended the passage of the U.S. version of the Hague Rules, stated that the bill defined the rights and liabilities of carriers and shippers in foreign commerce.<sup>54</sup> Moreover, COGSA placed limitations on the ability of a carrier to exempt itself from liability.<sup>55</sup> For example, a carrier may not lower his liability below the US\$500 per package value established in the statute.<sup>56</sup> The House Report on COGSA noted that before enactment of the Harter Act, the hundreds of different forms of bills of lading contained innumerable exemptions that limited a shipper's recovery for cargo loss.<sup>57</sup> The Committee recognized the "need . . . for uniformity of law in foreign trade."<sup>58</sup> Thus, while the Harter Act continues to govern domestic commerce involving the nation's waterways, COGSA governs international bills of lading.<sup>59</sup> In addition, COGSA may apply to domestic commerce

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ample, substitutes US\$500 for the 100 pounds sterling per package or unit limitation contained in the Hague Rules. *Compare* COGSA sec 4(5), 46 U.S.C. § 1304(5) (1982 & Supp. IV 1986) *with* Hague Rules, *supra* note 13, art. 4(5), 51 Stat. at 252, T.S. No. 931, at 23-24, 120 L.N.T.S. at 167.

53. *Compare* Hague Rules, *supra* note 13, art. 3(8), 51 Stat. at 250-51, T.S. No. 931, at 22, 120 L.N.T.S. at 187 *with* COGSA sec. 3(8), 46 U.S.C. § 1303(8). Section 3(8) 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, 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. § 1303(8) (1982 & Supp. IV 1986).

54. H.R. REP. NO. 2218, *supra* note 43, at 1.

55. *See* 46 U.S.C. §§ 1303-1304 (1982 & Supp. IV 1986); H.R. REP. NO. 2218, *supra* note 43, at 1. The committee's report stated that COGSA defined "by law the rights and liabilities of water carriers and shippers in foreign commerce. It fixes an irreducible minimum of immunity of the carrier from liability." *Id.*

56. *See* 46 U.S.C. § 1304(5). A carrier also may not escape liability for improper storage or an unseaworthy ship before and at the beginning of a voyage. *Id.* § 1303.

57. H.R. REP. NO. 2218, *supra* note 43, at 7.

58. *Id.*

59. 46 U.S.C. § 1312 (1982 & Supp. IV 1986); H.R. REP. NO. 2218, *supra* note 43, at 7. COGSA sec. 12 provides the coverage and scope of this statute. It reads:

through incorporation in a bill of lading.<sup>60</sup>

The unsettled law surrounding forum selection in bills of lading governed by COGSA revolves around the legislative intent of COGSA section 3(8).<sup>61</sup> The Harter Act provided the origin for the language contained within article 3(8) of the the Hague Rules that Congress incorporated into COGSA.<sup>62</sup> COGSA section 3(8), as adopted by the U.S. Congress, invalidates any clause in a bill of lading for goods to or from this country<sup>63</sup> that, in fact, relieves or lessens the carrier's liability.<sup>64</sup> One court noted that the strength behind COGSA's policy and, in particular, the strength of section 3(8) was to provide "the vehicle by which the courts can enforce the basic policy of the Act."<sup>65</sup> Some of the areas in which courts have applied COGSA section 3(8) to invalidate bill of lading clauses

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This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however*, That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter: *Provided further*, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter.

46 U.S.C. § 1312 (emphasis in original). Thus, COGSA applies to the shipment of cargo between U.S. ports and foreign ports. *Id.* This statute, however, does not apply to the shipment of live animals or on-deck storage of cargo as long as the bill of lading or another document so states. *Id.* § 1301(c) (1982).

60. See 46 U.S.C. § 1312; T. SCHOENBAUM, *supra* note 1, § 9-6. Schoenbaum notes that parties engaging in private carriage may incorporate COGSA into a charterparty using a Clause Paramount. *Id.*

61. See 46 U.S.C. § 1303(8); *infra* notes 146-70 and accompanying text.

62. Compare Harter Act sec. 1, 46 U.S.C. § 190 (1982 & Supp. IV 1986) with Hague Rules, art. 3(8), 51 Stat. at 250-51, T.S. No. 931, at 22, 120 L.N.T.S. at 187 and COGSA sec. 3(8), 46 U.S.C. § 1303(8).

63. See 46 U.S.C. § 1312.

64. 46 U.S.C. § 1303(8).

65. Sun Oil Co. v. M/T *Carisle*, 771 F.2d 805, 814 (3d Cir. 1985) (trade custom relieving carrier of responsibility for non-delivery of a certain percentage of crude oil that remains on ship conflicts with COGSA); see *infra* note 67.

include the location of storage,<sup>66</sup> trade customs,<sup>67</sup> and forum selection.<sup>68</sup>

## II. COGSA, FORUM SELECTION, AND THE COURTS: A CASE OF THE UNREASONABLE VERSUS THE REASONABLE

A discussion of the enforceability of forum selection clauses under COGSA reveals a history of conflicting court opinions and case results.<sup>69</sup> The differing approaches used by the federal courts to analyze the validity of forum selection in COGSA bills of lading may be analyzed in the context of an absolute invalidity approach and a rule of reason approach.<sup>70</sup>

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66. *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 15-16 (2d Cir. 1969) In *Encyclopaedia Britannica*, the Second Circuit held invalid a clause that authorized the carrier to ship goods on deck unless the shipper informed the carrier to the contrary. *Id.* COGSA sec. 1(c) defines "goods" as "goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried." 46 U.S.C. § 1301(c). Thus, COGSA excludes live animals and cargo carried on deck from the coverage of its provisions. *Id.*

The court in *Encyclopaedia Britannica* interpreted COGSA as requiring below-deck storage unless the carrier receives the actual consent of the shipper to transport the goods on deck. *Encyclopaedia Britannica*, 422 F.2d at 17-18. A clause that permits the on-deck storage of goods without the actual authorization of the shipper would violate COGSA sec. 3(8) by relieving the carrier of liability under the statute. *Id.* at 12-13. The Second Circuit, therefore, found this bill of lading clause to be invalid as a matter of public policy. *Id.* at 13-18.

67. *Sun Oil Co.*, 771 F.2d at 814-15. In *Sun Oil*, the Third Circuit held that a trade custom did not relieve the carrier from liability for delivery of 0.5% less crude oil than was loaded for transport. *Id.* at 816. The shipper brought a claim for loss of 2835 barrels of crude oil. *Id.* at 807-08. The Eastern District of Pennsylvania ruled in favor of the shipper but awarded recovery only for 133 barrels. *Id.* This amount represented the total number of barrels lost less a trade custom allowance relieving the carrier for non-delivery of up to 0.5% of the oil loaded onto a tanker. *Id.* The Third Circuit, in reversing the district court, found that COGSA allows for shortages in delivery of certain types of cargo, but the carrier must prove that the shortage resulted from an "inherent vice." *Id.* at 815; see 46 U.S.C. § 1304(2)(m). The carrier in *Sun Oil*, however, relied on this trade custom to relieve itself of accounting for the loss of oil. 771 F.2d at 815-16. Thus, the court found that such a contention violated COGSA sec. 3(8) as decreasing the carrier's standard of liability under the statute. *Id.* at 814-16.

68. *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 202-04 (2d Cir. 1967); see *infra* notes 72-81 and accompanying text.

69. See *infra* notes 71-137 and accompanying text.

70. *Id.* See generally Annotation, *Validity or Enforceability, Under Carriage of Goods by Sea Act (46 U.S.C. §§ 1300 et seq.), of Clauses in Bill of Lading or Shipping Contract as to Jurisdiction of Foreign Courts or Applicability of Foreign Law*, 2 A.L.R. FED. 963 (1969) &

### A. *The Absolute Invalidity Rule*

One of the first cases to decide this issue permitted the enforcement of a forum selection clause in a bill of lading governed by COGSA.<sup>71</sup> In the leading case of *Indussa Corp. v. S.S. Ranborg*,<sup>72</sup> however, the Second Circuit overruled this deci-

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Supp. 1988) (separating approaches used by courts into the "absolute invalidity" approach and the "rule of reason" approach).

71. *William H. Muller & Co. v. Swedish Am. Line*, 224 F.2d 806 (2d Cir.), cert. denied, 350 U.S. 903 (1955). The *Muller* case involved a shipment of 1000 bags of cocoa beans from Sweden to the United States on the *Oklahoma*, a Swedish-owned ship. *Id.* at 807-08. During the voyage, the *Oklahoma* was lost at sea. *Id.* at 807. The bill of lading provided for any claims to be brought under Swedish law in the Swedish courts. *Id.* The court in enforcing the forum selection clause noted that "if Congress had intended to invalidate such agreements, it would have done so in a forthright manner, as was done in the Canadian Act of 1910." *Id.* Consequently, the court held that the enforceability of a forum selection clause should be determined upon its reasonableness in a particular dispute. *Id.* at 808.

72. 377 F.2d 200 (2d Cir. 1967). The shipper in *Indussa* brought an in rem action in the amount of US\$2600 against the vessel for damage to a cargo of nails and barbed wire. *Id.* at 200-01. The owner of the vessel provided a letter of undertaking, or security, that the shipper accepted in lieu of arresting the ship. *Id.* at 201. The court made note of the small amount involved in this claim as compared to *Muller* and the burden of requiring this shipper to litigate in such a distant forum as Norway. *Id.* at 201.

The *Indussa* court also decided this case prior to the Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Feb. 23, 1968, 1977 Gr. Brit. T.S. No. 83 (Cmd. 6944) [hereinafter Visby Rules], and the United Nations Conference on the Carriage of Goods by Sea, Mar. 6-31, 1978, U.N. Doc. A/Conf. 89/5 [hereinafter Hamburg Rules], which representatives of the maritime world developed to revise and, in the case of the Hamburg Rules, to replace the Hague Rules. See T. SCHOENBAUM, *supra* note 1, § 9-18. The Hamburg Rules address the issue of forum selection and explicitly validate the selection of certain forums where proceedings may be brought. Hamburg Rules, *supra*, arts. 21-22, at 14-15; see A. MITCHELHILL, *BILLS OF LADING: LAW AND PRACTICE* § 2.3.20 (1982); W. TETLEY, *supra* note 1, at 784; Chandler, *A Comparison of "COGSA", the Hague/Visby Rules, and the Hamburg Rules*, 15 J. MAR. L. & COM. 233, 289-91 (1984) (listing contracting parties and signatories to the Hamburg Rules). Article 21 of the Hamburg Rules provides for the following places in which litigation may be brought under the convention:

- (a) The principal place of business or, in the absence thereof, the ordinary residence of the defendant; or
- (b) The place where the contract was made, provided that the defendant has a place of business, branch or agency through which the contract was made; or
- (c) The port of loading or the port of discharge; or
- (d) Any additional place designated for that purpose in the contract of carriage.

Hamburg Rules, *supra*, art. 21, at 14-15. The Hamburg Rules also provide for the locations listed above as proper for the bringing of an arbitration proceeding. Hamburg Rules, *supra*, art. 22, at 15. These articles contain no such counterpart in

sion and held that COGSA section 3(8) invalidates forum selection clauses in bills of lading governed by this statute, because they tend to lessen a carrier's liability.<sup>73</sup> More recently, the Fourth and Fifth Circuits relied on this absolute rule promulgated by the *Indussa* decision to render foreign forum selection clauses invalid per se.<sup>74</sup>

In *Indussa*, the court held that Congress meant to invalidate any contractual provision in a bill of lading governed by COGSA that prevented a shipper from gaining jurisdiction in the United States for a shipment to or from this country.<sup>75</sup> The bill of lading in *Indussa* involved a choice of jurisdiction clause that established the carrier's principal place of business, Norway, as the forum for settlement of any disputes.<sup>76</sup> Norway, which adhered to the Hague Rules, applied the same terms as COGSA except for a limitation of liability of less than US\$500 per package.<sup>77</sup> Thus, the Second Circuit could have

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the Hague/Visby Rules or COGSA, and the United States has not yet adopted the Hamburg Rules. See A. MITCHELHILL, *supra*, § 2.3.20; W. TETLEY, *supra* note 1, at 3, 1101-03.

73. *Indussa*, 377 F.2d at 203-04; see 46 U.S.C. § 1303(8) (1982 & Supp. IV 1986); see also T. SCHOENBAUM, *supra* note 1, § 9-18. The *Indussa* court stated

that in upholding a clause in a bill of lading making claims for damage to goods shipped to or from the United States triable only in a foreign court, the *Muller* court leaned too heavily on general principles of contract law and gave insufficient effect to the enactments of Congress governing bills of lading for shipments to or from the United States.

*Indussa*, 377 F.2d at 202.

74. *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441, 1442-44 (5th Cir. 1987) (choice of forum clause selecting Finland invalid per se even though bill of lading provided for application of COGSA in Finnish courts); *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 723-25 (4th Cir. 1981) (forum selection clause requiring litigation in Germany held invalid under COGSA sec. 3(8)).

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

76. *Id.* at 201. A bill of lading clause entitled "Jurisdiction" stated that "[a]ny 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.* A "U.S. Trade" clause also addressed the applicability of COGSA as follows: "In case the Contract evidenced by this Bill of Lading is subject to the U.S. Carriage of Goods by Sea Act then the provisions stated in said Act shall govern before loading and after discharge and throughout the entire time the goods are in the Carrier's custody." *Id.* Thus, by reading these two clauses together, the bill of lading casts doubt on the exclusivity of Norwegian law as to disputes under this contract. *Id.* at 205; see *infra* note 78.

77. *Id.* at 201 n.1.; see *supra* text accompanying note 56. The court stated that the Norwegian package limitation equaled 1800 kroner or approximately US\$240. *Indussa*, 377 F.2d at 201 n.1.



invalidated the forum selection clause, because the substantive law of Norway effectively lessened the carrier's liability below COGSA's requirements.<sup>78</sup>

The Second Circuit, however, went further and found that "requiring trial abroad *might* lessen the carrier's liability" even though the selected forum would apply COGSA or similar legislation.<sup>79</sup> The court reasoned that there was no guarantee that another nation would interpret the law in the same manner as the U.S. courts.<sup>80</sup> Therefore, the inclusion of a forum selection clause in an international bill of lading could not prevent a U.S. court from accepting jurisdiction of a cargo dispute governed by COGSA.<sup>81</sup>

The Fourth Circuit, in *Union Insurance Society of Canton, Ltd. v. S.S. Elikon*,<sup>82</sup> used the interpretation of COGSA's legislative intent provided by the *Indussa* court to invalidate a forum selection clause in a bill of lading governed by this statute.<sup>83</sup> The clause in this case provided for actions under the bill of lading to be brought in West Germany.<sup>84</sup> The Fourth Circuit found that the general policy of upholding forum selection in mari-

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78. See *Indussa*, 377 F.2d at 201 n.1. The *Indussa* court noted that Norway applied a US\$240 package limitation. *Id.* COGSA prohibits any clause that lowers the carrier's liability below the US\$500 per package minimum established in the statute. 46 U.S.C. §§ 1303(8), 1304(5) (1982 & Supp. IV 1986); see T. SCHOENBAUM, *supra* note 1, § 9-34. In a concurring opinion, Judge Moore stated that his "concept of the judicial function is that the particular panel is charged with the duty of deciding a specific controversy between two specific litigants based upon the specific facts therein presented and upon the law applicable thereto." *Indussa*, 377 F.2d at 205 (Moore, J., concurring). He noted that the forum selection clause in the bill of lading did not provide a clear contractual agreement for exclusive jurisdiction in the Norwegian courts. *Id.* Furthermore, the case involved an *in rem* action against the ship rather than an *in personam* action. *Id.* Thus, Judge Moore concluded that more than adequate reasons existed for the court to retain jurisdiction without overruling the *Muller* decision. *Id.*

79. *Indussa*, 377 F.2d at 203 (emphasis in original).

80. *Id.* at 203-04.

81. *Id.* at 204.

82. 642 F.2d 721 (4th Cir. 1981).

83. *Id.* at 723-25.

84. *Id.* at 722. The text of the bill of lading clause stated:

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

*Id.* at 722 n.1. The bill, however, also provided in clause 1 that COGSA applied and, thus, conflicted with its own terms. *Id.*

time bills of lading must recede before the specific policy of COGSA.<sup>85</sup> In addition, the court noted that the parties in *S.S. Elikon* did not agree to the inclusion of the forum selection clause through hard bargaining, but rather that the provision represented the form found in contracts of adhesion.<sup>86</sup> The Fourth Circuit, however, did not state that COGSA always required a U.S. court to retain a case governed by this statute.<sup>87</sup> Although the court invalidated this particular clause, it remanded for consideration of dismissal under the doctrine of *forum non conveniens*.<sup>88</sup>

In *Conklin & Garrett, Ltd. v. M/V Finnrose*,<sup>89</sup> the Fifth Circuit joined the Second and Fourth Circuits in holding that a forum selection clause in a bill of lading governed by COGSA could not be enforced.<sup>90</sup> The court once again found that the statutory language of COGSA invalidated the forum selection clause and retained jurisdiction of the case.<sup>91</sup> The Fifth Circuit, following the *S.S. Elikon* decision, did not foreclose the possibility of dismissal under *forum non conveniens*.<sup>92</sup>

A more recent Fifth Circuit case, *Hughes Drilling Fluids v. M/V Luo Fu Shan*,<sup>93</sup> extended the unenforceability of forum selection to cases involving general average.<sup>94</sup> The doctrine of general average, which differs from a shipper's claim for cargo loss or damage, requires cargo owners to contribute toward

85. *Id.* at 725. The Fourth Circuit noted that the Supreme Court in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), held that forum selection should be presumptively valid as a general policy only in the absence of congressional policy on the subject. *S.S. Elikon*, 642 F.2d at 724. According to the court, COGSA provided a specific policy to be used in the *S.S. Elikon* case. *Id.* at 724-25.

86. *S.S. Elikon*, 642 F.2d at 724; *see infra* note 182.

87. *S.S. Elikon*, 642 F.2d at 725. The court stated that "COGSA nonetheless does not explicitly require the district court to hear the case." *Id.* (emphasis in original).

88. *Id.* at 725-26. The doctrine of *forum non conveniens* permits a U.S. court to decline jurisdiction where the dispute involves aliens or non-residents, or can more appropriately be tried in a foreign tribunal. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (*forum non conveniens* permits a court to resist imposition upon its jurisdiction); *Canada Malting Co. v. Paterson Co.*, 285 U.S. 413 (1932) (unqualified discretion exists to decline jurisdiction in suits in admiralty between foreigners). *See generally* W. TETLEY, *supra* note 1, at 786-96.

89. 826 F.2d 1441 (5th Cir. 1987).

90. *Id.* at 1443-44.

91. *Id.* at 1444.

92. *Id.*

93. 852 F.2d 840 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1171 (1989).

94. *Id.* at 842.

the expenditures that a carrier makes to save or protect shipped goods when a vessel becomes damaged or sinks.<sup>95</sup> The Fifth Circuit, in rendering its opinion, found that COGSA applied to general average disputes.<sup>96</sup> Therefore, the court held that the enforcement of a bill of lading clause calling for litigation or arbitration of claims in China might lessen a carrier's liability and violate COGSA.<sup>97</sup>

In *State Establishment for Agricultural Product Trading v. M/V Wesermunde*,<sup>98</sup> the Eleventh Circuit found either that COGSA would bar a foreign arbitration clause per se or that the arbitration clause would be unenforceable without actual notice to the shipper.<sup>99</sup> The court found that both the Supreme Court and the Second Circuit in *Indussa* barred the enforcement of a clause that limited a shipper's claim for redress or tended to limit a carrier's liability below COGSA's minimum standards.<sup>100</sup> While the *M/V Wesermunde* court noted further that the Federal Arbitration Act<sup>101</sup> encouraged arbitration in maritime disputes,<sup>102</sup> the court would not enforce this particular clause due to COGSA's general policy of preventing carriers from lessening their liability.<sup>103</sup>

These decisions by courts that embrace the absolute invalidity approach demonstrate that many federal courts will not allow the enforcement of any forum selection clause.<sup>104</sup> The courts used the *Indussa* rationale that forum selection might remove either the applicability of COGSA or the jurisdiction of a U.S. court in these cases.<sup>105</sup> The courts in other jurisdictions, however, do not accept such an absolute approach, especially in the context of an arbitration clause, to consider the enforce-

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95. G. GILMORE & C. BLACK, *supra* note 1, § 5-1; see *Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1171 (1989).

96. *Hughes Drilling Fluids*, 852 F.2d at 842.

97. *Id.*

98. 838 F.2d 1576 (11th Cir.), *cert. denied*, 109 S. Ct. 273 (1988).

99. *Id.* at 1582.

100. *Id.* at 1580-81 (citing *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 11-12 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970)).

101. 9 U.S.C. §§ 1-14 (1982 & Supp. IV 1986); see *infra* note 131.

102. *M/V Wesermunde*, 838 F.2d at 1581.

103. *Id.*

104. See *supra* notes 71-103 and accompanying text.

105. *Id.*

ability of a foreign forum selection clause.<sup>106</sup>

### B. *The Rule of Reason Approach*

The U.S. courts at the time of the *Indussa* decision espoused a general policy of striking down all forum selection clauses in maritime contracts such as bills of lading.<sup>107</sup> In *The Bremen v. Zapata Off-Shore Co.*,<sup>108</sup> however, the U.S. Supreme Court used a less absolute method to consider the validity of forum selection clauses in maritime bills of lading.<sup>109</sup> This approach determines the reasonableness of such a clause in the context of a particular case's facts.<sup>110</sup>

The Supreme Court in *The Bremen*, a case that did not involve a bill of lading governed by COGSA, held that foreign forum selection clauses should be enforced as a general policy unless the resisting party shows that the clause is unreasonable under the circumstances.<sup>111</sup> The Court noted that the bill of lading in *The Bremen* governed a lengthy voyage.<sup>112</sup> Thus, the provision for a neutral forum alleviated the "uncertainty and

106. See *infra* notes 107-37 and accompanying text.

107. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). In 1972, the U.S. Supreme Court noted that "[f]orum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court." *Id.* (footnote omitted).

108. 407 U.S. 1 (1972).

109. *Id.*; see *infra* notes 111-17 and accompanying text.

110. See *infra* notes 111-17 and accompanying text.

111. *The Bremen*, 407 U.S. at 12-15. Unterweser, a German corporation, agreed with Zapata, a U.S. corporation, to tow a drilling rig from Louisiana to Italy. *Id.* at 2. The rig became damaged during a storm and Zapata instructed Unterweser to tow the rig to Florida. *Id.* at 3. Zapata commenced an action in the federal district court at Tampa, Florida, against Unterweser and ignored the bill of lading clause requiring that the settlement of disputes take place in London. *Id.* at 2-3. Unterweser, however, commenced an action in the United Kingdom and the High Court of Justice in London ruled that the forum selection clause should be enforced. *Id.* at 4. The U.S. Supreme Court, in an eight to one decision, agreed with the London court's determination and found the forum selection provision to be enforceable. *Id.* at 1-2. The Court noted the *Indussa* decision and found that COGSA did not apply to the towage contract in the present action but also did not endorse the Second Circuit's holding. *Id.* at 10 n.11. Furthermore, the Court found that in dismissing *The Momrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959), it did not reject the Second Circuit's finding in *Muller* that forum selection in COGSA bills of lading should be valid. *The Bremen*, 407 U.S. at 6 n.7. The *Carbon Black Export* case involved both an in rem action and an in personam action rather than solely an in personam action as in the *Muller* dispute. See *infra* note 121.

112. *The Bremen*, 407 U.S. at 13. The Court noted that the voyage would have

possibly great inconvenience to both parties"<sup>113</sup> that might arise if a suit could be brought in any jurisdiction where an accident could occur.<sup>114</sup> The Supreme Court stated that the elimination of such uncertainty was an integral part of this maritime contract and an important aspect of international business and contracts.<sup>115</sup>

The Court in *The Bremen* limited its decision to the issue of the forum selection clause in the non-COGSA towage contract before it and found these clauses to be enforceable where no evidence of "fraud, undue influence, or overweening bargaining power" exists.<sup>116</sup> The decision, however, provided the impetus for other courts to adopt a more reasonable approach than the absolute invalidity rule when considering the enforceability of forum selection in bills of lading that are governed by COGSA.<sup>117</sup>

The First Circuit, in *Fireman's Fund American Insurance Cos. v. Puerto Rican Forwarding Co.*,<sup>118</sup> used *The Bremen* to enforce a forum selection clause requiring litigation in the state or federal courts of New York City.<sup>119</sup> The court noted that *The Bremen* cast doubt on the rationale of *Indussa* and that unless a court considers a particular clause to be unreasonable, a forum selection clause should be enforced.<sup>120</sup> Therefore, because the First Circuit considered the New York courts to be a reason-

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taken the oil rig "from Louisiana across the Gulf of Mexico and the Atlantic Ocean, through the Mediterranean Sea to its final destination in the Adriatic Sea." *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 13-14. The English courts, in general, have a favorable attitude toward forum selection clauses. *Id.* at 11. The House of Lords specifically found that article 3(8) of the Newfoundland Carriage of Goods by Sea Act did not invalidate a choice of law clause in a bill of lading governed by the Act. *Vita Food Prods. v. Unus Shipping Co.*, 1939 App. Cas. 277, 299-300 (H.L.) (forum selection clause called for English law over cargo shipped from Newfoundland). A recent decision by Lord Diplock may limit somewhat the freedom in choice of law in England but he did not hold forum selection invalid in all cases. *The Hollandia*, [1983] 1 App. Cas. 565 (H.L. 1982) (express choice of law clause in a bill of lading governed by the British Carriage of Goods by Sea Act will be given effect if not contrary to public policy); see also P. TODD, MODERN BILLS OF LADING §§ 6.06, 7.10 (1986). Lord Diplock noted that a choice of forum clause does not necessarily offend art. 3(8) by lessening liability in all cases. *The Hollandia*, [1983] 1 App. Cas. at 575.

116. *The Bremen*, 407 U.S. at 12 (footnote omitted).

117. See *infra* notes 118-30 and accompanying text.

118. 492 F.2d 1294 (1st Cir. 1974).

119. *Id.* at 1297.

120. *Id.* at 1296 n.2.

able forum, the court relied on this clause to dismiss the case for lack of in personam jurisdiction in Puerto Rico.<sup>121</sup>

A more recent lower court case in the First Circuit, however, found a foreign forum selection clause to be invalid under COGSA, but dismissed the case to the selected jurisdiction on *forum non conveniens* grounds.<sup>122</sup> The District of Puerto Rico in *C.A. Seguros Orinoco v. Naviera Transpapel, C.A.*<sup>123</sup> found that the absolute invalidity rule of *Indussa* controlled in the case and refused to enforce the clause calling for Venezuelan jurisdiction.<sup>124</sup> The court, however, used *S.S. Elikon* and applied a *forum non conveniens* analysis to the case and rendered a conditional dismissal to the Venezuelan courts.<sup>125</sup>

The case law within the Ninth Circuit is unclear as to the enforceability of forum selection under COGSA in this circuit's courts.<sup>126</sup> In general, the courts will enforce a foreign forum

121. *Id.* at 1297. An admiralty proceeding may take the form of an in personam action or an in rem action. G. GILMORE & C. BLACK, *supra* note 1, § 1-11. An in rem action, or maritime lien, differs from other actions, including a suit against a natural or corporate person, in that it is enforced against the vessel in the place where it subsists. *Id.* The Supreme Court, in *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959), noted that this case involved a maritime lien against a ship for proper carriage, and, thus, the Fifth Circuit correctly held this in rem action maintainable even though the bill of lading contained a forum selection clause. *Id.* at 182. The Court ultimately dismissed the writ of certiorari granted in the case as improvident because the Fifth Circuit properly held this in rem action to be maintainable. *Id.* at 183.

122. *C.A. Seguros Orinoco v. Naviera Transpapel, C.A.* 677 F. Supp. 675, 679-87 (D.P.R. 1988).

123. 677 F. Supp. 675 (1988).

124. *Id.* at 682-84.

125. *Id.* at 684-87. The factors used in the court's *forum non conveniens* analysis included the fact that an alternate forum existed in Venezuela. *Id.* at 685. In addition, the court noted that the fire, which destroyed the cargo, probably took place in international waters between San Juan and Venezuela and the crew members of the vessel, except for one, were Venezuelan. *Id.* at 686.

126. *See infra* notes 127-32 and accompanying text. In *Roach v. Hapag-Lloyd, A.G.*, 358 F. Supp. 481 (N.D. Cal. 1973), the court upheld a bill of lading clause calling for foreign litigation of a third-party cargo claim in a longshoreman's personal injury action. *Id.* The court questioned the rationale of *Indussa* but noted that this claim involved indemnification of the shipper for injuries sustained from falling cargo rather than a claim for cargo damage or loss. *Id.* at 484. Thus, the dispute did not fall under the jurisdiction of COGSA. *Id.* Moreover, the Northern District of California pointed out that this case differed from *Indussa* in that a shipper, rather than a carrier, sought to invoke a forum selection clause. *Id.*; *see also* T. SCHOENBAUM, *supra* note 1, § 9-18.

The Western District of Washington in *Mitsui & Co. v. M/V Glory River*, 464 F. Supp. 1004 (W.D. Wash. 1978), however, followed *Indussa* in a case involving

selection clause where the parties incorporate COGSA into a bill of lading, but they will not allow enforcement where COGSA applies on its own force.<sup>127</sup> In *North River Insurance Co. v. Fed Sea/Fed Pac Line*,<sup>128</sup> the Ninth Circuit held that *The Bremen* controlled the facts of the case and the court enforced a clause calling for Canadian jurisdiction over any disputes under the bill of lading.<sup>129</sup> The court addressed *Indussa* and *S.S. Elikon* but found these cases to be relevant only where COGSA applies on its own force rather than where the parties contractually provide for COGSA to apply and specify a forum in which to litigate.<sup>130</sup>

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COGSA and invalidated a forum selection clause calling for disputes to be settled in Tokyo, Japan. *Id.* at 1004. The court noted that it possessed an unqualified discretion to decline suits between the foreign parties in this case but decided that the access to witnesses favored retention of the case and retained jurisdiction. *Id.* at 1005.

The court in *Taisho Marine & Fire Ins. Co. v. The Vessel "Gladiolus,"* 635 F. Supp. 878 (C.D. Cal. 1983), *rev'd per curiam*, 792 F.2d 1123 (9th Cir. 1986), however, upheld a forum selection clause between Japanese parties that called for disputes to be settled in Tokyo, Japan. *Id.* at 879. This district court considered *Indussa* and *S.S. Elikon* to be wrongly decided and found the clause reasonable under the circumstances. *Id.* The Ninth Circuit reversed this decision in an unpublished opinion. *Taisho Marine & Fire Ins. Co. v. The Vessel "Gladiolus,"* 792 F.2d 1123 (9th Cir. 1986).

127. *See, e.g.*, *North River Ins. Co. v. Fed Sea/Fed Pac Line*, 647 F.2d 985 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) (forum selection clause held valid where parties contractually provide for COGSA to apply); *Ampac Trading Co. v. M/V Ming Summer*, 566 F. Supp. 104 (W.D. Wash. 1983). The *M/V Ming Summer* court disagreed with the *North River* decision but found it to control and upheld a foreign forum selection clause. *Id.* at 106. The court found that COGSA did not apply on its own force because the carrier transported the goods between two foreign ports using on-deck storage. *Id.* Thus, the incorporation of COGSA into the bill of lading as the governing law did not take precedence over a choice-of-forum clause requiring disputes to be settled in Tokyo, Japan. *Id.* at 105-06.

128. 647 F.2d at 985.

129. *Id.* at 986-89. The *North River* case involved foreign litigants who agreed to the on-deck transport of three yachts destined for a U.S. port and one yacht destined for a Canadian port. *Id.* at 986. The bill of lading contained a clause paramount stating that COGSA would apply for the yachts shipped to the U.S. ports and Canadian law would apply for the yacht shipped to the Canadian port. *Id.* The parties, however, contracted for a Canadian court to hear any dispute no matter which law applied. *Id.* The Ninth Circuit decided that a forum selection clause merely becomes another contract term where COGSA does not apply of its own force but rather as an additional contract term. *Id.* at 989. Therefore, the court found the forum selection clause to be valid and affirmed the district court's refusal to exercise jurisdiction. *Id.*

130. *Id.* at 986-89. The Ninth Circuit stated:

Parties may contractually provide for a forum in which to litigate . . . just as they may contractually agree on COGSA as the governing law with

Most federal courts, in reviewing forum selection clauses in bills of lading requiring foreign arbitration, hold these provisions to be valid.<sup>131</sup> As noted in *Indussa*, the U.S. courts frequently sustain clauses requiring arbitration in a foreign forum.<sup>132</sup> In *Mid South Feeds, Inc. v. M/V Aqua Marine*,<sup>133</sup> the Southern District of Georgia held that the national policy favoring arbitration superseded COGSA section 3(8), and the court enforced a bill of lading clause that called for London

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respect to certain parties . . . . Because the language of COGSA is not inconsistent with foreign jurisdiction clauses, we reject the view that COGSA preempts all contract terms when its sole force is by incorporation into a contract for foreign transportation. When international parties contractually provide for COGSA to govern disputes, they need not be barred from determining where they want the disputes to be heard.

*Id.* at 989. Thus, the court concluded that *The Bremen* controlled the facts of this case and upheld the parties' contractual choice of forum. *Id.*

131. See, e.g., *Son Shipping Co. v. De Fosse & Tanghe*, 199 F.2d 687 (2d Cir. 1952) (charterparty provision requiring arbitration of disputes in New York City incorporated into bills of lading and enforceable); *Uniao de Transportadores Para Importacao e Comercio, Ltda. v. Companhia de Navegacao Carregadores Acoreanos*, 84 F. Supp. 582 (E.D.N.Y. 1949) (COGSA did not forbid enforcement of clause requiring arbitration in Lisbon, Portugal). The Federal Arbitration Act defines a maritime transaction as "charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished to vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction." 9 U.S.C. § 1 (1982). The Federal Arbitration Act further 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.

9 U.S.C. § 2 (1982). Thus, the Federal Arbitration Act specifically authorizes the use of forum selection clauses in all maritime transactions including bills of lading. *Mid S. Feeds, Inc. v. M/V Aqua Marine*, 1988 Am. Mar. Cas. 437, 439-40 (S.D. Ga. 1986); T. SCHOENBAUM, *supra* note 1, § 9-19.

132. *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 204 n.4 (2d Cir. 1967). The *Indussa* court stated:

Our ruling does not touch the question of arbitration clauses in bills of lading which require this to be held abroad. The validity of such a clause in a charter party, or in a bill of lading effectively incorporating such a clause in a charter party, has been frequently sustained.

*Id.* The court noted that the Federal Arbitration Act, because of its reenactment into positive law in 1947, should prevail if any inconsistencies exist between this statute and COGSA, which Congress enacted in 1936. *Id.*

133. 1988 Am. Mar. Cas. 437 (S.D. Ga. 1986) (not officially reported).



arbitration.<sup>134</sup> The Southern District of New York in *Travelers Indemnity Co. v. M/V Mediterranean Star*<sup>135</sup> also found that COGSA did not invalidate a foreign arbitration clause because *Indussa* did not control in cases requiring arbitration in a foreign forum.<sup>136</sup> Therefore, unlike a forum selection clause that calls for litigation in a non-U.S. court, a foreign forum selection clause requiring arbitration will be enforced by a U.S. court.<sup>137</sup>

### III. FORUM NON CONVENIENS AND A MORE REASONABLE APPROACH

*The Bremen* and subsequent holdings in other U.S. courts present an approach that considers the reasonableness of a particular forum selection clause.<sup>138</sup> The absolute rule promulgated in the *Indussa* decision<sup>139</sup> remains a persuasive force at present,<sup>140</sup> but the rationale behind *Indussa* may be outdated in an expanded era of international commerce.<sup>141</sup> Thus, the courts should consider a more liberal approach to the enforceability of forum selection in bills of lading governed by COGSA.<sup>142</sup>

The use of the doctrine of *forum non conveniens* provides carriers with a limited opportunity to dismiss cargo disputes to

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134. *Id.* at 440. The Southern District of Georgia, in citing the *Indussa* decision, found it "noteworthy that the Federal Arbitration Act was reenacted over ten years after COGSA was enacted." *Id.* The court also expressed "doubts about whether [46 U.S.C.] sec. 1303(8) should be stretched so far as to invalidate foreign arbitration clauses as limitations of liability." *Id.* at 439.

135. 1988 Am. Mar. Cas. 2483 (S.D.N.Y. 1988) (not officially reported).

136. *Id.* at 2484-85. The court in *M/V Mediterranean Star* found the *Indussa* footnote concerning arbitration to be central to this case. *Id.* at 2484. The bill of lading specifically provided for arbitration in Hamburg, West Germany, and the court did not accept the argument that COGSA barred enforcement of this clause. *Id.*

137. *See supra* text accompanying notes 131-36.

138. *See supra* text accompanying notes 107-37.

139. *See supra* notes 71-81 and accompanying text.

140. *See* T. SCHOENBAUM, *supra* note 1, § 9-18.

141. *Fireman's Fund Am. Ins. Cos. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294, 1296 n.2 (1st Cir. 1974). The court in *Fireman's Fund* notes that "several passages in the *Bremen* opinion cast some doubt on the underlying rationale of *Indussa*." *Id.* (citation omitted). The First Circuit highlights the concern of *The Bremen* that courts not hinder the expansion of U.S. business by requiring all disputes with foreigners to be resolved in U.S. courts. *Id.*

142. *See infra* notes 147-211 and accompanying text.

a more convenient forum.<sup>143</sup> However, the interpretation by some courts of the public policy intent behind the adoption of COGSA and the practical application of *forum non conveniens* in the context of an invalid forum selection clause do not provide carriers with just treatment in U.S. courts.<sup>144</sup>

#### A. *Bills of Lading, Forum Selection, and Public Policy*

While the *Indussa* court relied primarily on its interpretation of the intent behind COGSA section 3(8)<sup>145</sup> to invalidate forum selection,<sup>146</sup> other federal courts have used additional public policy arguments against these bill of lading provisions.<sup>147</sup> The public policy arguments used by these courts, however, do not support the application of the absolute invalidity rule over a more reasonable approach.<sup>148</sup>

##### 1. Relieving or Lessening of a Carrier's Liability

The *Indussa* court noted that enforcement of a foreign forum selection clause was against public policy because it tends to lessen a carrier's liability.<sup>149</sup> The intent behind the Harter Act prohibited the use of bill of lading clauses that required the jurisdiction of foreign courts or the application of foreign law, which in the 1800s usually limited a carrier's liability below U.S. standards under common law.<sup>150</sup> The Hague Rules, however, standardized the regulation of bills of lading in the major maritime nations and negated much of the disparity be-

143. See *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 725-26 (4th Cir. 1981) (COGSA suggests a preference for a U.S. forum); T. SCHOENBAUM, *supra* note 1, § 9-18 (application of *forum non conveniens* will be exceedingly rare as a practical matter).

144. See *infra* notes 147-211 and accompanying text.

145. 46 U.S.C. § 1303(8) (1982 & Supp. IV 1986).

146. *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 202-04 (2d Cir. 1967); see *supra* notes 72-81 and accompanying text.

147. See, e.g., *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441, 1444 (5th Cir. 1987) (COGSA and Harter Act designed to redress inequality of bargaining power between carrier and shipper); *S.S. Elikon*, 642 F.2d at 724 (bill of lading represented contract of adhesion).

148. See *infra* notes 149-93 and accompanying text.

149. *Indussa*, 377 F.2d at 203-04.

150. H.R. REP. NO. 1988, *supra* note 11, at 2; see *supra* note 32 (example of one such clause).

tween the laws of these nations.<sup>151</sup> Moreover, some countries now apply the Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading (the "Visby Rules"),<sup>152</sup> and the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the "Visby Amendment"),<sup>153</sup> which actually increase the monetary limitation of liability per package.<sup>154</sup>

The Hague Rules represented the first international effort to regulate bills of lading used for ocean transport.<sup>155</sup> As the Harter Act replaced the common law with regard to maritime bills of lading in the United States,<sup>156</sup> the Hague Rules replaced the diverse national statutes of the major maritime nations in the international law of these contracts for carriage.<sup>157</sup>

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151. See A. KNAUTH, *supra* note 18, at 136-37; *supra* text accompanying notes 36-49.

152. Visby Rules, *supra* note 72.

153. Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 (Cmd. 9197) [hereinafter Visby Amendment]. The representatives of the maritime world promulgated two subsequent amendments to the Hague Rules in 1968 and 1979. Visby Rules, *supra* note 72; Visby Amendment, *supra*. The Visby Rules increased the per unit limitation of liability above the value set in the Hague Rules. Visby Rules, *supra* note 72, art. 2, 1977 Gr. Brit. T.S. No. 83, at 2-3; see W. TETLEY, *supra* note 1, at 21. Furthermore, the United Nations Commission on International Trade Law ("UNCITRAL") developed the Hamburg Rules and increased the per package limitation to approximately US\$1000. See Hamburg Rules, *supra* note 72; W. TETLEY, *supra* note 1, at 891. The Hamburg Rules are not yet in force and the United States has not adopted the Visby Rules. *Id.* at 3, 1101-03. Thus, COGSA remains in force as the legislation that governs carriage of cargo to and from U.S. ports. *Id.*

154. See Visby Amendment, *supra* note 153, art. II, 1984 Gr. Brit. T.S. No. 28, at 3-4; Visby Rules, *supra* note 72, art. 2, 1977 Gr. Brit. T.S. No. 83, at 2-3; see also T. SCHOENBAUM, *supra* note 1, § 9-7. The Visby Rules first adjusted the per unit limitation of liability to 10,000 Poincaré gold francs ("p.g.f.") per package, a unit of account using gold as a basis, or about US\$800 per package. Visby Rules, *supra* note 72, art. 2, 1977 Gr. Brit. T.S. No. 83, at 2-3; W. TETLEY, *supra* note 1, at 878, 891. The Visby Amendment, however, changed the unit of account to Special Drawing Rights ("S.D.R.s"), an amount equal to the market value of five currencies including the U.S. dollar, and maintained the per package limitation at approximately US\$800. Visby Amendment, *supra* note 153, art. II, 1984 Gr. Brit. T.S. No. 28, at 3-4; W. TETLEY, *supra* note 1, at 879 n.12, 891. Many countries, however, set their own values for the per package limitation of liability. See T. SCHOENBAUM, *supra* note 1, § 9-7. During the late 1970s, this value differed as much as US\$62.50 per package in Spain to US\$1462.00 per package in Switzerland. See W. TETLEY, *MARINE CARGO CLAIMS* 532-33 (2d ed. 1978).

155. See *supra* notes 36-49 and accompanying text.

156. See H.R. REP. NO. 1988, *supra* note 11, at 3.

157. See A. KNAUTH, *supra* note 18, at 136-37.

The U.S. Congress noted that the Harter Act prohibited many of the exemptions from liability held valid by the courts of England and the United States.<sup>158</sup> The Hague Rules eliminated the varying exemptions contained in international bills of lading in the nations that adopted this international agreement.<sup>159</sup>

The U.S. enactment of the Hague Rules, in the form of COGSA, replaced the Harter Act in foreign commerce.<sup>160</sup> COGSA uses some of the same language as the Harter Act, but the same antagonism toward foreign courts should not exist, because under COGSA the law governing bills of lading became uniform with many other nations.<sup>161</sup> Thus, this international uniformity permits courts to look at the actual effect of a forum selection clause rather than finding these provisions invalid *per se* under COGSA.<sup>162</sup>

Representatives of the maritime world promulgated the Visby Rules in 1968 to address some of the unresolved problems of the Hague Rules.<sup>163</sup> The Visby Amendment, which the United States has not adopted, raises the per unit limitation of liability to approximately US\$800,<sup>164</sup> which is higher than the US\$500 per package under COGSA.<sup>165</sup> Moreover, under the United Nations Conference on the Carriage of Goods by Sea (the "Hamburg Rules"),<sup>166</sup> which represents the most recent convention on international uniformity in bills of lading, the liability of the carrier increases to approximately

158. H.R. REP. NO. 1988, *supra* note 11, at 3.

159. H.R. REP. NO. 2218, *supra* note 43, at 7 (uniformity and simplification in bills of lading created by the Hague Rules and contained within COGSA to benefit shippers); *see also* A. KNAUTH, *supra* note 18, at 136-40.

160. H.R. REP. NO. 2218, *supra* note 43, at 7.

161. *See* A. KNAUTH, *supra* note 18, at 136 (majority of questions posed by bills of lading should receive same answer in courts of all nations under Hague Rules).

162. *See, e.g.*, *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 201 (2d Cir. 1967) (determining that Norway permitted lower minimum of liability through use of affidavit); *see also* T. SCHOENBAUM, *supra* note 1, § 9-18 (courts should honor selection of country applying Visby or Hamburg Rules because limitation of liability will be higher).

163. *See* Visby Rules, *supra* note 72; T. SCHOENBAUM, *supra* note 1, § 9-7.

164. *See* Visby Amendment, *supra* note 153, art. II, 1984 Gr. Brit. T.S. No. 28, at 3-4; W. TETLEY, *supra* note 1, at 891, 1101-03.

165. 46 U.S.C. § 1304(5) (1982 & Supp. IV 1986).

166. Hamburg Rules, *supra* note 72.

US\$1000.<sup>167</sup> Thus, in some foreign countries, the financial liability of a carrier actually increases rather than lessens to presumably render valid a clause choosing a country that adheres to a higher monetary value.<sup>168</sup>

The rationale behind the *Indussa* decision represents a view of foreign courts as unable to dispense justice fairly between a shipper and a carrier.<sup>169</sup> The lessening of liability in COGSA should not lead to a rejection of the right to choose a foreign court for settlement of a claim.<sup>170</sup>

## 2. Forum Selection and the Proper Jurisdiction of the U.S. Courts Under COGSA

The court in the *Indussa* decision also held that Congress prohibited all clauses that prevented U.S. courts from deciding cases properly before them.<sup>171</sup> The court provided no case law support for this proposition and even noted the Congressional endorsement of arbitration clauses in maritime contracts.<sup>172</sup>

The *Indussa* court's position demonstrates a tendency of U.S. courts to believe they are better able than foreign courts to protect shippers against carriers who use over-reaching clauses.<sup>173</sup> Although the *Indussa* court contended that Congressional intent required invalidation of forum selection clauses,<sup>174</sup> the decision arguably represented a view of foreign

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167. See Hamburg Rules, *supra* note 72, art. 6, at 6-7; W. TETLEY, *supra* note 1, at 891.

168. See W. TETLEY, *supra* note 1, at 877-91; see also T. SCHOENBAUM, *supra* note 1, § 9-18; Chandler, *supra* note 72, at 266-71 (providing comparison of the different limitation values).

169. See *infra* notes 171-79 and accompanying text.

170. See *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 205 (2d Cir. 1967) (Moore, J., concurring); see *infra* note 173 and accompanying text.

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

172. *Id.* at 204 n.4 (Federal Arbitration Act endorses arbitration provisions in any maritime contract but COGSA makes no reference to such a procedure).

173. *Id.* at 205 (Moore, J., concurring). Judge Moore characterized the *Indussa* decision as proclaiming "the superiority of American courts, American law and the ample adequacy of American awards." *Id.*

174. *Id.* at 204. The *Indussa* court thought

that Congress meant to invalidate any contractual provision in a bill of lading for a shipment to or from the United States that would prevent cargo able to obtain jurisdiction over a carrier in an American court from having that court entertain the suit and apply the substantive rules Congress had prescribed.

*Id.* (footnote omitted). Judge Moore, however, countered that to speculate on Con-

courts as so unable to dispense justice that a U.S. court must not dismiss a case in favor of a foreign tribunal as a matter of public policy.<sup>175</sup> Moreover, the doctrine of *forum non conveniens* espoused by the Supreme Court expressly rejects the retention of a case by a U.S. court even where this country's laws may provide a more adequate remedy.<sup>176</sup>

The Supreme Court expressly rejected the idea that forum selection may oust the jurisdiction of a court in a non-COGSA bill of lading by referring to this view as "hardly more than a vestigial legal fiction."<sup>177</sup> Moreover, the Court stated that such

gressional intent remained a "rather uncertain, at best, venture." *Id.* at 205 (Moore, J., concurring).

175. *Id.* Judge Moore concluded:

The forbidding of a clause "lessening" liability in COGSA is scarcely the equivalent of a rejection of the rights of the parties to agree upon a forum. I find it singularly inappropriate for our courts to say, in effect, that the courts of all other nations are so unable to dispense justice that, as a matter of public policy, we must protect our citizens by outlawing any other tribunal than our own.

*Id.*

176. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247-55 (1981). In *Reyno*, the Court held that the lower court

erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.

*Id.* at 247. The *Reyno* decision caused at least one circuit to reevaluate a modified *forum non conveniens* approach used in maritime tort cases. See *In re Air Crash Near New Orleans*, 821 F.2d 1147, 1163-64 n.25 (5th Cir. 1987); see *infra* note 199. The weight of authority in the U.S. courts, however, points to a continuation of deciding the applicable law first and then determining the most convenient forum for litigation of a dispute based on a set of eight factors. See *Hellenic Lines v. Rhoditis*, 398 U.S. 306 (1970) (shipowner's base of operations added to list used for choice of law analysis in maritime tort cases); *Lauritzen v. Larsen*, 345 U.S. 571 (1953) (establishing list of seven factors to determine the law to govern maritime tort cases); *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2819 (1988) (*Reyno* does not preclude modified *forum non conveniens* analysis in maritime tort cases). The courts, however, do not use this modified approach at present for maritime contract cases. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); T. SCHOENBAUM, *supra* note 1, § 5-8. This Note suggests that a similar process should be used to decide the enforceability of a forum selection clause in a bill of lading. See *infra* notes 194-211 and accompanying text.

177. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972). The Court stated:

The argument that such clauses are improper because they tend to "oust" a court of jurisdiction is hardly more than a vestigial legal fiction. It

a contention should be afforded little weight in an era of international transactions and overloaded judicial systems.<sup>178</sup> The concurring opinion in *Indussa* noted that Congress could have outlawed every choice of forum clause in a bill of lading by simply including this prohibition in COGSA.<sup>179</sup>

### 3. Maritime Bills of Lading and Freedom of Contract

The Supreme Court, in *The Bremen*, also considered the principle of freedom of contract and the needs of modern business to provide a general policy in favor of forum selection.<sup>180</sup> The Court noted that the contract of carriage should be freely negotiated and unaffected by "fraud, undue influence, or overweening bargaining power" to permit enforcement of a mari-

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appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. No one seriously contends in this case that the forum-selection clause "ousted" the District Court of jurisdiction over Zapata's action. The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.

*Id.*

178. *Id.*

179. *Indussa*, 377 F.2d at 205 (Moore, J., concurring). Judge Moore wrote that "if Congress had really intended to outlaw every agreement in a bill of lading as to choice of forum for litigation, understandingly and voluntarily entered into, it could, and undoubtedly would, have easily drafted such a clause." *Id.*

180. *The Bremen*, 407 U.S. at 10-14. The Court noted that other common law countries including England followed the approach of *The Bremen*, enforcing maritime forum selection clauses unless unreasonable. *Id.* at 10-11. Moreover, the Court concluded:

It is the view advanced by noted scholars and [the approach] adopted by the Restatement of the Conflict of Laws. It accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world. Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter. Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation. The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.

*Id.* at 11-12 (footnotes omitted).

time forum selection clause.<sup>181</sup> The Fourth Circuit in *S.S. Elikon* specifically defined one COGSA bill of lading as affected by such factors and, thus, found that it represented an adhesion contract.<sup>182</sup> Therefore, under the principles of contract law and *The Bremen*, the court refused to enforce a forum selection clause in a bill of lading and remanded to the district court for consideration of *forum non conveniens*.<sup>183</sup>

The Fourth Circuit's representation of bills of lading as adhesion contracts may have been valid at the end of the last century,<sup>184</sup> but many cargo owners now are sophisticated and experienced businessmen or corporations with equal, if not more, bargaining power than shipowners.<sup>185</sup> Furthermore,

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181. *Id.* at 12-13. The court noted the far from routine nature of the towage contract involved. *Id.* at 13. For example, in the course of the voyage, the vessel would have taken the oil rig through the waters of many jurisdictions. *Id.* Thus, the parties eliminated the uncertain location of resolving any disputes "by agreeing in advance on a forum acceptable to both parties . . . ." *Id.*

182. *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 724 (4th Cir. 1981). The Fourth Circuit stated:

While *The Bremen* holds that forum selection clauses are presumptively valid, particularly in international transactions, it only expressed this view in the absence of any congressional policy on the subject, much less a contrary congressional policy. COGSA applies to [the defendant's] bills of lading in this case, but those bills clash with the statute on their face by their provision for German law in Clause 20. The terms of the bill were not agreed to through hard bargaining, but rather represent the form clauses of an adhesion contract. Congress intended COGSA to ameliorate this very difficulty of bills of lading with one-sided form provisions.

*Id.* (citation omitted).

183. *Id.* at 725. The Fourth Circuit noted the reasonableness of the German forum as specified in the bill of lading, but found its selection suspect in view of the defendant's headquarters location in the same city. *Id.* at 724. Therefore, the court found that "the general policy [of upholding forum selection clauses] must recede before the specific policy enunciated by Congress through COGSA." *Id.* at 724-25 (footnote omitted).

184. See *supra* notes 15-35 and accompanying text; see also A. KNAUTH, *supra* note 18, at 136-37. Knauth points out that the Hague Rules provide carriers and shippers with the assurance that "the greater number of questions posed by a bill of lading shall receive the same answer in the courts of all nations." *Id.* at 136.

185. See *The Bremen*, 407 U.S. at 13 (transaction involved experienced and sophisticated businessmen from different nations). Moreover, in many cases, an insurance company rather than the actual shipper of the goods brings the action against the carrier. See, e.g., *S.S. Elikon*, 642 F.2d at 722 (foreign marine insurer brought the action as subrogee of the General Electric Co., the U.S. shipper); *C.A. Seguros Orinoco v. Naviera Transpapel, C.A.*, 677 F. Supp. 675, 676-77 (D.P.R. 1988) (cargo consignee's insurer brought action under COGSA for loss of shipment in transit from Puerto Rico to Venezuela); *Taisho Marine & Fire Ins. Co. v. The Vessel "Gladialis"*, 635 F. Supp. 878, 878 (C.D. Cal. 1983), *rev'd per curiam*, 792 F.2d 1123 (9th Cir.



shipping agents who regularly deal with bills of lading usually execute these contracts for both the carrier and shipper.<sup>186</sup> Consequently, the shipping agents or brokers become the parties who may execute the bill of lading rather than a carrier and shipper, who supposedly possess unequal bargaining status.<sup>187</sup>

While the Harter Act was concerned with contracts of adhesion where unequal bargaining positions existed between a shipper and carrier, the very purpose of the Hague Rules and COGSA rest upon standard clauses in maritime bills of lading.<sup>188</sup> The law of contracts on the validity of standardized agreements remains unsettled, but the common law "duty to read" rule, which many U.S. courts continue to enforce, places a burden on both parties to read and understand the terms of an executory contract.<sup>189</sup> Furthermore, the law of contracts encourages forum selection in international law by providing the courts with more latitude to determine the reasonableness

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1986) (Japanese insurance company brought action on behalf of trading company for damage to carbon steel boiler tubes).

186. See T. SCHOENBAUM, *supra* note 1, § 9-3. A carrier and shipper may employ agents and independent contractors to arrange for the movement of goods. For example, a carrier usually will hire "a ship's agent or loading broker to advertise, secure business, schedule shipments of cargo, and arrange bunkers [i.e., fuel and oil] and supplies." *Id.* A shipper usually employs a freight forwarder as an intermediary to handle the details of shipping goods. *Id.* The freight forwarder may be paid by a carrier for the preparation of the bill of lading and by a shipper for facilitating the transport of goods. *Id.* The Federal Maritime Commission licenses and regulates ocean freight forwarders. *Id.*

187. See *supra* note 186.

188. See *supra* notes 15-68 and accompanying text.

189. See J. CALAMARI & J. PERILLO, *CONTRACTS* §§ 9-44 to 9-46 (3d ed. 1987); E. FARNSWORTH, *CONTRACTS* § 4-26 (1982). The courts that utilize traditional contract doctrine usually will not allow a party to be relieved of an agreement under any circumstance. *Id.* A growing body of case law, however, exists that subverts the traditional duty to read the terms of a contract upon the theory that a contract lacked true assent by a party or that a contract term should not be honored as unconscionable or contravening public policy. J. CALAMARI & J. PERILLO, *supra*, § 9-46. While the use of a standard form contract may benefit both parties, one party may impose terms without the actual notice of the other party or without the freedom to negotiate the terms. E. FARNSWORTH, *supra*, § 4-26. One view espoused by the courts refuses to hold a party to a writing on the grounds that it did not resemble the terms of a proposed contract. *Id.* A second view refuses enforcement of a standard form on the ground that a reasonable party would not expect such a term to be part of an offer. *Id.* The third approach used by the courts interprets the language of the contract against the drafter of the agreement. *Id.* The courts, however, do not agree on the approach to be used with respect to standard contracts or clauses. J. CALAMARI & J. PERILLO, *supra*, § 9-46.

of a foreign forum.<sup>190</sup>

A forum selection clause should receive consideration by the courts to determine its reasonableness.<sup>191</sup> The condemnation of all such clauses, however, under a contracts theory as well as for public policy reasons, hinders the goal of uniformity in international bills of lading strived for in the Hague Rules and COGSA.<sup>192</sup> Moreover, this absolute rule highlights the need for a more reasonable approach because of the lack of discretion provided to U.S. courts by this view.<sup>193</sup>

### B. *Forum Selection and Forum Non Conveniens*

The doctrine of *forum non conveniens* permits a court to decline jurisdiction when an adequate alternate forum exists in which to hear a case.<sup>194</sup> In *Gulf Oil Corp. v. Gilbert*,<sup>195</sup> the Supreme Court set forth guidelines that a court may use to decide the proper forum for a case.<sup>196</sup> In general, a *Gilbert* analysis requires the court to balance private interest factors, such as the access to proof, the costs of obtaining willing witnesses, and compulsory process for unwilling witnesses, against public interest factors, such as the interest of another forum in having the case heard there.<sup>197</sup> Furthermore, a court using *forum non conveniens* in a maritime contract proceeding not involving COGSA presumes that a choice of law made by the parties should control,<sup>198</sup> but a court still may apply a *forum non conveniens* analysis to determine whether another country's laws would violate COGSA by relieving or lessening a carrier's lia-

190. See *Aetna Ins. Co. v. The Satrustegui*, 171 F. Supp. 33, 35, *vacated*, 174 F. Supp. 934 (D.P.R. 1959). The court noted that contract law permits courts to enforce forum selection clauses unless unreasonable. *Id.* Moreover, this rule of determining the reasonableness of a forum selection clause "has a more liberal application in cases involving the conflict of laws." *Id.*; RESTATEMENT OF CONTRACTS § 558 (1932) (bargains that unreasonably limit choice of tribunal are illegal).

191. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972).

192. See A. KNAUTH, *supra* note 18, at 136-40.

193. See *infra* notes 194-211 and accompanying text.

194. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981).

195. 330 U.S. 501 (1947).

196. *Id.* at 508.

197. *Id.* at 508-09.

198. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (forum selection clause prima facie valid unless unreasonable as shown by the resisting party); *Lauritzen v. Larsen*, 345 U.S. 571, 588-89 (1953) (contractual choice of law should control the rights and duties of litigants unless against public policy).

bility.<sup>199</sup>

A court may use the *forum non conveniens* approach in an admiralty case to allow parties to dismiss a dispute in favor of an alternate forum,<sup>200</sup> including the one chosen in a forum selection clause, without contravening the legislative intent of COGSA.<sup>201</sup> Under this approach, the court may consider the reasonableness of the forum selected by considering the availability of witnesses, the place of contract, and the relative bargaining power of the parties.<sup>202</sup> Therefore, a *forum non conveniens* analysis permits a court to ensure that a forum selection clause receives proper consideration and does not contravene COGSA.<sup>203</sup>

The application of a *forum non conveniens* analysis, however, places a great burden on a defendant when not considered in the context of a valid forum selection clause.<sup>204</sup> A motion for

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199. T. SCHOENBAUM, *supra* note 1, § 9-18. In general, a court decides what law governs a maritime tort case and then applies a list of eight factors promulgated by the U.S. Supreme Court to determine the appropriate jurisdiction for the case. *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1482 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 2819 (1988); *see supra* note 176; T. SCHOENBAUM, *supra* note 1, § 5-8. The Second Circuit held in *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2d Cir. 1983), that "maritime choice of law principles are not involved in a *forum non conveniens* analysis." *Id.* at 48. In addition, the Fifth Circuit interpreted the *Reyno* decision to eliminate the two-step approach that courts use in applying *forum non conveniens* to a maritime tort case. *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1163-64 n.25 (5th Cir. 1987). The Ninth Circuit in *Zipfel* expressly disagreed with the Second Circuit (and the Fifth Circuit by implication) in finding that *Reyno* does not eliminate the modified *forum non conveniens* analysis in maritime tort cases. *Zipfel*, 832 F.2d at 1482 n.3. At present, the courts do not apply a modified *forum non conveniens* analysis to maritime contract cases, because *The Bremen* holds forum selection clauses to be *prima facie* valid unless unreasonable. *The Bremen*, 407 U.S. at 12-15; T. SCHOENBAUM, *supra* note 1, § 5-8 n.10.

200. *See Canada Malting Co. v. Paterson S.S.*, 285 U.S. 413 (1932) (courts possess discretion to decline jurisdiction over admiralty cases); *Alcoa S.S. Co. v. M/V Nordic Regent*, 453 F. Supp. 10 (S.D.N.Y.), *aff'd*, 654 F.2d 165 (2d Cir. 1978), *cert. denied*, 449 U.S. 890 (1980) (*forum non conveniens* principles apply to admiralty cases).

201. *See* T. SCHOENBAUM, *supra* note 1, § 9-18; *see, e.g., Roach v. Hapag-Lloyd, A.G.*, 358 F. Supp. 481 (N.D. Cal. 1973) (shipper rather than carrier sought protection of forum selection clause that COGSA invalidates under *Indussa*, but COGSA did not apply in this action).

202. *The Bremen*, 407 U.S. at 16-20; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *see also* T. SCHOENBAUM, *supra* note 1, § 9-18.

203. *See* T. SCHOENBAUM, *supra* note 1, § 9-18; W. TETLEY, *supra* note 1, at 787-93.

204. *See, e.g., Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 725-26 (4th Cir. 1981). In *S.S. Elikon*, the court noted that "COGSA not only invalidates a forum selection clause appointing a foreign tribunal and designating the applica-

dismissal on the grounds of *forum non conveniens* usually would require the defendant carrier, as the moving party, to provide the bases for the granting of the motion.<sup>205</sup> *The Bremen*, however, placed the burden of proving the unreasonableness of a forum selection clause on the shipper as the moving party.<sup>206</sup> The combination of a *forum non conveniens* analysis with a valid choice of forum clause recognizes the needs of modern businessmen to contract freely and removes uncertainty from the terms of a bargain.<sup>207</sup> The two approaches balance each other by requiring both carriers and shippers to prove or disprove the reasonableness of the selected forum or the existence of a more convenient forum for the settlement of a dispute.<sup>208</sup>

A *forum non conveniens* analysis in the context of a valid forum selection clause would permit courts to implement a less liberal application of *The Bremen* principle in cases where COGSA applies to a bill of lading dispute.<sup>209</sup> The court could determine the applicable law and the appropriate jurisdiction in which to resolve a dispute under a forum selection clause and decide whether the dismissal of a case would violate the Congressional intent of COGSA.<sup>210</sup> This more reasonable approach to the consideration of forum selection in bills of lading gives shippers the protections provided in COGSA and simultaneously considers the interests of a carrier to ensure fairness in deciding jurisdiction over these disputes arising in international commerce.<sup>211</sup>

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tion of foreign law, but appears to suggest a preference for an American forum." *Id.* at 726.

205. *Gilbert*, 330 U.S. at 508 (balance of factors must favor defendant strongly to disturb plaintiff's choice of forum); see also *C.A. Seguros Orinoco v. Naviera Transpapel, C.A.*, 677 F. Supp. 675, 687 (D.P.R. 1988) (defendant carrier required to submit proof needed to dismiss on grounds of *forum non conveniens*).

206. See *The Bremen*, 407 U.S. at 10 (resisting party must show unreasonableness of forum selection clause).

207. *Id.* at 13-14.

208. See *The Bremen*, 407 U.S. at 10 (shipper, as owner of oil rig under towage, forced to prove unreasonableness of the forum selection clause); *Gilbert*, 330 U.S. at 508 (moving party required to prove more convenient forum). See generally W. TETLEY, *supra* note 1, at 786-93.

209. See *supra* notes 194-208 and accompanying text.

210. See *id.*; W. TETLEY, *supra* note 1, at 786-93.

211. See *supra* notes 194-208 and accompanying text; W. TETLEY, *supra* note 1, at 786-93.

*CONCLUSION*

Some U.S. courts have been too restrictive in their consideration of forum selection clauses in COGSA bills of lading. While the Supreme Court's decision *The Bremen* did not involve a COGSA bill of lading, the Court clearly defined its liberal position toward forum selection in international contracts. Unless the U.S. Supreme Court or the U.S. Congress decides to address forum selection in maritime bills of lading governed by COGSA, the lower courts will continue to render inconsistent opinions. The application of a *forum non conveniens* approach in the context of a valid forum selection clause offers the most reasonable way of protecting the interests of both carriers and shippers and, at the same time, settles this area of maritime law.

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