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Joseph Sweeney

Fordham University School of Law

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The Prism of COGSA

JOSEPH C. SWEENEY*

COGSA, however, requires that we view container cases through a different prism.¹

I

INTRODUCTION

I first met Jay Joseph, the founder of our Journal, in early spring 1969 at a planning meeting at New York University with our first editor, Professor Albert H. Garretson; our third editor, Professor Nicholas J. Healy; my Fordham colleague, Professor Ludwik A. Teclaff, and his wife Eileen; and Professors Andreas F. Lowenfeld, Julius J. Marke, and Michael A. Schwind of the NYU faculty. Thirty years later, the Journal of Maritime Law and Commerce is the leading publication in admiralty and international maritime affairs due to the guiding hand of Jay Joseph, who, like a prudent master, has recruited an expert crew and charted a careful course through the perils of publication.

There was an element of adventure in 1969, as it was uncertain how the various constituencies that make up the maritime industry would react to a theoretical, even academic, presentation of the problems of admiralty law, the law of the sea, and maritime resources. At that first meeting Jay was, as he continues to be, steadfast, gentle, genial, and totally supportive. We can be proud of the achievements of the Journal today as we congratulate Jay and his lovely and gracious wife Ann on the joyous occasion of Jay's 80th birthday and the 30th volume of the Journal of Maritime Law and Commerce.

*The John D. Calamari Distinguished Professor of Law, Fordham University. A.B., Harvard University; J.D., Boston University; LL.M., Columbia University. Member of the Editorial Board of the Journal of Maritime Law and Commerce. The author served as U.S. Representative and Chairman of Delegation to the diplomatic conferences to replace the Hague Rules in 1978 (The Hamburg Rules) and to amend them in 1979 (The SDR Amendment).

¹Monica Textile Corp. v. S.S. Tana, 952 F.2d 636, 641, 1992 AMC 609 (2d Cir. 1991) (McLaughlin, J.).

II BACKGROUND

This article began as a meditation on the Supreme Court's 1995 decision, *Vimar Seguros y Reaseguros v. M/V Sky Reefer*,² which changed the existing doctrine that choice of forum and choice of law clauses in bills of lading may be invalid to oust the jurisdiction of American courts over shipments to or from the United States under the Hague Rules treaty³ and the Carriage of Goods by Sea Act (COGSA).⁴ *Sky Reefer* presents a problem in the interpretation of a text that is both a statute and a treaty.

It soon became apparent that *Sky Reefer* was but a small part of a much larger problem of textual interpretation, to which the Supreme Court appears to be giving inconsistent treatment. This article cannot encompass the entire history of textual interpretation, let alone a review of all recent interpretation cases; thus, its scope will be limited to the subject of international transportation.

While maritime transport involves a text that is both a statute and a treaty and concerns only cargo damage, air transport involves a treaty only, but deals with carrier liabilities to both passengers and cargo. Although both treaties—the Hague Rules of 1924 and the Warsaw Convention of 1929⁵—came out of the same historical period, there is little evidence that either one influenced the other; maritime law had a long history with profound policy-based decisions, while the air transport industry did not yet exist.

The original and only authentic texts of both conventions are in the French language. Because there is no American statute covering the Air Law Convention, American courts must struggle with French grammar and vocabulary. They never, however, consult the French original in maritime cases because of COGSA, whose terms are controlling in American courts in any dispute over a treaty provision.

Just as a transparent crystal prism focuses and enlarges the image under study, it is the goal of this article to examine the decisional history of COGSA and to find the historical background and evidence of the intent of its drafters in 1936 and determine how that intent has been developed over the 63 years since enactment. COGSA has never been amended and we

²515 U.S. 528, 1995 AMC 1817 (1995).

³International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155 (U.S. ratification proclaimed effective Dec. 29, 1937 (51 Stat. 246)).

⁴Act of Apr. 16, 1936, ch. 229, Pub. L. No. 74-521, 49 Stat. 1207, effective from July 15, 1936 (49 Stat. 1213), now codified at 46 U.S.C. app. §§ 1300-1315.

⁵Convention for the Unification of Certain Rules Relating to International Transportation by Air, Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (U.S. ratification proclaimed effective Oct. 29, 1934 (49 Stat. 3013)).

presently remain uncertain whether an international consensus can ever be achieved on changing it. Assuming, however, that COGSA will remain in some form, it is time to apply modern interpretive scholarship to it—the most important and most frequently litigated statute in American international trade. We must also bear in mind that COGSA emerged from a treaty ratified by the United States; thus, it must be interpreted both as treaty and statute. In either case, preparation of this article has been made much easier by the legislative histories prepared by Professor Michael F. Sturley.⁶

III MARITIME TRANSPORT

It is appropriate to look at the history of the allocation of cargo damage liability and the circumstances of the passage of COGSA⁷ before we analyze the few Supreme Court decisions⁸ of treaty interpretation and statutory construction⁹ to discern the prism of COGSA.

The case from which the “prism of COGSA” language is taken involved the narrow issue of the unit limitation of liability (\$500 per package).¹⁰ There had been damage to a cargo of 76 bales of cloth stowed inside a container (20' x 8' x 8') that was being shipped from Africa to Savannah, Georgia. The cloth was damaged by salt water. The bill of lading described the contents as 76 bales of cotton cloth in the “description” column of the bill of lading, but in the column headed “No. of Pkgs.” the typed figure “1” was found.¹¹ The carrier defendant argued that its liability was limited to \$500 because of bill of lading language that defined a container as one package.

The District Court rejected the carrier's argument and ruled for the cargo

⁶Essential documents of the 1924 International Convention and COGSA are printed in *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* (M. Sturley ed. 1990) [hereinafter cited as *Leg. Hist.*] See also Sturley, *The History of COGSA and the Hague Rules*, 22 *J. Mar. L. & Com.* 1 (1991) [hereinafter cited as *COGSA History*], and Sturley, *The History of the Hague Rules and the United States Carriage of Goods by Sea Act*, [1991] *II Diritto Marittimo* 1.

⁷See *infra* notes 117–91 and accompanying text.

⁸See *infra* notes 192–319 and accompanying text.

⁹Professor William Tetley reminds us of the distinction between the word “construction,” favored by common law lawyers, and “interpretation,” favored by those trained in the civil law, but cites Corbin to the effect that the distinction is by no means necessary. W. Tetley, *Marine Cargo Claims* 83 (3d ed. 1988) (citing 3 A. Corbin, *Corbin on Contracts* § 534, at 13 (1960)). In the view of Professor Hans Kelsen, however, “There are no principles concerning the interpretation of treaties different from those concerning the interpretation of other legal instruments.” H. Kelsen, *Principles of International Law* 460 (2d rev. ed. 1966).

¹⁰*Monica Textile Corp. v. S.S. Tana*, 952 F. Supp. 636, 1992 AMC 609 (2d Cir. 1991).

¹¹*Id.* at 637.

owner, citing Second Circuit authority on shipping containers.¹² After the trial court decision's in *Monica Textile*,¹³ however, the Second Circuit decided *Seguros Illimani S.A. v. M/V Popi P*,¹⁴ which seemed to elevate the legal effect of the number of packages column in the bill of lading over the cargo description column; accordingly, the District Court reversed itself and awarded only the \$500 package limitation amount.¹⁵ The *Monica Textile* bill of lading defined the shipping container as one package in a minuscule pre-printed exculpatory clause, allegedly reflecting the agreement of the parties.

The Second Circuit, however, reversed,¹⁶ noting that it had consistently cast a jaundiced eye on exculpatory agreements which are "against the grain of COGSA."¹⁷ Examining the face of the bill of lading, the court found no agreement but rather an inherent ambiguity.¹⁸ *Seguros Illimani* was rejected as analogous because the court's decision in that case was *not* whether one container is one package but rather whether each individual tin ingot inside the container was a package or whether a bundle of 15 ingots was the package.

In *Seguros Illimani*, the cargo owner argued that there were 9,000 packages with a value of \$4,500,000; the carrier argued that there were 600 packages with a value \$300,000. In *Monica Textile*, the Second Circuit concluded that *Seguros Illimani* was not a container case, but a pallet case;¹⁹ thus, the bill of lading definition of a container as one package was a unilateral, self-serving, and ambiguous declaration by the carrier that was not negotiated by the parties.²⁰ The opinion traced the history of the \$500 per package doctrine through the changes in shipping practices since the Second World War and disposed of inapposite holdings because COGSA requires "a different prism."²¹

The prism of COGSA designed by Congress can be observed in the court's textual and intentional reading of the historical record:

Long before COGSA was enacted, industrialized nations recognized the need to reconcile the desire of carriers to limit their potential liability with their vastly superior bargaining power over shippers. . . . The nations at the Brussels

¹²*Mitsui & Co., Ltd. v. American Export Lines, Inc.*, 636 F.2d 807, 1981 AMC 331 (2d Cir. 1981).

¹³*Monica Textile Corp. v. S.S. Tana*, 731 F. Supp. 124, 1990 AMC 1639 (S.D.N.Y. 1990).

¹⁴929 F.2d 89, 1991 AMC 1521 (2d Cir. 1991).

¹⁵*Monica Textile Corp. v. S.S. Tana*, 765 F. Supp. 1194, 1991 AMC 2378 (S.D.N.Y. 1991).

¹⁶952 F.2d at 637. See also *All Pacific Trading, Inc. v. M/V Hanjin Yosu*, 7 F.3d 1427, 1994 AMC 365 (9th Cir. 1993), cert. denied, 510 U.S. 1194 (1994).

¹⁷952 F.2d at 641.

¹⁸*Id.* at 642.

¹⁹*Id.* at 640.

²⁰*Id.* at 643.

²¹*Id.* at 641.

Convention of 1924 balanced these competing concerns with a per-package limitation on liability. . . . The principles established by the Brussels Convention became the template for COGSA. . . .²²

A teleological interpretation²³ of that treaty was found in *Leather's Best, Inc. v. S.S. Mormaclynx*,²⁴ also cited in *Monica Textile*, in its application of the treaty to containers, a transport mode that did not exist in 1936. In *Leather's Best*, Judge Friendly had written:

The difficulty presented in this case . . . is that "[f]ew, if any, in 1936 could have foreseen the change in the optimum size of shipping units that has arisen as the result of technological advances in the transportation industry." [T]he problem demands a solution better than the courts can afford, preferably on an international scale. . . . Meanwhile the courts must wrestle with a statutory provision that has become ill-suited to present conditions. . . . Still we cannot escape the belief that the purpose of § 4(5) of COGSA was to set a reasonable figure below which the carrier should not be permitted to limit his liability and that "package" is thus more sensibly related to the unit in which the shipper packed the goods and described them than to a large metal object, functionally a part of the ship, in which the carrier caused them to be "contained."²⁵

While *Monica Textile's* prism of COGSA analysis illustrates the problems in hundreds of cargo damage cases where unit limitation is involved, it also illustrates generally the necessary background for the interpretation or construction of COGSA in other contexts.²⁶

IV

HISTORICAL BACKGROUND OF CARGO DAMAGE LITIGATION

A. *Developments to 1893*

The new United States of America was already an important trading nation in 1789, furnishing grain, fish, rum, and lumber to Europe and the European colonies in the West Indies.²⁷ Those cargoes were carried in an increasing number of United States built and flagged vessels. This occurred despite the maritime war between France and England, which began in 1793

²²Id. at 638. An intentional interpretation of the balancing of interests can be found in *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 1969 AMC 1741 (2d Cir. 1969), cert. denied, 397 U.S. 964 (1970).

²³In a teleological interpretation of a treaty, unexpressed purposes of the treaty emerge over time to fill in gaps in our understanding of the text and intent of the drafters.

²⁴451 F.2d 800, 1971 AMC 2383 (2d Cir. 1971), cited at 952 F.2d 638–39.

²⁵451 F.2d at 814–15.

²⁶See *infra* notes 85–113 and 159–87 and accompanying text.

²⁷J. Hutchins, *The American Maritime Industries and Public Policy, 1789–1914*, 221–28 (1941); A. Nevins, *Sail On, The Story of the American Merchant Marine 19–30* (1946).

and continued to 1815.²⁸ Although the belligerents captured and destroyed our neutral ships, the growth of the American fleet was actually stimulated by these challenges.²⁹ At the conclusion of the war, regular liner service began in 1816 in the North Atlantic trade, eventually using steamboats after 1819.³⁰ Large iron and steel steam-powered vessels with greater cargo carrying capacity began about mid-century.³¹

American shipyards turned out fast and efficient types of sailing vessels, eventually trading to China and the East Indies legally while a vast and profitable commerce was conducted illegally in the European colonies in Latin America and Africa.³² This was still the age of the all-purpose merchant, in which vessels were owned by groups of investors based on town or family connections while cargoes were similarly owned by groups of merchants who speculated that buyers could be found for their goods at destination. The "common venture" concept of general average accurately described the shipping reality: the same merchants who owned fractions of the ship also owned fractions of the cargoes.³³ In fact, a representative of the cargo owners, the supercargo, often sailed on the ship with the goods to look after them and arrange sales. Modern bulk shipments were unknown except in wartime, and goods were usually shipped in boxes, bales, bags, barrels, and drums. Insurance on the hulls of vessels was widely available, but insurance on cargoes and the liability insurance of owners to third parties developed only gradually as part of marine insurance practices.³⁴

All these factors account for the absence of direct litigation between the economic interests of shippers and carriers or the subrogation litigation by cargo insurers against P & I clubs that is a conspicuous feature of modern admiralty law. Legal treatises in this country and England simply did not

²⁸Hutchins, *supra* note 27, at 184–88; Nevins, *supra* note 27, at 27–29.

²⁹The cargo carrying capacity of the U.S. merchant fleet increased from 124,000 gross tons in 1789 to 840,000 gross tons in 1807. Hutchins, *supra* note 27, at 225–27.

³⁰*Id.* at 228–46, 260–64, 327–32, 397–410, 441–50; Nevins, *supra* note 27, at 30–37; R. Albion, *Square Riggers on Schedule: The New York Sailing Packets to England, France and the Cotton Ports* (1938).

³¹J. Morrison, *A History of American Steam Navigation 19–27* (1903). See also *The Advent of Steam: The Merchant Steamship Before 1900* (R. Gardiner ed. 1993).

³²Hutchins, *supra* note 27, at 200–28; R. Albion & J. Pope, *Sea Lanes in Wartime—The American Experience, 1775–1942*, 65–125 (1942); S. Morison, *The Maritime History of Massachusetts, 1783–1860*, 96–118, 225–52 (1921).

³³General average, of course, results when "any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure." Rule A, York-Antwerp Rules 1994, reprinted at 6 *Benedict on Admiralty* Doc No. 4–6 (7th rev. ed. 1999). See generally L. Buglass, *Marine Insurance and General Average* (3d ed. 1991). For a further look at the merchants of this period, see R. Albion, *The Rise of New York Port, 1815–1860* (1939), and A. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* 15 (1977).

³⁴A. Parks, *The Law and Practice of Marine Insurance and Average* 3–4 (1987).

deal with questions of the apportionment of risks between the shippers and carriers in cases of cargo damage³⁵ until the end of the century, after the appearance of the Harter Act³⁶ in 1893.

Specialization of functions³⁷ came in during the vast increase in world trade towards the end of the 19th century, a time when wooden sailing ships were replaced by iron and steel vessels powered by steam and moved by screw propellers. Wealthy investors in the age of the railroad and factory, however, had more profitable avenues for their capital, and the American owned fleet began to shrink in size and importance.³⁸ In the law, the distinction between common carriage and private carriage became significant.³⁹ In 1848, however, the United States Supreme Court held an ocean carrier fully liable for the loss of a cargo of gold and silver coins, thus imposing a high standard of care for cargo carriers in the landmark case of *The Lexington*,⁴⁰ despite strong exculpatory language in the bill of lading. Liability in that case was based on both negligence and unseaworthiness, as the shipper alleged that its cargo was carelessly stowed aboard a common carrier's vessel that was carelessly, improperly, and negligently conducted with imperfect and insufficient machinery.⁴¹

The Lexington was a paddle-wheel steamboat engaged in regular multi-modal liner service between New York and Boston.⁴² The shipper, the Merchants' Bank of Boston, shipped a wooden chest of gold and silver coins without informing the carrier of the contents, although the weight of the coins may have made its valuable contents obvious.⁴³ The bill of lading excepted "danger of fire, water, breakage, leakage, and all other accidents" and limited carrier liability to \$200 per package.⁴⁴ Additionally, the carrier had posted signs at the loading dock and its business offices that shipments were at the risk of the owners.⁴⁵ The vessel departed from New York at 4:00 p.m. on January 13, 1840, but a fire broke out at 7:30 p.m. that could not be controlled. The ship sank in Long Island Sound off Fisher's Island before

³⁵H. Flanders, *Treatise on Maritime Law* (1852); A. Browne, *A Compendious View of the Civil Law and of the Law of the Admiralty* (American ed. 1840).

³⁶Act of Feb. 13, 1893, ch. 105, §§ 81-196, 27 Stat. 445, now codified at 46 U.S.C. app. §§ 190-196.

³⁷Chandler, *supra* note 33, at 15.

³⁸Nevins, *supra* note 27, at 44-59.

³⁹See *Propeller Niagara v. Cordes*, 62 U.S. (21 How.) 7 (1858).

⁴⁰*New Jersey Steam Nav. Co. v. Merchants' Bank of Boston (The Lexington)*, 47 U.S. (6 How.) 344 (1848). See also Sweeney, *The Admiralty Law of Arthur Browne*, 26 J. Mar. L. & Com. 59, 129-31 (1995).

⁴¹47 U.S. at 350-52.

⁴²*Id.* at 344-47.

⁴³*Id.* at 346-47.

⁴⁴*Id.*

⁴⁵*Id.*

midnight, taking the lives of all but four of the 150 passengers and causing the loss of plaintiff's chest of coins, allegedly worth \$18,000.⁴⁶

The shipowner denied the allegations of negligence, asserted that its servants exercised ordinary care, but that in any event it was not liable to the shipper for the loss because of its notices of non-liability in the bill of lading exculpatory clause and posted signs.⁴⁷ Justice Nelson's majority opinion⁴⁸ held that the exculpatory language could not overcome the insurer's obligations as common carrier, thus the shipper could recover its full damages.⁴⁹

Reaction to the decision, based on carrier outrage, was not favorable, and

⁴⁶Id. at 350.

⁴⁷Id. at 352.

⁴⁸Id. at 392. Chief Justice Taney and Justices McLean and Wayne joined the opinion, while Justices Catron and Woodbury concurred in the result. Justice Daniel issued a dissent, which was joined in by Justice Grier. Justice McKinley did not participate.

Samuel Nelson (1792–1873) was the Supreme Court's admiralty expert in the middle years of the 19th century, having served 27 years (1845–72). His appointment by President John Tyler followed Senate rejection or withdrawal of three previous nominees. (A non-Jacksonian Democrat from Virginia, Tyler was the Whig nominee for Vice President in 1840 on the ticket with General William Henry Harrison, who died one month after his inauguration. Tyler's administration was cursed by party and intra-party conflict.) Nelson, who came from Hebron, in upstate New York, attended Middlebury College, and apprenticed and was admitted to the New York bar in 1817, had a successful commercial and admiralty practice in New York City. He entered politics in the early days of his career and served as a delegate to the New York Constitutional Convention in 1821. In 1831, he was appointed an Associate Justice of the New York Supreme Court (a trial court), and became its Chief Justice in 1836. A Jacksonian Democrat, he was easily confirmed by the Democratic-majority senate in 1845, five days before Tyler left office.

Justice Nelson wrote the Court's opinion in *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1855), which imposed the equal division of damages rule in both to blame collisions until displaced by *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 AMC 541 (1975). He dissented in *The Prize Cases*, 67 U.S. (2 Black) 635 (1863), because he required a congressional declaration of war to justify the blockade of confederate ports. He wrote the majority opinion in *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866), restating the principle that both the commission and the consummation of a maritime tort must occur on navigable waters, a doctrine set aside in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 1973 AMC 1 (1972).

⁴⁹47 U.S. at 390. Justice Nelson framed the issue as follows:

The general liability of the carrier, independently of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident,—in other words, the act of God or the public enemy. The liability of the respondents, therefore, would be undoubted, were it not for the special agreement under which the goods were shipped.

The question is, to what extent has this agreement qualified the common law liability?

[B]ut admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own . . . he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to.

Id. at 381–82.

three years later Congress reacted⁵⁰ to the outcry by enacting the Fire Statute⁵¹ and the Limitation of Shipowners' Liability Act.⁵² While these statutes relieved some carrier distress so that the American merchant marine would remain "competitive" with that of Great Britain (as respects non-liability), the basic proposition of the "insurer" liability of common carriers for negligent damage to cargo remained. *Clark v. Barnwell*⁵³ and the *Propeller Niagara*⁵⁴ did not alter the *Lexington's* principles, and the strategic position of shippers in America was strengthened by the admiralty remedy of arrest of the vessel for cargo damage approved in *Bulkley v. Naumkeag Steam Cotton Co.*,⁵⁵ and the joint and several liability provisions of *The Alabama*⁵⁶ and *The Atlas*.⁵⁷

The American flag merchant fleet was devastated by the Civil War (1861–65).⁵⁸ Further, American owners were slow to invest in modern steam-driven iron ships. On the other hand, Great Britain's merchant fleet, supported by the Royal Navy, ruled the waves, while British carriers avoided liability for cargo damage by their broad exculpatory clauses⁵⁹ enforced by British courts on the theory of "liberty of contract."⁶⁰ Furthermore, excul-

⁵⁰G. Gilmore & C. Black, *The Law of Admiralty* 818–22 (2d ed. 1975); Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 *Tul. L. Rev.* 999, 1016–17 (1979).

⁵¹Act of Mar. 3, 1851, ch. 43, § 2, 9 Stat. 635, now codified at 46 U.S.C. app. § 182.

⁵²Act of Mar. 3, 1851, ch. 43, §§ 3 and 4, 9 Stat. 635, now codified at 46 U.S.C. app. §§ 183–188.

⁵³53 U.S. (12 How.) 272 (1851), a 7–2 decision written by Justice Nelson, with dissents by Chief Justice Taney and Justice Wayne.

The Court held that the carrier has the burden of proving that the cause of the damage was an excepted clause in the bill of lading—here "dangers of the seas." Nevertheless, the shipper may win its case by going forward with proof of negligence. "But if it can be shown that it might have been avoided by the use of proper precautionary measures, and that the usual and customary methods for this purpose have been neglected, they may still be held liable." *Id.* at 282.

⁵⁴See *supra* note 39. On a November voyage from Buffalo to Chicago, a steam vessel went aground and became frozen in ice and abandoned by the crew from December 3, 1854 to April 27, 1855. In a unanimous opinion by Justice Clifford, the carrier was held liable under the general maritime law, the Court noting:

Common carriers by water, like common carriers by land, in the absence of any legislative provisions describing a different rule, are also, in general, insurers, and liable in all events, and for every loss or damage, however occasioned, unless it happened by the act of God, or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading.

62 U.S. at 22.

⁵⁵65 U.S. (24 How.) 386 (1860).

⁵⁶92 U.S. (2 Otto) 695 (1875).

⁵⁷93 U.S. (3 Otto) 302 (1876).

⁵⁸See generally S. Bernath, *Squall Across the Atlantic: American Civil War Prize Cases and Diplomacy* (1970); Hutchins, *supra* note 27, at 44–50; Albion & Pope, *supra* note 32, at 148–73.

⁵⁹See generally Yiannopoulos, *Bills of Lading and the Conflict of Laws: Validity of Negligence Clauses in England*, 37 *Det. L.J.* 99 (1959).

⁶⁰See, e.g., *Tattersall v. National Steamship Co.*, 12 Q.B. Div. 297 (1884), and *In re Missouri S.S. Co.*, 42 Ch. Div. 321 (1889).

patory clauses were joined to a choice of law clause, selecting English law, and a forum selection clause, requiring disputes to be heard before English courts.⁶¹ The impact of these clauses on American shippers was devastating because at least half of all vessels in international trade were British flag⁶² and the United States flag merchant marine was in serious decline, despite congressional assistance in the form of lucrative subsidies for carrying mail.⁶³

These developments occurred while British shipowners organized for defense and aggression. In 1874 the first modern P & I club, the Steamship Owners' Mutual Protection and Indemnity Association, was organized, and in 1875 the classic shipowner cartel, the Calcutta Steam Traffic Conference, was created.⁶⁴ In 1890 the Shipping Federation, an organization of shipowner employers, was created to combat seamen's unions, especially efforts to enforce the "closed shop" on vessels.⁶⁵

These threads of unified actions by carriers and their insurers would come together in an 1882 meeting of the International Law Association (ILA) at Liverpool that negotiated and produced the Conference Form Model Bill of Lading.⁶⁶ The purpose of this document, to be adopted voluntarily by all shipowners (although required by their insurers), was the elimination of different standards and amounts of liability to shippers as an element of competition between carriers.

There was public reaction, at least among shipper interests, to the dominance of British shipping and British law,⁶⁷ leading to American congressional action—the 1893 Harter Act—following the Supreme Court's landmark opinion in *Liverpool & Great Western Steam Co. v. Phenix Insurance Co.*,⁶⁸ in which it was held that exculpatory clauses in bills of

⁶¹Id.

⁶²See D. Howarth, *Sovereign of the Seas: The Story of Britain and the Sea* 33 (1974) (estimating that the British merchant flag controlled 52% of world shipping in 1900).

⁶³Subsidization of Atlantic shipping services by contracts for the carriage of mail was very common in France, Germany, and Great Britain. The United States provided such subsidies beginning in 1845. See further McKee, *The Ship Subsidy Question in American Politics*, in *Smith College Studies in History* VIII (1922).

⁶⁴See generally N. Singh & R. Colinvaux, *Shipowners* 96–112, 208–28 (1967).

⁶⁵See generally H. Levinson et al., *Collective Bargaining and Technological Change in American Transportation* 274–303 (1971).

⁶⁶See A. Knauth, *The American Law of Ocean Bills of Lading* 118–31 (4th ed. 1953).

⁶⁷H.R. Rep. No. 1988, 52d Cong., 1st Sess. (1892). See also H.R. Rep. No. 342, 46th Cong., 3d Sess. (1881); H.R. Rep. No. 1665, 48th Cong., 1st Sess. (1884); H.R. Rep. No. 1210, 51st Cong., 1st Sess. (1884). The carriage of U.S. foreign trade in American flag ships declined from about 67% in 1859 to about 38% in 1870. See Hutchins, *supra* note 27, at 323–24. By 1910, American flag participation was just 10%. See R. Morris, *Encyclopedia of American History* 489 (1st ed. 1953).

⁶⁸129 U.S. 397 (1889) (a unanimous (7–0) opinion written by Justice Gray). On a voyage from New York to Liverpool on the British ship *Montana*, the cargo was lost when the vessel grounded near Holyhead, Wales. The cargo insurer sued due to the negligence of the carrier's servants; the carrier

lading denying recovery for damage to cargo owners violated public policy.⁶⁹

B. *The Harter Act (1893)*

The direct predecessor of COGSA was the 1893 Harter Act,⁷⁰ which has never been repealed or even amended. That statute has a unique position in maritime history as it was the first regulation by government of the apportionment of risks between cargo owning interests and ship owning interests. As such it was the spark that led to the 1924 Hague Rules Treaty,⁷¹ on which COGSA is based.

The bill that would become the Harter Act⁷² dealt with the prohibition of exculpatory clauses in bills of lading as “some protection as against foreign shipowners.”⁷³ That protection was the prohibition of clauses relieving carriers of liability for negligence or lessening the obligation to furnish a seaworthy vessel,⁷⁴ but two new carrier defenses—negligent navigation (or nautical fault) and negligent management—were created by Congress.⁷⁵ Unfortunately, the record is lamentably void as to the bargaining that

defended on the basis of a bill of lading clause exempting it from “negligence, default, or error in judgment of the master, mariners, engineers, or others of the crew. . . .” *Id.* at 438.

Horace Gray (1828–1902) was born in Boston, studied law at Harvard University, and was admitted to the Massachusetts bar in 1851. He was appointed an Associate Justice of the Supreme Judicial Court in 1864, having served as Reporter of that court’s decisions for eight years. In 1873, he became Chief Justice of Massachusetts (Louis D. Brandeis was one of his clerks in 1879–81). President Chester A. Arthur appointed him to the U.S. Supreme Court in 1882. His nomination, confirmation, and installation took place within a three week period. He is chiefly remembered for his decision extending Fourteenth Amendment citizenship to children born in the United States of Chinese laborers imported to work on the California railroads but ineligible for citizenship by statute. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

In *Liverpool & Great Western*, he wrote:

But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the bill of lading, of perils of the sea or other specified perils does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed.

129 U.S. at 438.

⁶⁹*Id.* at 441 (“It being against the policy of the law to allow stipulations which will relieve [it] from the exercise of care or diligence, or which, in other words, will excuse it for negligence in the performance of its duty, the company remains liable for such negligence.”).

⁷⁰See *supra* note 36.

⁷¹See *supra* note 3.

⁷²H.R. 9176, 52d Cong., 2d Sess. (1892). The bill prepared by Congressman Harter (D-Ohio) is found in 46 U.S.C. app. §§ 190 and 191.

⁷³See Sweeney, *Happy Birthday, Harter: A Reappraisal of the Harter Act on its 100th Anniversary*, 24 J. Mar. L. & Com. 1, 10 n.42 (1993) [hereinafter cited as *Birthday*].

⁷⁴46 U.S.C. app. §§ 190–191.

⁷⁵46 U.S.C. app. § 192. See *Birthday*, *supra* note 73, at 10–12.

produced these policy-based defenses in unreported committee hearings and unrecorded proceedings in the House and Senate.

Nevertheless, interpretation of the Harter Act has been remarkably consistent. In its first Harter Act decision, the Supreme Court saw the statute as *remedial* legislation enacted to limit the effect of carrier exculpatory clauses.⁷⁶ In the words of Justice Brown,⁷⁷ “the evil to be remedied being one produced by the oppressive clauses forced upon the shippers of goods by the vessel owners.”⁷⁸ This analysis by an experienced admiralty judge supplements the scanty congressional record⁷⁹ and helps to discern the meaning of the Harter Act.

⁷⁶The *Delaware*, 161 U.S. 459 (1896). This case of first impression involved a daylight collision between a steamship in ballast and a tug in a crossing situation in a dredged channel at the entrance to New York harbor. The tug sank; the steamship was in sole fault as the burdened (or giving way) vessel. Nevertheless, the steamer argued that it could not be held at fault because, under the Harter Act, the steamer's owners had exercised due diligence to make the ship seaworthy before the collision caused by negligent navigation. The steamship's argument came from a *literal* reading of the statute. The unanimous opinion of the Court rejected this reading:

It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her cargo. This is apparent not only from the title of the act, but from its general tenor and provisions, which are evidently designed to fix the relations between the cargo and the vessel, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair, and outfit of the vessel, and the care and delivery of the cargo. The act was an outgrowth of attempts, made in recent years, to limit, as far as possible, the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage and negligence in navigation, and other forms of liability which had been held by the courts of England, if not of this country, to be valid as contracts and to be respected even when they exempted the ship from the consequences of her own negligence. As decisions were made by the courts from time to time, holding the vessel for non-accepted liabilities, new clauses were inserted in the bills of lading to meet these decisions until the common-law responsibility of carriers by sea had been frittered away to such an extent that several of the leading commercial associations, both in this country and in England, had taken the subject in hand, and suggested amendments to the maritime law in line with those embodied in the Harter act.

Id. at 471–72.

⁷⁷Henry B. Brown (1836–1913), born in South Lee, Massachusetts, attended Yale University and read law prior to moving to Detroit in 1859, where he established a flourishing admiralty practice. In 1875, he was appointed United States District Judge for Eastern Michigan. He was elevated to the U.S. Supreme Court by President Benjamin Harrison in 1890. His nomination, confirmation, and installation took less than two weeks. While praised for his admiralty opinions, he has come to be vilified in modern times for writing the majority opinion on racial segregation in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and for his concurrence in *Lochner v. New York*, 198 U.S. 45 (1905). He retired in 1905.

⁷⁸161 U.S. at 474.

⁷⁹24 Cong. Rec. 1180 (1893). See also *United States v. Atlantic Mut. Ins. Co.*, 343 U.S. 236, 1952 AMC 659 (1952) (discussed *infra* notes 204–37 and accompanying text); *Schnell v. The Vallescura*, 293 U.S. 296, 1934 AMC 1573 (1934); *May v. Hamburg-Amerikanische Packetfahrt A.G. (The Isis)*, 290 U.S. 333, 1933 AMC 1565 (1933); *The Germanic*, 196 U.S. 589 (1905); *Isthmian S.S. Co. v. California Spray-Chem. Corp.*, 300 F.2d 41, 1962 AMC 1474 (9th Cir. 1962); *The Willdomino*, 300 F. 5, 1924 AMC 889 (3d Cir. 1924), cert. dismissed, 270 U.S. 641 (1926); *Green, The Harter Act*, 16 Harv. L. Rev. 153 (1904).

C. From the Harter Act to the Hague Rules (1908–1924)

Early efforts in the Comité Maritime International (CMI)⁸⁰ to deal with the apportionment of the risks of cargo damage were begun in 1908, shortly before the successful diplomatic conference on collision and salvage in 1910,⁸¹ but these efforts were interrupted by the First World War. Nevertheless, three “shipper” colonies, about to become independent dominions—New Zealand,⁸² Australia,⁸³ and Canada,⁸⁴—had enacted “Harter-type” legislation governing outward shipments, although shipment of manufactured goods into these dominions from Britain was not affected.

Agitation for empire-wide legislation to forestall further national legislation led to the 1921 Recommendation by the British Imperial Conference for imperial legislation. At approximately the same time, the Maritime Law Committee of the ILA began to formulate model rules on bills of lading for voluntary adoption by shipowners and cargo owners.⁸⁵

The “imperial” draft won the unanimous approval of the ILA at its September 1921 conference at the Hague, Netherlands (hence the name, Hague Rules).⁸⁶ The CMI resumed its work of unifying maritime law in July 1921, but made no proposals to amend the draft ILA Rules, noting however that it would be ready to consider, “Subsequent international action on diplomatic lines.”⁸⁷

The CMI meeting followed the June 1921 founding meeting of the

⁸⁰The CMI was organized by national groups of maritime lawyers in 1897. In its early years it conducted studies of maritime problems and drafted international conventions for diplomatic conferences convened by the Belgian government; 13 of these were held from 1910–79. Since 1972, it has worked closely with the International Maritime Organization and the United Nations Conference on Trade and Development. For a further look at the history of the CMI, see generally A. Lilar & C. Van Den Bosch, *Le Comité Maritime Internationale* (1972).

⁸¹The 1910 conference produced the International Convention for the Unification of Certain Rules of Law with Respect to Collisions Between Vessels, Brussels, Sept. 23, 1910, reprinted at 6 *Benedict on Admiralty*, Doc. No. 3–2 (7th rev. ed. 1999), and the Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, Brussels, Sept. 23, 1910, 37 Stat. 1658, T.S. No. 576, reprinted at 6 *Benedict on Admiralty*, Doc. No. 4–1 (7th rev. ed. 1999).

The United States is not a party to the Collisions Convention. Although it became a party to the Salvage Convention, this treaty has been replaced by the International Convention on Salvage, London, Apr. 28, 1989, reprinted at 6 *Benedict on Admiralty*, Doc. No. 4–2A (7th rev. ed. 1999).

⁸²(1903) Acts No. 96, superseded by (1908) Acts. No. 178 and by (1940) Acts. No. 31. New Zealand achieved dominion (as opposed to colony) status in 1907.

⁸³Sea Carriage of Goods Act, 3 Commonwealth Acts 37 (1904), superseded by Sea Carriage of Goods Act, Acts of 1924 No. 22. The Commonwealth of Australia was created from six colonies in 1901.

⁸⁴9 & 10 Edw. 7, ch. 61 (1910), R.S. Canada, ch. 207 (1927), superseded by Water Carriage of Goods Act, 2 Edw. 8, ch. 49 (1936). Canada became a confederation in 1867 when four colonies were joined by the British North America Act.

⁸⁵COGSA History, *supra* note 6, at 18–25.

⁸⁶*Id.* See also Knauth, *supra* note 66, at 124–27. Imperial restraints on the actions of dominion parliaments were entirely removed by the 1931 Statute of Westminster, 22 Geo. 5, ch. 4.

⁸⁷See COGSA History, *supra* note 6, at 25–26.

International Chamber of Commerce (ICC), whose Bill of Lading Committee, under Charles S. Haight of New York City,⁸⁸ supported the ILA draft.⁸⁹ With all the positive endorsements of groups where shipowners were prominent, if not predominant, it might be expected that cargo owners' reactions would be uniformly negative, but this was not the case, and there was no unified opposition of cargo interests to the 1921 ILA Hague rules, nor to the minor revisions by the CMI in 1922 and 1923.⁹⁰

The Chairman of the CMI study group (sous-commission) was an American judge, Charles M. Hough of the Second Circuit, who was also President of the Maritime Law Association of the United States (MLA). No major changes were made at the formal Diplomatic Conference at Brussels in August 1924 that was called to transform the voluntary rules of 1921 into the mandatory provisions of the 1924 treaty.⁹¹ Aside from the Belgian delegation made up of the officers of the CMI, most delegations consisted of embassy personnel stationed in Brussels. Obviously, no debates or amendments were envisaged.

D. The Hague Rules Treaty (1924)

The heart of the treaty is Article 4, the catalog of defenses, a triumph of English legal drafting as it incorporates most exculpatory clauses, but the despair of lawyers trained in continental civil law systems. Unlike the situation of last-minute compromise and hasty drafting in the 1893 Harter Act,⁹² the Hague Rules had been carefully considered and approved by the best minds of that post-war era. The flaw, however, was the very catholicity of the Article 4 catalog, including every exculpatory clause then current in the maritime industry. In other words, many of the exculpatory clauses that American shippers considered to have been nullified by the Harter Act reemerged as part of the new treaty. In light of the changes in technology,

⁸⁸Charles S. Haight (1870–1938) earned his A.B. from Yale University (1892) and his LL.B. from Harvard University (1895). He was from New Lebanon, New York, where he founded the New Lebanon School for Boys. He began practicing admiralty law in 1896 and was the senior partner of Haight, Griffin, Deming & Gardner. He had a longstanding relationship with Scandinavian shipowners and their insurers and was a founder of the American Scandinavian Foundation. His work on behalf of the shipping interests of Denmark, Norway, and Sweden in the First World War was honored by decorations from those nations. He was a member of the Executive Committee of the Maritime Law Association of the United States in 1929–30. He was also a Director of the American Bureau of Shipping, the Maritime Association of the Port of New York, and the Seaman's Church Institute. For his essential contributions to COGSA, see *infra* notes 160–80 and accompanying text.

⁸⁹Knauth, *supra* note 66, at 125–28; COGSA History, *supra* note 6, at 25–26.

⁹⁰*Id.*

⁹¹See R. Colinvaux, *The Carriage of Goods by Sea Act, 1924, 1–9* (1954). See also Knauth, *supra* note 66, and COGSA History, *supra* note 6.

⁹²See Birthday, *supra* note 73, at 9–13.

economics, and politics since 1921, even its most ardent supporters no longer consider the Hague Rules to be a model of careful drafting.

The treaty is essentially a two-article document: Article 3 on Carrier Duties and Article 4 on Carrier Rights and Immunities. Nevertheless, the carrier responsibilities of Article 3 are subject to the defenses of Article 4.⁹³ It should be inserted here that Congress deliberately deleted that provision of Article 3 subjecting carrier responsibilities to the Article 4 defenses;⁹⁴ accordingly, case law under the United States version of the treaty can seldom be made to conform to decisions in those nations that adopted the treaty without any reservations or understandings.

The Hague Rules of 1924, together with its protocols of 1968⁹⁵ and 1979,⁹⁶ are often referred to as carrier liability treaties, but in truth they are carrier non-liability treaties. Article 3 contains such disparate subjects as the carrier's duty to use due diligence to make the vessel seaworthy,⁹⁷ issuance of bills of lading,⁹⁸ the evidentiary consequences of the bill of lading,⁹⁹ shipper guarantees,¹⁰⁰ cargo's obligation to give notice of loss,¹⁰¹ shipped bills of lading,¹⁰² and prohibition of carrier exculpatory clauses lessening liability under the treaty, specifically listing benefit of insurance clauses.¹⁰³

Article 4 also contains a number of differing subjects, such as the burden of proof on unseaworthiness,¹⁰⁴ shipper liability for fault,¹⁰⁵ the catalog of 17 defenses,¹⁰⁶ a new provision dealing with the consequences of unreason-

⁹³Hague Rules, *supra* note 3, at art. 3(2) ("Subject to the provisions of Article 4 the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."). See *Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine Ltd.*, [1959] A.C. 589 (P.C.).

⁹⁴46 U.S.C. app. § 1303(2).

⁹⁵The 1968 Visby Amendments to the 1924 Hague Rules are contained in the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, Feb. 23, 1968, reprinted at 6 *Benedict on Admiralty*, Doc. No. 1-2 (7th rev. ed. 1999).

⁹⁶The 1979 SDR amendment to the gold value is contained in the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, Dec. 21, 1979, reprinted at 6 *Benedict on Admiralty*, Doc. No. 1-2A (7th rev. ed. 1999). The 1968 and 1979 protocols were prepared in both French and English official texts.

⁹⁷Art. 3, § 1.

⁹⁸*Id.* § 3.

⁹⁹*Id.* § 4.

¹⁰⁰*Id.* § 5.

¹⁰¹*Id.* § 6. COGSA provides additionally that failure to give notice does not effect the time bar. See 46 U.S.C. app. § 1303(6).

¹⁰²Art. 3, § 7.

¹⁰³*Id.* § 8.

¹⁰⁴Art. 4, § 1.

¹⁰⁵*Id.* § 3.

¹⁰⁶*Id.* § 2(a)-(q). COGSA alters the strike provision and the q clause. See 46 U.S.C. §§ 1304(2)(j) and (q).

able deviation,¹⁰⁷ the package or unit limitation of liability (£100 sterling in gold),¹⁰⁸ and the treatment of dangerous cargo.¹⁰⁹

Crucial substantive provisions are not found in these substantive articles but are disguised in the definitions of Article 1: the nature of the carrier (owner or charterer),¹¹⁰ necessity for a physical document,¹¹¹ exclusions of deck cargo and live animals,¹¹² and the voyage limit of carrier responsibility (the tackle to tackle rule), despite the fact that the goods are in the actual "charge" or custody of the carrier.¹¹³ Civil law trained lawyers decry these non-definitions and blame Anglo-Saxon habits of over-inclusive drafting. The treaty does not incorporate all leading decisions allocating risks of cargo damage (especially those of the United States Supreme Court), but does accommodate almost all carrier views, especially bill of lading clauses exculpating carrier liability.

The unsystematic and even haphazard drafting of the Hague Rules came just after the once vibrant industry had suffered wartime destruction from submarines; at the same time, there was reckless over-expansion in ship building. By 1924, the industry was suffering from depression, labor troubles, and reckless competition, and therefore desperately needed protection.¹¹⁴

These troubles of the maritime industry contrast with the situation of the international air transport industry, which did not even exist at the time its basic treaty, the Warsaw Convention of 1929,¹¹⁵ was prepared. Because it was drafted out of theory rather than harsh business competition, the Warsaw Convention contains an orderly progression of ideas that has served as the model for a number of other treaties dealing with international transport.¹¹⁶

¹⁰⁷Art. 4, § 4. COGSA provides that deviation to load or unload cargo or passengers is unreasonable. See 46 U.S.C. app. § 1304(4).

¹⁰⁸Art. 4, § 5. COGSA revises the entire provision and inserts new language on packagable goods and customary freight units. See 46 U.S.C. app. § 1304(5).

¹⁰⁹Art. 4, § 6.

¹¹⁰Art. 1(a).

¹¹¹Id. (b). See also art. 5 excluding charter parties generally.

¹¹²Art. 1(c).

¹¹³Id. (e). Cf. Harter Act, 46 U.S.C. app. §§ 190-191.

¹¹⁴G. Mangone, *Marine Policy for America* 81-87 (1977); S. Lawrence, *United States Merchant Shipping Policies and Politics* (1966).

¹¹⁵See *supra* note 5.

¹¹⁶See, e.g., *International Convention on the Contract for the International Carriage of Goods by Road (CMR)* Geneva, May 19, 1956, 399 U.N.T.S. 190 (U.S. not a party); *United Nations Convention on the Carriage of Goods by Sea, Hamburg*, Mar. 31, 1978, UN Doc. A/CONF. 89/14 (1978), entered into force Nov. 1, 1992, reprinted at 6 *Benedict on Admiralty*, Doc. No. 1-3 (7th rev. ed. 1999) (U.S. a signatory); *United Nations Convention on International Multimodal Transport of Goods*, Geneva, May 24, 1980, U.N. Doc. TD/MT/CONF.17 (1980), reprinted at *Benedict on Admiralty*, Doc. No. 1-4 (convention not yet in force); *United Nations Convention on the Liability of Operators of Transport Terminals in*

V

THE LEGISLATIVE PROCESS ON COGSA

A. Organizational and Historical Background of the 74th Congress (1935–1937)

The 74th Congress was elected on November 6, 1934, while the United States was still struggling to recover from the Great Depression that had overlaid the nation since the great panic of October 29, 1929.¹¹⁷ On November 8, 1932, Franklin D. Roosevelt had been elected president and his party again controlled Congress. In the election of 1934, Democratic strength in the Senate increased from 60 to 69 seats, with 26 Republicans and one Farmer-Labor Party member. In the House of Representatives, the increase was from 310 to 319 Democrats; 108 Republicans and five Farmer-Labor Party candidates also were elected.¹¹⁸ The Congress that assembled on January 3, 1935, was the first since the ratification of the Twentieth Amendment,¹¹⁹ which had ended the unsatisfactory practice of the past whereby a lapse of 13 months intervened between election day and the first meeting of the newly-elected Congress.

In his State of the Union message on January 4, 1935, President Roosevelt spoke optimistically to the new congress about his program of social reform: social security for the aged, unemployment insurance for workers, public employment for the chronically unemployed, and slum clearance.¹²⁰ The

International Trade (OTT), Vienna, Apr. 19, 1991, U.N. Doc. A/CONF. 152/13, reprinted at 6 Benedict on Admiralty, Doc. No. 1–7 (7th rev. ed. 1999) (convention not yet in force). Equally authentic texts of the Carriage of Goods, Multimodal Transport, and OTT Conventions were prepared in Arabic, Chinese, English, French, Russian, and Spanish.

¹¹⁷See J. Galbraith, *The Great Crash of 1929*, 93–132 (3d ed. 1972). See also F. Allen, *Only Yesterday: An Informal History of the Nineteen-Twenties* 320 (1931). On “Black Tuesday,” October 29, 1929, the stock market recorded 16,410,030 sales, three times the number then considered to be a record.

¹¹⁸See Election of 1932, in 2 *History of American Presidential Elections 1789–1968* (A. Schlesinger, Jr. & F. Israel eds. 1971).

¹¹⁹The Twentieth Amendment (nicknamed the “Lame Duck Amendment”) remedied the situation whereby those defeated in even-year elections continued to serve until the next congress assembled in December of the odd years. The amendment by Senator George W. Norris (R-Neb.) was proposed to the states on March 2, 1932, and declared ratified on February 6, 1933. See further Nagle, *A Twentieth Amendment Parable*, 72 *N.Y.U. L. Rev.* 470 (1997).

¹²⁰4 *The Public Papers and Addresses of Franklin D. Roosevelt* 15 (S. Rosenman ed. 1938).

None of the background biographies of FDR deal specifically with maritime policy. The background of general economic collapse is discussed in the following works: J. Burns, *Roosevelt: The Lion and The Fox* (1956); R. Dallek, *Franklin D. Roosevelt and American Foreign Policy, 1932–1945* (1979); K. Davis, *FDR (1971–93)*; F. Freidel, *Franklin D. Roosevelt: A Rendezvous with Destiny* (1990); W. Leuchtenberg, *Franklin D. Roosevelt and The New Deal, 1932–1940* (1963); R. Moley, *The First New Deal* (1966); T. Morgan, *FDR: A Biography* (1985); S. Rosenman, *Working with Roosevelt* (1952); A. Schlesinger, Jr., *The Age of Roosevelt (1957–60)*; R. Tugwell, *The Democratic Roosevelt: A Biography of Franklin D. Roosevelt* (1957).

legislative product of the 74th Congress on social issues was to be truly remarkable.¹²¹

The reform of maritime law on carrier liability was *not* part of the president's program. Moreover, the issues in COGSA both then and now have *never* been part of the political struggle between the parties. Nonetheless, in the realm of transportation, the 74th Congress passed COGSA,¹²² the "Sirovich" amendment to the 1851 Limitation of Liability Act (brought about by the loss of life in the fire on board the passenger liner *Morro Castle*¹²³), and the Merchant Marine Act of 1936, which established the United States Maritime Commission.¹²⁴ The final action on COGSA was

¹²¹Reform legislation of the 74th Congress included, in 1935: Emergency Relief Appropriations Act, ch. 48, 49 Stat. 115 (to fund the Works Progress Administration, Public Works Administration, and Civilian Conservation Corps); Rural Electrification Act, ch. 432, 49 Stat. 1363; National Labor Relations Act, ch. 372, 49 Stat. 449; Motor Carriers' Act, ch. 498, 49 Stat. 543; Social Security Act, ch. 531, 49 Stat. 620; Banking Act, ch. 614, 49 Stat. 684; Public Utility Company Act, ch. 687, 49 Stat. 803; Farm Mortgage Moratorium Act, ch. 792, 49 Stat. 967; Bituminous Coal Stabilization Act, ch. 824, 49 Stat. 991.

The 1936 social agenda included: Bonus Payment Act (World War I), ch. 32, 49 Stat. 1099; Soil Conservation and Domestic Allotment Act, ch. 104, 49 Stat. 1151; Robinson-Patman Anti-Price Discrimination Act, ch. 592, 49 Stat. 1526; Walsh-Healy Government Contracts Act, ch. 881, 49 Stat. 2036.

¹²²See *supra* note 4.

¹²³The *S.S. Morro Castle*, a Ward Line passenger vessel on service from Havana to New York, caught fire and burned at sea in hurricane winds off the coast of New Jersey on September 8, 1934. At least 137 lives were lost from the fire or drowning, but 413 were rescued. Efforts to tow the flaming ship were unsuccessful and she grounded off Asbury Park, New Jersey. Arson was suspected but could not be proved.

The master had died just before the fire broke out and poison was suspected because of violent labor troubles, but again this was not proved. Criminal prosecutions of the acting master, chief engineer, and the corporate owner resulted in convictions, fines, and imprisonment on charges of negligence, misconduct, and inattention to duty. See *United States v. Abbott*, 1936 AMC 321 (S.D.N.Y. 1936). The officers' convictions were later reversed. See *United States v. Abbott*, 1937 AMC 533 (2d Cir. 1937).

The shipowner sought limitation of liability, see *New York & Cuba Mail S.S. Co. v. Continental Ins. Co.*, 32 F. Supp. 251, 1940 AMC 366 (S.D.N.Y. 1940), *rev'd*, 117 F.2d 404, 1941 AMC 243 (2d Cir.), *cert. denied*, 313 U.S. 580, 1941 AMC 1010 (1941), but the cases were settled after payments greatly exceeding the limitation amount were made. See further G. Thomas, *Shipwreck: The Strange Fate of the Morro Castle* (1972); T. Gallagher, *Fire at Sea—The Story of the Morro Castle* (1959); U.S. Gov't, Senate Comm. on Commerce, *Morro Castle and Mohawk Investigations* (1937).

The Sirovich Amendment to the 1851 Limitation of Liability Act, Pub. L. No. 662, ch. 521, 49 Stat. 1479, was codified in 46 U.S.C. app. §§ 183–189. It provided a minimum limitation fund of \$60 per ton for personal injury and death claims, nullified exculpatory clauses in passenger contracts, and imposed a six month limit on the shipowner's right to a concursus of claims. In 1984 the figure of \$60 per ton was increased to \$420 per ton. See Pub. L. No. 98–498, § 213, 98 Stat. 2296, 2306.

¹²⁴Act of June 26, 1936, Pub. L. No. 74–835, ch. 858, 49 Stat. 1985, now codified as amended in scattered sections of 46 U.S.C. app. See M. Beschloss, *Kennedy and Roosevelt: The Uneasy Alliance* (1980); J. Bunker, *Liberty Ships: Ugly Ducklings of World War II* (1972); E. Land, *Winning the War with Ships* (1952); F. Lane, *Ships for Victory: A History of Shipbuilding Under the U.S. Maritime Commission in World War II* (1951).

taken during the week of April 17, 1936,¹²⁵ the Sirovich Amendment on June 5, 1936,¹²⁶ and the Merchant Marine Act on June 26, 1936.¹²⁷

Nineteen thirty-six was also a presidential election year. The president's State of the Union message was given before Congress and, contrary to custom, at night, in order to reach a nationwide radio audience. In it, the president stressed the need for a strong defense because of threats of renewed conflict as Hitler rearmed, Mussolini conquered Ethiopia, and Japan invaded China. A newly invigorated merchant marine would become a critical component of America's defense.

From 1913–21, Franklin D. Roosevelt had served as Assistant Secretary of the Navy in the administration of President Woodrow Wilson. In that post he became very much aware of the peril to United States foreign trade before America's entry into the First World War, when the decline of the United States flag merchant fleet and the resulting reliance on British flag carriers had put America's foreign trade at the mercy of German submarine warfare and the requirements of the British war effort.¹²⁸ Roosevelt's wartime experience was shared by many in his administration as well as members of Congress, thus the merchant marine as an element of national defense would seem natural to them.

A worldwide depression in ocean shipping followed the First World War so that the industry was engaged in cut-throat competition, destructive of proper maintenance, and leading to confrontational labor relations from 1922–36. President Roosevelt strongly supported the 1936 Merchant Marine Act and soon moved his top troubleshooter, Joseph P. Kennedy, from the Securities and Exchange Commission to the new Maritime Administration created by the 1936 Act. However, Kennedy lusted for the appointment as Ambassador to the United Kingdom, the most prestigious ambassadorship at the time, but rumors of its expected availability did not materialize; thus, Kennedy reluctantly accepted the new maritime assignment in February 1937. A year later, however, he resigned to become United States Ambassador to the Court of St. James's.¹²⁹

The Roosevelt Administration proposed a new policy to provide direct

¹²⁵See 1 Leg. Hist., supra note 6, at 600; 80 Cong. Rec. 5026 (1936) (House) and 80 Cong. Rec. 5070 (1936) (Senate).

¹²⁶See supra note 123.

¹²⁷See generally *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 573–76, 1980 AMC 15 (1980). See also Hutchins, supra note 27; Lawrence, supra note 114; Albion & Pope, supra note 32, especially chs. I–V on U.S. maritime policy from 1914–59.

¹²⁸See Safford, *The American Merchant Marine as an Expression of Foreign Policy: Woodrow Wilson and the Genesis of Modern Maritime Diplomacy*, in *The Atlantic World of Robert B. Albion* 144–68 (B. Labaree ed. 1975).

¹²⁹Beschloss, supra note 124.

subsidization of a vast new American fleet of modern cargo vessels¹³⁰ rather than the indirect subsidies favored by European and Japanese owners.¹³¹ Another reason for the new policy was the collapse of the earlier policy of subsidization through contracts to carry the United States mails; Senator (later U.S. Supreme Court Justice) Black's investigation revealed vast corruption and scandalous waste and inefficiency, thus making renewal of the subsidy system politically impossible in the depression atmosphere.¹³²

There were three essential elements to the new policy:

1. The United States must have an adequate fleet to carry all of its domestic waterborne commerce and an adequate fleet to carry a substantial portion of its foreign trade on essential trade routes.
2. The United States flag merchant fleet must serve as a naval auxiliary in war or times of national emergency.
3. These fleets (domestic and foreign) must be composed of the best-equipped, safest, and most suitable vessels, constructed in the United States and owned and operated under the United States flag.¹³³

To accommodate these goals, there would be a vessel construction subsidy (CDS) whereby the government would provide up to 55% of the cost of construction of new ships in United States shipyards.¹³⁴ A second subsidy, the Operating Differential Subsidy (ODS), would pay the difference between the cost of operations (chiefly labor) under the United States flag and the cost of foreign flag operations on essential foreign trade routes.¹³⁵ At the same time, the United States used its substantial influence in the

¹³⁰While the 1936 plan called for 500 ships in 10 years, the impact of the Second World War was to create 5,777 ships in five years. See Lane, *supra* note 124; Lawrence, *supra* note 114; P. Zeis, *American Shipping Policy* (1938); Morse, *Study of American Merchant Marine Legislation*, 25 *L. & Contemp. Prob.* 57 (1960).

¹³¹See U.S. Dep't of Commerce, *Mar Ad Report, Maritime Subsidies* (1971); Mangone, *supra* note 114.

¹³²See *Hearings Before Special Senate Committee to Investigate Air Mail and Ocean Mail Contracts*, 73d Cong., 2d Sess (1933) (The Black Committee Report).

¹³³See *supra* notes 124 and 130.

¹³⁴The 1981 federal budget eliminated all funding for the CDS and proclaimed a moratorium on ODS contracts. As a result, the few American shipyards still left now concentrate on Defense Department contracts and the coastwise or cabotage fleet, which is protected from foreign flag competition.

¹³⁵See Whitehurst, *The Merchant Marine Act of 1936: An Operational Subsidy in Retrospect*, 8 *J.L. & Econ.* 223 (1965). The "essential foreign trade routes" requirement was removed in 1971 and the subsidy was made available to tramp shipping (in addition to liner shipping) in 1970. See G. Jantscher, *Bread Upon the Waters: Federal Aids to the Maritime Industries* (1975); Lawrence, *supra* note 114; Blackwell, *Implementation of the Merchant Marine Act of 1970*, 5 *J. Mar. L. & Com.* 167 (1974); Diebold, *Shipping in the Immediate Postwar Years*, 53 *J. Pol. Econ.* 15 (1945).

ODS has been replaced by the Maritime Security Act of 1996, Pub. L. No. 104-239, 110 Stat. 3118, whereby militarily useful ships can receive an operating subsidy for 10 years. Forty-seven ships owned by 17 companies received this subsidy in 1999. See Pouch, *The U.S. Merchant Marine and Maritime Industry, in Review*, 125 *U.S. Naval Inst. Proc.* 104-11 (May 1999).

International Labour Organization (ILO) to improve the working conditions, health, safety, wages, and hours of seamen throughout the world.¹³⁶

Thus, the 1936 Congress provided for the carriage of American foreign trade in new United States vessels under a regime of carrier liability that, because of agreement between shippers and carriers, had the appearance of fairness both to carriers and their insurers and also to cargo owners and their insurers. Congress, however, did not forbid or restrict the use of third country carriers for American foreign trade, as it might have done. Arguably, Congress could not have foreseen that United States flag vessels would eventually be carrying less than 3% of our foreign trade.¹³⁷ In 1999, much of the unrepealed Merchant Marine Act of 1936 is a dead letter.¹³⁸

The presidential election of 1936 tested the actions of the First New Deal, and the outcome was favorable.¹³⁹ It was also the year when fringe group fanatics were noticed, although they did not affect the outcome,¹⁴⁰ and it was the year when the infant science of political forecasting was undone by reliance on the telephone,¹⁴¹ which was not yet the ordinary means of communication because of its relatively high cost.

¹³⁶The ILO was created in 1919 by the peace treaties that also created the League of Nations, as an autonomous organization within the League system. See D. Morse, *The Origin and Evolution of the ILO and its Role in the World Community* (1969). The United States became a member in 1934. The organization continued at its Geneva headquarters following creation of the United Nations, becoming a specialized agency under art. 57 of the U.N. Charter.

Although five important maritime conventions were completed before the United States became a member of the ILO, American participation was vitally important in securing the 1936 Convention on the Liability of Shipowners in Case of Sickness, Injury or Death of Seamen, 54 Stat. 1693, T.S. No 951, 40 U.N.T.S. 169. Other projects pushed through with the help of the United States included Accommodation of Crews (1946), Annual Holidays with Pay (1936), Convention on Sickness Insurance for Seamen (1936), Food and Catering (Ships' Crews) (1946), and Hours of Work on Shipboard (1936).

¹³⁷U.S. Dep't of Commerce, *Mar Ad, Merchant Fleets of the World* (1970). See also Mangone, *supra* note 114, and Pouch, *supra* note 135.

¹³⁸The Maritime Subsidies Programs have been repealed despite statutory language requiring the United States to have an adequate fleet to carry all of its domestic waterborne commerce and an adequate fleet to carry a substantial portion of its foreign trade.

¹³⁹See Schlesinger & Israel, *supra* note 118, at "Election of 1936." The Second New Deal, 1937-45, is analyzed in A. Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (1995).

¹⁴⁰See A. Brinkley, *Voices of Protest: Huey Long, Father Coughlin, and the Great Depression* (1982).

¹⁴¹Editors of the *Literary Digest* were persuaded by their direct-mail ballots and telephone polls that the Republican candidate, Governor Alfred M. Landon of Kansas, would triumph in the 1936 presidential election. They predicted he would capture 32 states with 370 electoral votes. President Roosevelt, however, gained 60.8% of the popular vote and 523 of the 531 electors—every state except Maine and Vermont. See Schlesinger & Israel, *supra* note 118, at "Election of 1936."

The apparent electoral triumph of 1936 would be dissipated in 1937 because of the failure of the "court-packing" plan. See L. Baker, *Back to Back: The Duel Between FDR and the Supreme Court* 109-36 (1967), and J. Patterson, *Congressional Conservatism and The New Deal: The Growth of the Conservative Coalition in Congress, 1933-39*, 211-49 (1967). In 1938, the Democrats lost 70 seats in the House and seven in the Senate.

B. Committee Consideration and Background of S. 1152

The Senate Committee on Commerce in the 74th Congress was made up of 14 Democrats and 6 Republicans, chaired by Royal S. Copeland of New York.¹⁴² The majority group was *not* made up of leaders of the Senate. Members included Champ Clark of Missouri¹⁴³ and Theodore Bilbo of Mississippi.¹⁴⁴ The minority group, however, was distinguished: Wallace H. White of Maine, who introduced the COGSA bill;¹⁴⁵ Charles McNary of Oregon;¹⁴⁶ Hiram Johnson of California,¹⁴⁷ who had been a majority

¹⁴²Royal S. Copeland (1868–1938) received his M.D. from the University of Michigan (1889), where he was later appointed a professor of ophthalmology (1895–1908). After serving as the Republican mayor of Ann Arbor, he became Dean of the Flower Hospital Medical College in New York (1908–18) and then, as a Democrat, the President of the New York City Board of Health (1918–23). He served as a United States senator (D-N.Y.) from 1923 until his death in 1938, having been twice re-elected. His initial nomination was due to the support of the publisher William Randolph Hearst, who had sought the nomination for himself but was unacceptable to Governor Alfred E. Smith. As Chairman of the Senate Committee on Commerce, Copeland led investigations into the conditions of seamen and the shipping industry. He opposed much of the New Deal, especially the 1937 Supreme Court Packing Plan. His last campaign was on behalf of Tammany Hall, where he ran unsuccessfully against Mayor Fiorello H. La Guardia's re-election. He was responsible for much legislation dealing with pure food and drugs.

¹⁴³Bennett "Champ" Clark (1890–1954) was the son of the legendary Champ Clark (1850–1921), who had been a member of Congress from Missouri for 26 years and served as Speaker of the House from 1911–19. Senator Clark served as Missouri's senator from 1933–45.

¹⁴⁴Theodore G. Bilbo (1877–1947), a white supremacist from Mississippi, served two terms as Governor (1916 and 1928). In the Senate, where he sat from 1934–47, he was tolerated because he was a vigorous opponent of Senator (and former governor) Huey (The Kingfish) Long of neighboring Louisiana.

¹⁴⁵Wallace H. White (1877–1952) received his A.B. from Bowdoin College in 1899, studied law at Columbian University in Washington, D.C., was an assistant clerk to the U.S. Senate Committee on Commerce, and was admitted to the bar in D.C. in 1902 and in Maine in 1903. He was first elected to Congress in 1917 and was re-elected six times; he was elected to the U.S. Senate in 1930 and re-elected in 1936 and 1942. He was chair of the House Merchant Marine and Fisheries Committee from 1927–31 and was the U.S. Delegate to the 1929 London Conference on Safety of Life at Sea. He also represented the United States at international conferences dealing with telecommunications, radio, and telegraphy.

¹⁴⁶Charles McNary (1874–1944) attended Stanford University from 1896–98 and was admitted to the Oregon Bar in 1899. He was first elected to the Senate in 1917, having been a justice of the Oregon Supreme Court. He was re-elected four times, serving in the Senate for 27 years (1917–44), and was the Minority Leader of the Senate from 1933–44. He sat out the 1936 election, but in 1940 was Wendell Wilkie's vice presidential candidate. He made his reputation with farm relief legislation, but in 1924 filed a bill (S. 3177, 68th Cong., 1st Sess.) that was responsive to the complaints of shippers in the 1923 Hague Rules House hearings (see *infra* note 165). This legislation would also have answered complaints about some of the significant omissions in the 1893 Harter Act (such as a time bar). No action was taken on McNary's bill after its referral to the Commerce Committee.

¹⁴⁷Hiram W. Johnson (1866–1945) attended the University of California from 1884–86, was admitted to the California bar in 1888, became a reforming prosecutor in San Francisco, and was elected Governor of California in 1911. He was Theodore Roosevelt's vice presidential choice in the Progressive (or Bull Moose) Party in 1912. He was re-elected as a progressive governor in 1915, but soon "retired" to the U.S. Senate, where he became increasingly conservative, serving 28 years (1917–43). Although frequently mentioned as a possible Supreme Court justice, especially after he sat out the 1936 election as a Roosevelt Republican, he was never nominated for a seat.

committee member at the 1927 hearings;¹⁴⁸ and Arthur Vandenberg of Michigan.¹⁴⁹

The House Committee on Merchant Marine and Fisheries was made up of 15 Democrats and five Republicans, chaired by Schuyler Otis Bland of Virginia,¹⁵⁰ who had followed the earlier hearings as a minority member in 1923, 1925, and 1930. Notable majority members were William Sirovich of New York¹⁵¹ and Monrad Wallgren of Washington.¹⁵² The congressmen¹⁵³ who had stalled the Hague Rules in 1930 by a numbing, populist cross-examination of the treaty proponents were missing in 1936.

Two independent processes were at work in the 74th Congress: treaty approval and statutory enactment. The Senate proceeded to consider the international treaty on which COGSA is based,¹⁵⁴ eventually giving its advice and consent to the treaty,¹⁵⁵ although subject to a reservation.¹⁵⁶ Only

¹⁴⁸See *infra* note 167.

¹⁴⁹Arthur Vandenberg (1884–1951), a newspaperman from Grand Rapids, Michigan, became a Republican State Committeeman and was appointed to the Senate in 1928. Elected and re-elected three times, he advanced rapidly in the party. Previously an isolationist, in the Second World War he championed a unified and bipartisan (or non-partisan) foreign policy. He was a delegate to the 1945 founding conference of the United Nations and when the Republicans took the Senate in 1946, he became Chairman of the Foreign Relations Committee, supporting the United Nations Charter, the Marshall Plan, and the North Atlantic Treaty.

¹⁵⁰Schuyler Otis Bland (1872–1950) briefly attended the College of William and Mary and was admitted to the Virginia bar in 1900. He practiced in Newport News until elected to Congress in 1918. He was re-elected 14 times, serving until 1949.

¹⁵¹William I. Sirovich (1882–1939) received his A.B. from the City College of New York in 1902 and earned an M.D. from Columbia University in 1906. He served as the Superintendent of the Peoples' Hospital from 1911–29, was nominated for Congress in 1924 but was defeated, and was then elected in 1926 and re-elected six times. He was responsible for the 1936 Amendment to the Limitation of Liability Act, see *supra* note 123. He was a strong supporter of the New Deal, a playwright, and a reformer. Nine years before the Social Security Act, he introduced a bill for federal grants in aid to those states adopting old age insurance plans; it never emerged from committee.

¹⁵²Monrad C. Wallgren (1891–1961), an optometrist and army officer in the First World War, entered politics as a radical congressman in 1932 from the Washington State Commonwealth Federation (similar to Upton Sinclair's "End Poverty in California"). Re-elected to Congress three times, he was elected to the Senate in 1940 and served on the Truman Committee investigating wartime defense contracts. He left the Senate to run successfully for Governor in 1944 but was defeated for re-election in 1948. President Truman then appointed him to the Federal Power Commission, where he served as Chairman until his retirement in 1951.

¹⁵³See *infra* note 169 and accompanying text.

¹⁵⁴See *supra* note 3.

¹⁵⁵See 1 Leg. Hist., *supra* note 6, at 582–86; Senate Foreign Relations Committee, 3 Leg. Hist., *supra* note 6, at 508–21, Ex. Rep. No. 2, 74th Cong., 1st Sess. (1935).

¹⁵⁶3 Leg. Hist., *supra* note 6, at 586; S. Rep. No. 742, 74th Cong. 1st Sess. (1935), 1 Leg. Hist., *supra* note 6, at 531–35.

The reservation reads as follows:

[N]otwithstanding the provisions of Article 4, Section 5, and the first paragraph of Article 9 of the convention, neither the carrier nor the ship shall in any event be or become liable within the jurisdiction of the United States of America for any loss or damage to or in connection with goods in an amount exceeding \$500.00, lawful money of the United States of America, per package or

when the Senate had completed its work on the international agreement was the domestic bill referred to the House of Representatives for legislative action.¹⁵⁷

The remarkable feature of this legislation in both houses of Congress is the minimal amount of debate and its passage without recorded votes. In that sense it resembles the passage of the Harter Act in 1893.¹⁵⁸ These examples prove the proposition that agreement within the maritime industry is essential before Congress will act. Congressional intent in COGSA, if any, would have to emerge from the Committees of the Senate and House, but even there the legislation would not bear the imprint of any single powerful individual; nor are there traces of presidential pressure on Congress.

The Hague Rules treaty had been sent to the Senate by President Calvin Coolidge for advice and consent nine years before on February 26, 1927.¹⁵⁹ Hearings were held on the submitted treaty in a desultory fashion in 1927 and 1930, but the Hague Rules treaty (and domestic legislation) were not given serious consideration in Congress, despite the best efforts of America's foremost admiralty lawyers to hasten the process.¹⁶⁰ The final form of the domestic legislation reflected textual compromises achieved in 1930–31 between those representing ship owners (and their insurers) and those representing cargo owners (and their insurers).¹⁶¹ The specialists worked out an agreement they could all live with, and Congress later accepted and endorsed their efforts in its own time.¹⁶²

Senator White introduced the bill that would become COGSA (S. 1152, 74th Cong., 1st sess.) on January 17, 1935. The compromises of 1930–31

unit unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. . . .

51 Stat. 260.

¹⁵⁷3 Leg. Hist., supra note 6, at 594–743; H.R. Rep. No. 2218, 74th Cong., 2d Sess. (1936), 1 Leg. Hist., supra note 6, at 521–29.

¹⁵⁸See *Birthday*, supra note 73, at 10–13.

¹⁵⁹1 Leg. Hist., supra note 6, at 561; see Exec. E, 69th Cong., 2d Sess. (1927), and Transmittal Letter from President Coolidge.

¹⁶⁰See S. 1295, 70th Cong., 1st Sess. (Dec. 9, 1927) (introduced by Senator William E. Borah (R-Idaho)), and International Convention for the Unification of Certain Rules in Regard to Bills of Lading for the Carriage of Goods by Sea: Hearings on Executive E Before a Subcommittee of the Senate Committee on Foreign Relations, 70th Cong., 1st Sess. (1927), 3 Leg. Hist., supra note 6, at 323–64.

Senator White introduced domestic legislation on the Hague Rules to accompany S. 1295 in the 70th Cong. (H.R. 12208, 70th Cong., 1st Sess. (Mar. 19, 1928)). Thereafter, he reintroduced the bill (with various alterations) in the 71st (H.R. 3830), 72d (S. 482), and 73d (S. 2598) Congresses.

Hearings were held only in 1930. See *Relating to the Carriage of Goods by Sea: Hearings on H.R. 3830 Before the House Committee on Merchant Marine & Fisheries*, 71st Cong., 1st Sess. (1930), 3 Leg. Hist., supra note 6, at 365–498.

¹⁶¹See Report of the Chamber of Commerce of the United States, Conference on Uniform Ocean Bills of Lading—Hague Rules (Nov. 14, 1930).

¹⁶²See COGSA History, supra note 6.

held firm because previous opponents had been coopted into proponents. The 1935 hearings in the Senate (May 10, 1935) before the Committee on Commerce, and the 1936 hearings in the House (January 28, 1936) before the Committee on Merchant Marine and Fisheries, were anticlimactic. The fierce opposition of shippers in the American Meat Packers Institute (AMPI) and the National Industrial Traffic League (NITL) that had been expressed in the House in 1923, 1925, and 1930, and in the Senate in 1927, had dissipated because of the 1930–31 changes in the treaty language negotiated under the auspices of the Chamber of Commerce of the United States (CoCUS) with the assistance of the government in the form of the United States Shipping Board of the Department of Commerce; the result was, in effect, a package deal. Mr. Haight,¹⁶³ representing the ICC as Chairman of its Bill of Lading Committee, was a key player who could express the views of shipowners and their insurers in the negotiated compromise. Norman Draper¹⁶⁴ of the AMPI could likewise express the views of shippers and their insurers.

Following sharp but inconclusive confrontations in 1923,¹⁶⁵ 1925,¹⁶⁶ and 1927,¹⁶⁷ the organized interest groups reached a compromise in 1931 that neither group would have accepted willingly except for the fact that stalemate would continue. Certainly the cargo interests would have preferred to tighten the Harter Act's restraints on shipowner's defenses and exculpatory clauses. Just as certainly the shipowner interests would have preferred

¹⁶³See *supra* note 88.

¹⁶⁴Norman Draper (1893–1963) was not a lawyer but a public relations and advertising consultant. He began his career as a reporter for the New York Sun and was then an editor for the New York Journal and a foreign correspondent for the Associated Press in London and Paris; he was also a war correspondent with the American Forces in France (1917–19) and at the subsequent Peace Conference at Paris in 1919. He returned to the United States in 1919 and became the Washington, D.C. representative of the AMPI (now the American Meat Institute of Arlington, Virginia) and the unofficial spokesman for American shippers. The AMPI made its opposition to the Hague Rules clear in a 1922 pamphlet entitled "The Hague Rules, 1921 versus The Harter Act." Draper served in Washington until 1940, when he transferred to Chicago to serve as the AMPI's public relations director (where he remained until 1957). The AMPI was founded in Chicago in 1906 in response to the first federal meat Inspection Act of 1906, Act of June 30, 1906, ch. 3913, 59th Cong., 1st Sess., 34 Stat. 674, now codified at 21 U.S.C. §§ 601–695, which was enacted following public outrage at the revelations contained in Upton Sinclair's "The Jungle."

¹⁶⁵Hearings Relating to the Carriage of Goods by Sea: Hearings Before the House Committee on Merchant Marine and Fisheries, 67th Cong., 4th Sess. (1923), held on Feb. 13–14, 1923, 3 Leg. Hist., *supra* note 6, at 3–122.

¹⁶⁶Hearings Relating to the Carriage of Goods by Sea: Hearings Before the House Committee on Merchant Marine and Fisheries, 68th Cong., 2d Sess. (1925), held on Jan. 28–29, 1925, 3 Leg. Hist., *supra* note 6, at 123–321.

¹⁶⁷Hearing Before a Subcommittee of the Committee on Foreign Relations, United States, Senate, Relative to Executive E, A Treaty Entitled International Convention for Unification of Certain Rules in Regard to Bills of Lading for Carriage of Goods by Sea, 70th Cong., 1st Sess. (1927), held on Dec. 22, 1927, 3 Leg. Hist., *supra* note 6, at 323–64.

continuation of exculpatory clauses under a freedom of contract rationale; if that could not be attained, they preferred no changes in the text of a treaty they regarded as already full of compromises.

While agreement in principle had been reached in 1930, the formal changes in text would not be drafted until 1931. The lengthy 1930 hearings¹⁶⁸ had been extremely frustrating for the commercial lawyers, who had thought that in the absence of organized opposition the process might be shortened. They had not counted on congressional grandstanding. Two minority members of the House Committee¹⁶⁹ vigorously and exhaustively cross-examined the proponents of the compromise, finally demanding that the legislation not proceed without a quorum of the committee and the presence of witnesses from all industries affected by the legislation.¹⁷⁰ Such hearings were never held in the 71st Congress; nor were hearings on Hague Rules legislation ever held in the crisis atmosphere of the depression-afflicted 72nd and 73rd Congresses.

The 1935 Senate hearings,¹⁷¹ attended by the Chair (Senator Copeland) and one minority member (Senator Ernest W. Gibson, R-Vt.), began with favorable commendations by the Department of State and the Department of Commerce. Favorable testimony from seven non-governmental witnesses was also heard;¹⁷² the sole note of discord came from D. Roger Englar,¹⁷³ the General Counsel of the American Institute of Marine Underwriters (AIMU), who sought to amend the bill by a provision outlawing the "both to blame" collision clause.¹⁷⁴ His proposal was not accepted then and would be reintroduced, unsuccessfully, in the next year.

The 1936 House hearings¹⁷⁵ heard favorable testimony from twelve

¹⁶⁸Hearings Relating to the Carriage of Goods by Sea: Hearings on H.R. 3830 Before the House Committee on Merchant Marine and Fisheries, 71st Cong., 2d Sess. (1930), held on Mar. 3-5 and 10, 1930, 3 Leg. Hist., *supra* note 6, at 365-498.

¹⁶⁹Ewin L. Davis (D-Tenn.) was defeated for renomination in 1932 after seven terms in Congress. He was then appointed to the Federal Trade Commission, where he served until his death in 1949. Charles L. Abernethy (D-N.C.) was defeated for renomination in 1934 after eight terms in Congress. He then resumed the private practice of law until 1938, when he retired. He died in 1955.

¹⁷⁰See 3 Leg. Hist., *supra* note 6, at 451.

¹⁷¹Hearing on the Carriage of Goods by Sea: Hearing on S. 1152 Before the Senate Committee on Commerce, 74th Cong., 1st Sess. (1935), held on May 10, 1935, 3 Leg. Hist., *supra* note 6, at 499-593.

¹⁷²Charles S. Haight (ICC); A.B. Barber (CoCUS); Luther M. Walter (NITL); Thomas B. Paton (American Bankers' Association); Cletus Keating (American Steamship Owners' Association); James Sinclair (Trans-Atlantic Associated Freight Conference); Arnold W. Knauth (MLA).

¹⁷³D. Roger Englar (1884-1948) received his A.B. from Western Maryland College in 1903 and his LL.B. from Harvard University in 1906. He practiced admiralty law with the New York City firm of Bigham, Englar, Jones & Houston for more than 40 years. Unlike Mr. Haight, he usually represented cargo owners and insurers.

¹⁷⁴See *infra* notes 207-13 and accompanying text.

¹⁷⁵Hearings on Uniform Ocean Bills of Lading: Hearings on S. 1152 Before the House Committee on Merchant Marine and Fisheries, 74th Cong., 2d Sess. (1936), held on Jan. 28, 1936, 3 Leg. Hist., *supra*

witnesses. Again counsel for the AIMU sought to amend the bill to outlaw the both to blame clause.¹⁷⁶ However, there was agreement that this clause was outside the basic 1930 compromise and could be put aside.¹⁷⁷ In fact, the clause would never be outlawed by legislation; in 1952, the Supreme Court finally rendered the clause unenforceable in its *Esso Belgium* decision as a violation of public policy.¹⁷⁸

The Senate Committees on Commerce and Foreign Relations reported favorably on the Hague Rules treaty in March 1935,¹⁷⁹ some six months *after* the Senate's advice and consent to the international convention on air carrier liability.¹⁸⁰ While the Senate gave its first formal advice and consent to the Hague Rules on April 1, 1935, subject to a reservation translating the unit limitation from £100 to \$500,¹⁸¹ no action was taken to proclaim ratification of the treaty until more than two years later, following a second formal advice and consent that subjected the treaty text to the previously approved reservation and an "understanding."¹⁸² While Senate understand-

note 6, at 595-743. In addition to Messrs. Barber, Paton, Haight, and Knauth from the Senate Hearings, the House heard from Norman Draper (AMPI), N.D. Belnap (NITL), Francis T. Cole (American Manufacturers' Export Assoc.), Ira A. Campbell (American Steamship Owners' Association), R.C. Fullbright (American Cotton Shippers' Association), Henry R. Sutphen (Merchants' Association of New York), H. Ayres (Chamber of Commerce of the State of New York), and C.H. Callahan (Maritime Association of the Port of New York).

¹⁷⁶See supra notes 173-74 and accompanying text.

¹⁷⁷The AIMU did not oppose passage of the bill if its amendment to exclude the clause was unsuccessful.

¹⁷⁸See infra notes 204-37 and accompanying text.

¹⁷⁹1 Leg. Hist., supra note 6, at 582-86; Senate Foreign Relations Committee Report, 3 Leg. Hist., supra note 6, at 508-21, Ex. Rep. No. 2, 74th Cong., 1st Sess. (1935).

¹⁸⁰Advice and consent of the Senate to the French text was obtained without debate or recorded vote on June 15, 1934. See 78 Cong. Rec. 11,587 (1934). Ratification was proclaimed by the President to be effective October 29, 1934. See 49 Stat. 3013.

¹⁸¹See supra note 156.

¹⁸²3 Leg. Hist., supra note 6, at 594-743; H.R. Rep. No. 2218, 74th Cong., 2d Sess. (1936), 1 Leg. Hist., supra note 6, at 521-29.

The understanding simply stated, "that should any conflict arise between the provisions of the convention and the provisions of the act of April 16, 1936, known as the Carriage of Goods by Sea Act, the provisions of said act shall prevail." 51 Stat. 260. This statement is consistent with art. VI of the Constitution whereby, as between a treaty or a statute, the later in time has priority. See *Edye v. Robertson*, 112 U.S. 580 (1884) (later statute accorded priority over an earlier treaty). Cf. *Cook v. United States (The Mazel Tov)*, 288 U.S. 102 (1933) (later treaty accorded priority over an earlier statute). Thus, the COGSA statute of April 16, 1936 would have priority domestically over the Hague Rules treaty of April 1, 1935.

ings are not the same as formal reservations in international law,¹⁸³ the effect in United States courts is essentially the same.¹⁸⁴

C. Enactment and Presidential Approval

By August 1, 1935, the Senate had finished the domestic maritime legislation and sent it to the House of Representatives.¹⁸⁵ Senate Report No. 742 is essential to understanding the differences between the Hague Rules and COGSA. The lower house, however, had different priorities, and it was not until January 1936 that it held hearings on the bill, subject to a number of “clarifications” that gave the United States a law on ocean carriage of goods that would be significantly different from that in force in the other nations signatory to the Hague Rules.¹⁸⁶

¹⁸³See generally McRae, *The Legal Effect of Interpretative Declarations*, 49 *Brit. Y.B. Int'l L.* 155 (1978), and Gamble, *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 *Am. J. Int'l L.* 372 (1980). See also K. Holloway, *Modern Trends in Treaty Law: Constitutional Law, Reservations, and the Three Modes of Legislation* (1967), and Glennon, *The Senate Role in Treaty Ratification*, 77 *Am. J. Int'l L.* 257 (1983).

¹⁸⁴See *Power Auth. of the State of N.Y. v. Federal Power Comm'n*, 247 F.2d 538 (D.C. Cir.), vacated as moot, 355 U.S. 64 (1957). In its advice and consent to the 1950 Saint Lawrence Seaway Treaty with Canada, the Senate included a reservation that the power resources of the Niagara River could only be developed by special act of Congress. In 1920, however, both houses of Congress had assigned the development of power generation in the rivers to the Federal Power Commission (FPC). Canada ignored the U.S. reservation as it did not affect the international obligation, but New York State challenged plans of the FPC to develop the power generation of the river. The Court found the alleged “reservation” to be ineffective as it related solely to domestic concerns and could not alter the earlier legislation by both houses. (This was decided 26 years before *I.N.S. v. Chadha*, 462 U.S. 919 (1983), the one house legislation prohibition). There are 16 other reservations to the 1924 treaty: Australia (1955), Cuba (1977), Denmark (1938), Egypt (1943), France (1937), Ireland (1962), Ivory Coast (1961), Japan (1957), Kuwait (1969), Nauru (1955), Netherlands (1956), Norway (1938), Papua-New Guinea (1955), Switzerland (1954), Tanzania (1962), and the United Kingdom (1930).

¹⁸⁵Hearing on Uniform Ocean Bills of Lading: Hearings on S. 1152 Before the House Committee on Merchant Marine and Fisheries, 74th Cong., 2d Sess. (1936), held on Jan. 28, 1936, 3 *Leg. Hist.*, supra note 6, at 595–743.

¹⁸⁶The depth and magnitude of United States variations from the treaty language can be understood only by a textual analysis of both statute and treaty.

Some of the differences are major:

- 1) Section 1303(2) of COGSA omits “Subject to the provisions of Article 4.”
- 2) Section 1303(4) adds “*Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part [of the Pomerene Act on Bills of Lading].”
- 3) Section 1303(6) adds “*Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.”
- 4) Section 1304(4) “*Deviations*” adds “*Provided, however*, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.”
- 5) Section 1304(5) COGSA deletes “per package or unit” and replaces it with “per package lawful money of the United States, or in case of goods not shipped in packages, per customary

The "clarified" text was approved by the House of Representatives on April 6, 1936.¹⁸⁷ With the concurrence of both House and Senate Committees on a unified text, formal reconciliation by a Conference Committee was not necessary and President Franklin D. Roosevelt approved COGSA on April 16, 1936, to be effective July 15, 1936.¹⁸⁸ Thus, a new regime of carrier liability by treaty and statute began to be applied to United States foreign trade. As of 1999, COGSA has not been amended in any respect, although a bill has been introduced in the Senate to make significant changes to it.¹⁸⁹

After presidential approval of the domestic statute and proclamation of treaty ratification, the United States Department of State gave two "interpretations" of the textual changes in the treaty language. On June 5, 1937, there was a Department Memorandum which first listed the changes and then said:

The foregoing differences from the Convention, made in the Carriage of Goods by Sea Act, are intended primarily (1) to clarify provisions in the Convention which may be of uncertain meaning thereby avoiding expensive litigation in the United States for purposes of interpretation and (2) to

freight unit." Furthermore, "100 pounds sterling" is deleted and replaced with "\$500" and "the transportation of" is added between "in connection with . . . goods" in two places: in the first and fourth paragraphs. Lastly, the following sentence is added: "In no event shall the carrier be liable for more than the amount of damage actually sustained."

6) Section 1312 replaces art. 10 of the Hague Rules on the application of the treaty to bills of lading issued in contracting states. Section 1312 applies the statute to "all contracts for carriage of goods by sea to or from ports of the United States in foreign trade."

7) Section 1309 adds a provision prohibiting discrimination between competing shippers.

8) Section 1309 also adds a provision for suspension of the statute in retaliation for discriminatory application of the treaty by foreign nations.

Other differences are minor:

1) Section 1308 substitutes the 1851 United States Limitation of Liability Act and the 1916 Shipping Act.

2) Art. 9 of the Hague Rules is entirely deleted (gold value of sterling and rates of exchange).

3) Section 1311 preserves the Harter Act for the periods "before" and "after" COGSA carriage in international trade and preserves the Harter Act in domestic trade subject to the "coastwise option" for application of COGSA.

4) Arts. 11-16, the Final Clauses of the Hague Rules, are entirely deleted.

One difference is inscrutable:

Section 1304(2)(j) "Strikes" adds "*Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts."

¹⁸⁷80 Cong. Rec. 5220 (Senate) and 5319 (House) (Apr. 9, 1936).

¹⁸⁸See *supra* note 4.

¹⁸⁹As of May 1, 1999, the bill, "To revise the Carriage of Goods by Sea Act, and for other purposes" has been redrafted by Counsel to the Senate (Staff Working Draft, Apr. 16, 1999), and awaits introduction by Senator Kay Bailey Hutchison (R-Tex.). See Tetley, *The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law*, 30 J. Mar. L. & Com. 595 (1999).

coordinate the Carriage of Goods by Sea Act with other legislation of the United States.¹⁹⁰

As a prognosticator, the State Department failed totally. COGSA has always provided full-time employment for maritime lawyers and the case law now fills 330 pages of the U.S. Code Annotated.

The second effort prepared by the Department of State involved diplomatic correspondence in an official note to the Italian Ambassador which said:

The ratification of the Convention by the United States with its accompanying Carriage of Goods by Sea Act is an important step towards international uniformity, with reference to the carriage of goods by sea. It is believed that neither the understandings to which that ratification was made subject nor the provision of either the Carriage of Goods by Sea Act or the Pomerene Bills of Lading Act are out of harmony with the provisions of the Convention.¹⁹¹

VI

INTERPRETATIONS OF COGSA BY THE SUPREME COURT

Given the continuous economic warfare¹⁹² between the ship owning interests¹⁹³ and the cargo owning interests¹⁹⁴ that has produced and continues to produce a great volume of litigation, it is surprising that so few cases have actually been decided by the Supreme Court, despite the efforts of the bar to seek a writ of certiorari¹⁹⁵ whenever courts of appeal diverge on the interpretation of COGSA.

The enactment of COGSA in 1936 did not clean the slate of Supreme Court cases decided under the general maritime law¹⁹⁶ or the 1893 Harter Act.¹⁹⁷ The pre-Harter Act cases would take on the luster of "public policy,"

¹⁹⁰See Knauth, *supra* note 66, at 84–85.

¹⁹¹*Id.* at 88.

¹⁹²This may be too strong an expression to describe litigation, congressional skirmishes, and diplomatic arguments, but as an observer and commentator on the scene for 40 years, the author feels it fairly describes his observations.

¹⁹³The shipowner, the time charterer(s), the voyage charterer(s), and the P & I club.

¹⁹⁴The shipper, the consignee, the cargo insurer, and sometimes the charterer.

¹⁹⁵Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 *Tex. L. Rev.* 1251 (1989). See generally Sturley, *Filing and Responding to a Petition of Certiorari*, 24 *J. Mar. L. & Com.* 595 (1993) [hereinafter cited as *Petition*].

¹⁹⁶*New Jersey Steam Nav. Co. v. Merchant's Bank of Boston (The Lexington)*, 47 U.S. (6 How.) 344 (1848); *Clark v. Barnwell*, 53 U.S. (12 How.) 272 (1851); *Propeller Niagara v. Cordes*, 62 U.S. (21 How.) 7 (1858); *Bulkley v. Naumkeag Steam Cotton Co.*, 65 U.S. (24 How.) 386 (1860); *The Alabama*, 92 U.S. (2 Otto) 695 (1875); *The Atlas*, 93 U.S. (3 Otto) 302 (1876); *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889).

¹⁹⁷See generally Birthday, *supra* note 73. Supreme Court cases interpreting the Harter Act from 1893–1934 are discussed *id.* at 14–25.

while the Harter Act cases retained their vitality even after the passage of COGSA. Not only did COGSA specifically preserve the Harter Act,¹⁹⁸ but the interpretation of the Harter Act as a remedial statute¹⁹⁹ has been extended to COGSA.²⁰⁰ Thus, Harter Act cases continue to be cited in COGSA disputes for the interpretive technique therein.²⁰¹

The small number of Supreme Court cases directly interpreting COGSA does not make the task of the investigator easy; there are just too many unanswered questions. Nevertheless, trends in Supreme Court interpretation of other statutes (especially among justices with perceived agendas) may be helpful in framing arguments in future disputed interpretations.²⁰²

The three cases in which the Supreme Court has interpreted the meaning of COGSA involve exculpatory clauses, that is, bill of lading practices of the shipping industry that brought about the need for government intervention in

Supreme Court cases interpreting the Harter Act after the enactment of COGSA are: *Great Lakes Transit Corp. v. Interstate S.S. Co.*, 301 U.S. 646, 1937 AMC 697 (1937) (insured bill of lading results in waiver of Harter Act benefits by shipowner); *Smith v. The Ferncliff*, 306 U.S. 444, 1939 AMC 403 (1939) (upholding the validity of a clause that adjusted damages on the basis of the value declared by the shipper or net invoice cost plus disbursements, whichever was less); *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 1941 AMC 1697 (1941) (essentially dealing with limitation of liability where a barge sank after its tanks were overfilled); *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 1959 AMC 1631 (1959) (a case dealing with tugboat liability and exculpation in tariffs filed with the Federal Maritime Commission).

¹⁹⁸46 U.S.C. app. § 1311 provides:

Nothing in this chapter shall be construed as superseding any part of §§ 190–196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

Likewise, the fourth sentence of 46 U.S.C. app. § 1312 states:

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. . . .

¹⁹⁹See supra notes 76–78.

²⁰⁰See *United States v. Atlantic Mut. Ins. Co. (The Esso Belgium)*, 343 U.S. 236, 1952 AMC 659 (1952).

²⁰¹See, e.g., *The Bill*, 47 F. Supp. 969, 1942 AMC 1607 (D. Md. 1942), *aff'd*, 145 F.2d 470, 1944 AMC 883 (4th Cir. 1944), and *Wirth Ltd. v. S/S Acadia Forest*, 537 F.2d 1272, 1976 AMC 2178 (5th Cir. 1976).

²⁰²Controversial reinterpretations of traditional and consistent case law analyzing federal legislation can be seen in such cases as: *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 1985 AMC 1700 (1985); *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 1987 AMC 2113 (1987); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 1991 AMC 1 (1990); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 1991 AMC 1697 (1991); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 1994 AMC 2855 (1994); *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 1995 AMC 1167 (1995); *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 1995 AMC 1872 (1995); *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 1997 AMC 1817 (1997).

the first place in 1893: adhesion “agreements” or printed exculpatory clauses that cannot be bargained away by the shipper.²⁰³ It was the both to blame clause in 1952, the Himalaya clause in 1959, and the foreign arbitration clause in 1995. The proper question in all three cases is whether the unbargained clause *relieves* carrier liability from the effect of negligence or *lessens* carrier liability under COGSA, actions condemned by Congress in 1893 and 1936.

*A. United States v. Atlantic Mutual Insurance Co. (The Esso Belgium)*²⁰⁴

In this case the Supreme Court held that the both to blame collision clause, found in all bills of lading in North Atlantic trades, could not be enforced against shippers by carriers.²⁰⁵ While the shippers might have argued that the invalid clause lessened carrier liability, the Supreme Court’s opinion did not discuss the consequences of invalidity in COGSA terminology, but rather was based on public policy against the clause²⁰⁶ commencing in pre-Harter act cases.

The problem in the *Esso Belgium* case can be traced to 1875, when the Supreme Court applied the common law rule of *joint and several* liability of tortfeasors to both to blame collisions so that the non-carrying colliding vessel was liable to the cargo on the carrier vessel for 100% of its loss.²⁰⁷ Carriers later argued that joint and several liability in collision had been abrogated by the Harter Act, but the Supreme Court rejected this argument

²⁰³For prominent recognition of the differences between bargained contracts and adhesion agreements, see Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 *Colum. L. Rev.* 629 (1943). The Supreme Court treated pre-printed exculpatory clauses as a special type of contract and disapproved the same in *New York Central R.R. Co. v. Lockwood*, 84 U.S. (17 Wall.) 357 (1873) (railroad bill of lading), and *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889) (ocean bill of lading).

²⁰⁴343 U.S. 236, 1952 AMC 659 (1952).

²⁰⁵*Id.* at 242.

²⁰⁶*Id.*

The language about *relieving* and *lessening* carrier liability originated in the Harter Act, 46 U.S.C. app. §§ 190 and 191, concerning the carrier’s liability for “negligence, fault or failure” and the carrier’s obligation to use due diligence to make the vessel seaworthy.

The prominent position of the phrase in the Harter Act is somewhat obscured in COGSA, having been placed at the end of the lengthy § 1303 on shipowner duties to cargo, but the positioning of the words does not in itself indicate inferior status. Thus, this central provision of the Hague Rules, unaltered in COGSA, states:

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

Hague Rules, art. 3(8); 46 U.S.C. app. § 1303(8).

²⁰⁷*The Alabama*, 92 U.S. (2 Otto) 695 (1875), and *The Atlas*, 93 U.S. (3 Otto) 302 (1876). Only the latter case is cited by the majority in *The Esso Belgium*.

in *The Chattahoochee*,²⁰⁸ and American law continues to adhere to joint and several liability of colliding vessels to innocent cargo in both to blame situations. This rule was changed for signatory parties to the Brussels Collisions Convention of 1910,²⁰⁹ which provides for the *several* liability of the carrier and non-carrier vessel in collisions involving property damage, as opposed to personal injuries, so that the cargo owner can recover from these vessels only the percentage of fault determined in the collision action, with the further exculpation of the carrier vessel to her own cargo.

United States delegations opposed several liability to cargo during the CMI discussions and at the diplomatic conference, but without success.²¹⁰ Accordingly, the convention's rule would be bitterly opposed by American shippers and cargo insurers. In 1936–37 there was hope in ship owning circles that with the advent of COGSA, on which there was substantial agreement within the entire shipping industry, a new attempt would be made to resurrect the 1910 Collisions Convention.²¹¹ This effort eventually failed

²⁰⁸173 U.S. 540 (1899). See also *Aktieselskabet Cuzco v. The Sucarseco*, 294 U.S. 394, 1935 AMC 412 (1935).

²⁰⁹See *supra* note 81, at art. 4. The French original reads as follows:

Les dommages causés soit aux navires, soit à leurs cargaisons, soit aux effets ou autre biens des équipages, des passagers ou d' autres personnes se trouvant à bord sont supportés par les navires en faute, dans ladite proportion, sans solidarité à l' égard des tiers.

The U.K. Maritime Conventions Act 1911, 1 & 2 Geo. 5, ch. 57, § 1(1), which ratified the 1910 convention, states:

Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.

²¹⁰Sweeney, *Proportional Fault in Both to Blame Collisions*, [1964] *Il Diritto Marittimo* 549, 569–71 (Sp. Ed., Studi in Onore di Giorgio Berlingieri) [hereinafter cited as *Proportional Fault*].

²¹¹The Brussels Diplomatic Conference of 1910 prepared two conventions: *Collisions and Salvage*. See *supra* note 81. In 1912, President William Howard Taft submitted only the *Salvage Convention* to the Senate for advice and consent and subsequently proclaimed its ratification. See 37 Stat. 1658; T.S. No. 576.

The *Collisions Convention* was not submitted to the Senate for advice and consent until April 1937, at which time President Roosevelt forwarded it during the Senate's reconsideration of the Hague Rules (see *supra* notes 180–82); hearings, however, were not held until June 1939 (see 1939 AMC 1051–69). The treaty was favorably reported by the Foreign Relations Committee because the rule of indirect liability of a carrier to its own cargo (*The Chattahoochee*, *supra* note 208) had been apparently repudiated by COGSA's reaffirming of the defenses of negligent navigation and management in the Harter Act; for reasons of international uniformity and equity, the Committee recommended advice and consent. Nevertheless, the treaty received "contested treaty" calendar treatment (undoubtedly because of the activity of cargo interests that demanded domestic legislation by both houses); as a result, the Senate never gave advice and consent. See Exec. K, 75th Cong., 1st Sess., reprinted at 6 *Benedict on Admiralty* 4 (6th ed. 1940). See also MLA Doc. No. 161 at 1714–43. See generally Comment, *The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Conventions to Achieve International Agreement on Collision Liability, Liens, and Mortgages*, 64 *Yale L.J.* 878 (1955). President Harry S. Truman withdrew the *Collisions Convention* from the Senate in 1947 as "obsolete." See 16 *State Dep't Bull.* 726 (1947).

Thereafter, the MLA recommended approval in 1961 as part of a package with the 1957 Limitation

because of shipper opposition to the abolition of joint and several liability; therefore the North Atlantic Freight Conference adopted the both to blame clause in 1937 in an attempt to eliminate the carrier's indirect liability to its own cargo because of joint and several liability.²¹²

An unusual circumstance in *The Esso Belgium* case was the unexpected advocacy in favor of the clause by the United States government; cargo insurers opposed the clause as a violation of public policy. Another unusual circumstance was the fact that the colliding shipowners had agreed on a proportional division of the damages:²¹³ two-thirds fault to the *Esso Belgium*, one-third fault to the *Nathaniel Bacon*, despite the extant rule of *The Schooner Catherine*²¹⁴ calling for equal division of damages in both to blame collisions.

The United States government owned the *Nathaniel Bacon* and appeared as bailee of the cargo thereon. The Atlantic Mutual Insurance Company was subrogated to the same cargo claims and intervened in the collision action between the *Esso Belgium* and *Nathaniel Bacon*. By operation of joint and several liability, *Nathaniel Bacon* cargo would have collected 100% of its damages from the *Esso Belgium*, whose claim for collision damage would include both the physical damage to the *Esso Belgium* and payments made to third parties. Thus, *Esso Belgium* would collect one-third of its collision damage claim (instead of one-half), because of the stipulation).

At this point the United States government attempted to enforce the clause against its own cargo, claiming two-thirds of the amount paid to *Nathaniel Bacon* cargo by the *Esso Belgium*.²¹⁵ In the district court, Judge Medina enforced the clause on behalf of the United States.²¹⁶ The Second Circuit, however, reversed in an opinion by Judge Clark, and the United States sought further review.²¹⁷ The Supreme Court affirmed the Second Circuit

of Shipowners' Liability Convention. See MLA Doc. No. 450 at 4742-62. This was an unfortunate linkage because the personal injury bar was violently opposed to limitation of liability. Legislation was introduced in 1961 (see S. 2313, S. 2314, H.R. 7911, and H.R. 7912, 87th Cong., 1st Sess.), but no action was taken thereon.

²¹²343 U.S. at 241. Recall the efforts of cargo insurers to outlaw the both to blame clause as part of COGSA, *supra* notes 173-74 and 176-78 and accompanying text.

²¹³343 U.S. at 237.

²¹⁴58 U.S. (17 How.) 170 (1855).

²¹⁵343 U.S. at 239.

²¹⁶90 F. Supp. 836, 1950 AMC 719 (S.D.N.Y. 1950).

²¹⁷191 F.2d 370, 1951 AMC 1435 (2d Cir. 1951), cert. granted, 342 U.S. 913 (1952).

The Second Circuit wrote:

The shipowners stress the consensual nature of the clause, arguing that a bill of lading is but a contract. But that is so at most in name only; the clause, as we are told, is now in practically all bills of lading issued by steamship companies doing business to and from the United States. Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all of its twenty-eight lengthy paragraphs, of which

7–2 in a loosely reasoned opinion by Justice Black.²¹⁸ Justices Frankfurter and Burton dissented.

The question framed by the majority was whether the Harter Act defense of negligent navigation for carriers, reenacted in COGSA, carved out a special statutory exception to the public policy against stipulations immunizing carriers from their own or their agents' negligence.²¹⁹ Although the cited cases traced the history of exculpatory clauses, the Court sought support for its negative conclusion in *The Kensington*,²²⁰ a passenger luggage case, used because the Court had found language that Congress had not changed the general rule of non-immunity for negligence, and thus by clear implication had approved it.²²¹ Justice Black also noted that the public policy of non-immunity had acquired the force and precision of legislation because it had been a continuous guide for more than a century.²²² Argument that the both to blame clause bore the same relation to the Harter Act and COGSA as the approved general average *Jason* clause bore to *The Irrawaddy* was held to be irrelevant because the *Jason* clause represented a

this clause is No. 9. *This lack of equality in bargaining power has long been recognized in our law; and stipulations for unreasonable exemption of the carrier have not been allowed to stand.* 191 F.2d at 374 (emphasis added).

²¹⁸Hugo L. Black (1886–1971), from rural Alabama, studied law at the University of Alabama, where he received his LL.B. in 1906, and practiced in Birmingham from 1907–27, during which time he joined the Ku Klux Klan, the Knights of Pythias, the Odd Fellows, and the Masons. He entered politics as part of his law practice, becoming Police Court Judge in 1911, County Solicitor in 1914, and, after outpolling four other candidates in an open primary, U.S. Senator in 1927. After ten years, he was part of the Democratic leadership of the Senate. He strongly supported FDR's New Deal, major portions of which were held unconstitutional by the Supreme Court in 1935–36, leading to FDR's plan to "pack" the Court with additional appointees for every justice over the age of 70 (see *supra* note 141). During the political fight on the plan, the Court upheld a state minimum wage law and Justice Van Devanter announced his retirement. The beneficiary of these changes was Senator Black; he was confirmed by a vote of 63–16 (the opposition was made up of 10 Republicans and six Democrats). Then, revelation of his KKK membership resulted in a demand for his impeachment before he could take his seat. His nationwide radio confession and apologia saved him.

Justice Black became one of the most controversial members of the Court; his violent disagreements with Justices Douglas, Frankfurter, and Jackson resembled ancient blood feuds and his opinions still produce academic controversies.

The loose reasoning of *Esso Belgium* may be compared to his dissent in *Adamson v. California*, 332 U.S. 46 (1947), on the incorporation of the Bill of Rights (specifically the Fifth Amendment's prohibition on self-incrimination) against the states through the Fourteenth Amendment; Justice Black's dissent found a total incorporation of the Bill of Rights in the Fourteenth Amendment despite contra-indications in the historical record. See further G. Dunne, *Hugo Black and the Judicial Revolution* (1977), and J. Frank, *Mr. Justice Black: The Man and His Opinions* (1948).

²¹⁹343 U.S. at 239–40.

²²⁰183 U.S. 263 (1902). The Harter Act was indirectly incorporated into the subject ticket by reference to the terms of the shipowner's bill of lading. The Court found the arbitrary limit of recovery of 250 francs (about \$50), without an accompanying right to increase the liability amount by an adequate and reasonable proportional payment, to be void as against public policy.

²²¹*Id.* at 268–69.

²²²343 U.S. at 239.

sharing in same ship general average, although the Harter Act would have prevented it, while the both to blame clause relieved the carrier of liability to the other ship in circumstances where the carrier was not relieved from responsibility.²²³

Justice Frankfurter's dissent began with his objection to the Court interfering in private business agreements and quickly passed to the nature of the judicial process²²⁴—that judges are thrown upon their own resources in ascertaining public policy where there has been no legislative guidance, but when the legislature has formulated public policy they must carry it out—applying declared defined policy, judges must disregard their personal views of the public good.²²⁵

Justice Frankfurter's view of the 1893 Harter Act compromise and its reenactment in COGSA was that carriers had been relieved of liability as insurers for faulty navigation, in exchange for which they were required to forego certain exculpatory clauses.²²⁶ He viewed the Harter Act as a rejection of a public policy against exculpating carriers from their own negligence because of the statutory defenses of negligent navigation and

²²³Id. at 241.

²²⁴Id. at 244–45.

Felix Frankfurter (1882–1965) was born in Vienna, Austria, emigrated to New York City at the age of 12, and later graduated from the City College of New York (A.B. 1902) and Harvard University (LL.B. 1906). He was an assistant U.S. Attorney (to Henry L. Stimson) and served with Stimson in politics, practice, and the Southern District of New York before being appointed to the faculty of Harvard Law School in 1913. He remained at Harvard for 26 years until, in 1939, he was selected to succeed Justice Benjamin N. Cardozo on the U.S. Supreme Court.

As an academic, he had advised President Wilson on labor law (1916–18) and President Roosevelt (before and after his appointment to the Court) on regulatory aspects of the New Deal and positions for his former students. His own mentors on the Court were undoubtedly Justices Holmes and Brandeis, whose liberal goals he tempered with judicial restraint, balancing of interests, and deference to the legislative will. After 13 years on the Court, Justice Frankfurter could no longer be called a radical or even a liberal, and his dissent in *Esso Belgium* is consistent with the developments in his thinking about the deference owed to private agreements and the will of the 1893 Congress. See generally L. Baker, Brandeis and Frankfurter: A Dual Biography (1984); B. Murphy, The Brandeis/Frankfurter Connection (1982); Felix Frankfurter Reminisces (H. Phillips ed. 1960).

In crafting his *Esso Belgium* dissent, it is possible that Justice Frankfurter was relying on the thoughts of Justice Cardozo as set forth in *The Nature of the Judicial Process* (1921), which were drawn from the latter's Storrs Lectures at Yale University. This provocative book introduced elements of sociological analysis into a basically positivist approach to legal sources, thereby stressing the purposes and functions of the law rather than its abstract formal character.

Justice Cardozo's death at the age of 68 cut short his six year service on the U.S. Supreme Court, which came after 18 years on the New York State Court of Appeals, six of which were spent as Chief Judge. Justice Cardozo wrote the majority opinion in *May v. Hamburg-Amerikanische Packetfahrt A.G. (The Isis)*, 290 U.S. 333, 1933 AMC 1565 (1933), expounding, in dictum, the doctrine of non-causal unseaworthiness under the Harter Act.

²²⁵343 U.S. at 245.

²²⁶Id.

management. Thus, the Court could not revive a public policy discarded by Congress.²²⁷

Justice Frankfurter's reading of *The Chattahoochee*²²⁸ was that the Harter Act itself did not eliminate the consequences of joint and several liability in collisions, but that the parties might choose to do so by contract,²²⁹ citing *The Jason*.²³⁰ His reasoning would find an echo in Justice Whittaker's dictum about the Himalaya clause in *Robert C. Herd & Co. v. Krawill Machinery Corp.*²³¹ Because of *The Jason*, contracting for immunity from an indirect liability closely resembled contracting for participation in general average.²³²

Justice Frankfurter's dissent properly takes the majority to task for its use of *The Kensington* as an authoritative expression of public policy because the Harter Act, by its terms, applied only to vessels carrying cargo and Congress had not provided that passengers' luggage should be treated the same as cargo.²³³ To summarize the dissent, the Harter Act defense of negligent navigation established congressional public policy that did not condemn the both to blame clause.²³⁴

Justice Frankfurter's view of the defense of negligent navigation as public policy replacing the traditional opposition to exculpatory clauses does seem misplaced in view of the drafting history of the Harter Act,²³⁵ where the negligent navigation defense emerged only as a quid pro quo for further American opposition to British exculpatory clauses. Furthermore, *The Chattahoochee* appears to be correct in law and policy, especially in view of continued United States opposition to several liability as against acceptance thereof by the CMI.²³⁶

Justice Frankfurter's well-reasoned dissent would have lost its force if Justice Black had confined himself to *The Chattahoochee* and suppressed

²²⁷Id.

²²⁸See supra note 208.

²²⁹343 U.S. at 246.

²³⁰225 U.S. 32 (1912).

²³¹See infra notes 238–61.

²³²The Jason Clause tracks the language of § 3 of the Harter Act, 46 U.S.C. app. § 192, for the purpose of the liability of shippers to make contribution in general average.

²³³183 U.S. at 268.

²³⁴343 U.S. at 249 (Frankfurter, J., dissenting) ("I would recognize that the Congressional pronouncement of public policy—when it exempted carriers from liability for faulty navigation—precludes our striking down the clause here in issue.")

²³⁵See Birthday, supra note 73, at 8–14.

²³⁶The CMI's adoption of several liability was based on *The Milan*, 167 Eng. Rep. 167 (Adm. 1861). This theoretical proportionality would greatly influence the 1910 Diplomatic Conference despite the notional innocence of cargo in the shipowners' faults. The MLA was not organized until 1899, thus United States views were not considered at important CMI meetings on collision damages in 1897 and 1898. See Proportional Fault, supra note 210, at 568–71.

reliance on *The Kensington*. However, the majority's policy choice accommodated economic reality: the United States was no longer a great ship owning nation. Thousands of its ships were tied up in moth ball fleets, never to sail again except to be scrapped. Yet the United States continued to be the most important trading nation in the world.²³⁷ If the United States chose to penalize its cargo owning interests for the benefit of foreign carriers and their insurers, that choice had to be made by Congress and not by the carriers' unbargained adhesion clauses.

Nowhere in the majority opinion, nor in the dissent, is the treaty origin of COGSA mentioned. The decision is entirely a question of statutory interpretation.

*B. Robert C. Herd & Co. v. Krawill Machinery Corp.*²³⁸

In this case a 19-ton industrial press was being loaded by an independent contractor, a stevedore, into the *S.S. Castillo Ampudia* at Baltimore for carriage to Valencia, Spain. The seller had sent the press, along with 61 other packages, on a railroad flatcar from Detroit to a Baltimore terminal alongside which the ship was tied up. The carrier's bill of lading had been given to the shipper's agent by the carrier's agent on the carrier's form. The stevedore's crew negligently dropped the press into Baltimore harbor, thereby causing substantial damage to its parts.²³⁹ The shipper sued the stevedore in tort, who answered by denying negligence and pleading limitation of liability to \$500 per package because of COGSA or alternatively a bill of lading clause.²⁴⁰

The trial court held the stevedore liable to the shipper for the full damages, \$47,992.04, rather than the \$500 package limit.²⁴¹ The Fourth Circuit affirmed unanimously.²⁴² Because of conflict with a Fifth Circuit decision, the Supreme Court granted certiorari.²⁴³ The Fifth Circuit's protection of stevedores without even a bill of lading clause in their favor would be decisively rejected by the Supreme Court.

Justice Whittaker, speaking for a unanimous Court, affirmed.²⁴⁴ In the

²³⁷Mangone, *supra* note 114.

²³⁸359 U.S. 297, 1958 AMC 879 (1957).

²³⁹*Id.* at 298.

²⁴⁰*Id.* at 298-99.

²⁴¹155 F. Supp. 296, 1957 AMC 2188 (D. Md. 1957).

²⁴²256 F.2d 946, 1958 AMC 1265 (4th Cir. 1958).

²⁴³358 U.S. 812 (1958). See also Petition, *supra* note 195, at 664-66 (hypothetical pool memorandum authored by Professor Sturley), and Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 Va. J. Int'l L. 729, 749-51 (1987) [hereinafter cited as *Influence*].

²⁴⁴359 U.S. at 301. Justice Whittaker referred to the origins of COGSA as follows:

Supreme Court the stevedore argued for limitation of liability to \$500 per package based on COGSA and the bill of lading. Respecting direct applicability of COGSA defenses to stevedores, the stevedore argued that stevedores must necessarily have been included in the Hague Rules and COGSA because they are necessarily included in the carriage of goods. Alternatively, the stevedore argued that stevedores act as agents of the carrier. Both assertions were rejected. Neither the Hague Rules nor COGSA make any reference to stevedores.²⁴⁵ Furthermore, the press was dropped into the water *before* loading into the ship had begun; thus, by its terms, COGSA would not apply, because COGSA applies *from* loading on to the vessel and limits its protection to the ship or the carrier—either the owner or charterer.²⁴⁶

Respecting the Fifth Circuit case that extended carrier protections to stevedores as agents, *A.M. Collins & Co. v. Panama R.R. Co.*,²⁴⁷ the Court expressly disapproved its immunization of agents for their own negligence in derogation of the common law, looking back to the 1824 authority of *Osborn v. Bank of the United States*,²⁴⁸ but also citing *Boston Metals Co. v.*

The legislative history of the Act shows that it was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924, 51 Stat. 233. The effort of those Rules was to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade. *Ibid.* Those Rules do not advert to stevedores or agents of a carrier. The debates and Committee Reports in the Senate and the House upon the bill that became the Carriage of Goods by Sea Act likewise do not mention stevedores or agents.

Id. (footnotes omitted).

Charles E. Whittaker (1901–73) came from a Kansas farm. He entered the law school at the University of Kansas City directly from high school (a common practice at the time), and was admitted to the Kansas bar in 1923. Thereafter, he practiced law in Kansas City until 1954, when he was appointed to the U.S. District Court; after two years, he was elevated to the Eighth Circuit; after little more than seven months, he was nominated to replace Justice Reed at the U.S. Supreme Court. He retired in 1962, after just five years on the Court.

²⁴⁵359 U.S. at 301 (“We can only conclude that if Congress had intended to make such an inroad on the rights of claimants (against negligent agents) it would have said so in unambiguous terms’ and ‘in the absence of a clear Congressional policy to that end, we cannot go so far.’”).

Stevedores are “independent contractors” in most instances, although they may be agents or employees of the principal in accordance with the factual relationship. While “employee” means the same thing in all languages and legal systems, the same cannot be said of “agent” or “independent contractor.” *Id.* at 299 and 301.

²⁴⁶46 U.S.C. app. § 1301(a). There is, however, authority to apply COGSA during the “*process of loading*” in cases dealing with damage to cargo in lighters alongside the ocean-going vessel. See *Hoegh Lines v. Green Truck Sales, Inc.*, 298 F.2d 240, 1962 AMC 431 (9th Cir.), cert. denied, 371 U.S. 817 (1962).

Knauth’s approach to the period of carrier responsibility was a factual determination whether the goods on the tackle or in the pipeline had crossed the vessel’s sides as extended vertically. See Knauth, *supra* note 66, at 144.

²⁴⁷197 F.2d 893, 1952 AMC 2054 (5th Cir.), cert. denied, 344 U.S. 875 (1952).

²⁴⁸22 U.S. (9 Wheat.) 738 (1824).

The Winding Gulf,²⁴⁹ one of a series of three 1955 cases²⁵⁰ dealing with public policy in the tug and tow industry.

Respecting the bill of lading, it must be noted that this is not a Himalaya clause case; that clause was missing in the bill of lading and the stevedore was forced to argue that stevedores were “necessarily” included in the bill of lading exculpatory clauses, either as agents of the carrier or as third-party beneficiaries of the contract of carriage, because of the language of a general clause limiting liability to \$500 per package, “unless the nature of such goods and a value higher than \$500 per package . . . shall have been declared in writing” and “unless payment of the extra freight charge incident thereto shall have been made or promised. . . .”²⁵¹ The stevedore argued that its interpretation was supported by the House of Lords,²⁵² but the Supreme Court found that English case not to have decided the point.²⁵³ Two Australian cases²⁵⁴ were also cited by the stevedore, but they had been later expressly disapproved by the higher court.²⁵⁵ Thus, there was no authority to apply this clause to stevedores unless there was an express exoneration by statute or contract (which did not exist here).

While this case rejected the extension of carrier defenses to stevedores by interpretation of COGSA, it would become the foundation of the extension of these same carrier defenses to stevedores through bill of lading clauses known as Himalaya clauses.²⁵⁶ (The carrier defenses usually sought by stevedores are the one year time bar and the \$500 per package limitation of liability.²⁵⁷) There was no specific approval of bill of lading clauses in dictum. However, there was also no suggestion of a condemnation of such clauses on public policy grounds. Justice Whittaker’s careful language left

²⁴⁹349 U.S. 122, 1955 AMC 927 (1955).

²⁵⁰The others being *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 1955 AMC 899 (1955), and *United States v. Nielson*, 349 U.S. 129, 1955 AMC 935 (1955).

²⁵¹359 U.S. at 299.

²⁵²*Elder Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522 (H.L.).

²⁵³359 U.S. at 307. See also T. Scrutton, *Charter Parties and Bills of Lading* 286–87 (W. McNair & A. Mocatta eds., 16th ed. 1955).

²⁵⁴*Gilbert, Stokes & Kerr Pty. Ltd. v. Dalgety & Co.*, (1948) 81 Lloyd’s List L. Rep. 337 (N.S.W. Sup. Ct.), and *Waters Trading Co. v. Dalgety & Co.*, [1951] 2 Lloyd’s List L. Rep. 385 (N.S.W. Sup. Ct.).

²⁵⁵*Wilson v. Darling Island Stevedoring & Lighterage Co.*, [1956] 1 Lloyd’s List L. Rep. 346 (Austl. High Ct.).

²⁵⁶In *Adler v. Dickinson*, [1954] 2 Lloyd’s List L. Rep. 267 (C.A.), a passenger on the ship *Himalaya* successfully sued the master and bosun in tort for personal injuries, rather than suing the contractual carrier whose passage ticket contained an exculpatory clause. Because the court failed to extend exculpatory provisions of the passage contract to the carrier’s servants or agents, exculpatory clauses, known as Himalaya clauses, came to be added to contracts such as ocean bills of lading. Himalaya clause exculpations were recognized under an agency theory in *Midland Silicones, Ltd. v. Scruttons, Ltd.*, [1962] A.C. 446 (H.L.).

²⁵⁷46 U.S.C. app. § 1303(6), fourth paragraph (one year time bar), and 46 U.S.C. app. § 1304(5) (\$500 per package unit limitation of liability).

open for future decision the application of COGSA defenses to stevedores by bill of lading clauses in derogation of state common law and the strict liability of bailees. Justice Whittaker wrote:

There is, thus, nothing in those provisions to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence. If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract. Since they did not do so, it follows that the provisions of the bill of lading did 'not cut off (respondent's) remedy against the agent that did the wrongful act.'²⁵⁸

In the context of COGSA itself, a Himalaya clause extending carrier protections to stevedores could not violate § 1303(8) because the clause does not lessen carrier liability under COGSA.

Since 1959, courts of appeal have had a variety of responses to the Himalaya clause. Initially, the clauses were given a very strict scrutiny that required very specific language extending the carrier defenses to a very clearly defined class of beneficiaries.²⁵⁹ Later, the essential element would be the bargaining by which the shipper surrendered its claim against the stevedore in order to benefit from lower rates to load and unload the vessel; the economic effect being a saving to consumers by elimination of dual or triple insurance on the same goods.²⁶⁰ Now the Himalaya clause has

²⁵⁸359 U.S. at 302.

²⁵⁹See, e.g., *Cabot Corp. v. S.S. Mormacscan*, 441 F.2d 476, 1971 AMC 1130 (2d Cir.), cert. denied, 404 U.S. 855 (1971); *Rupp v. International Terminal Operating Co.*, 479 F.2d 674, 1973 AMC 1093 (2d Cir. 1973); *De Laval Turbine, Inc. v. West India Indus., Inc.*, 502 F.2d 259, 1974 AMC 1156 (3d Cir. 1974); *Toyomenka, Inc. v. S.S. Tosaharu Maru*, 523 F.2d 518, 1975 AMC 1820 (2d Cir. 1975); *La Salle Mach. Tool, Inc. v. Maher Terminals, Inc.*, 611 F.2d 56, 1980 AMC 1187 (4th Cir. 1979); *Mikinberg v. Baltic S.S. Co.*, 988 F.2d 327, 1993 AMC 1661 (2d Cir. 1993), on remand, 1995 AMC 779 (E.D.N.Y. 1994), *aff'd mem.*, 60 F.3d 811, 1995 AMC 2408 (2d Cir. 1995). See generally Hooper, *Legal Relationships: Terminal Owners, Operators, and Users*, 64 Tul. L. Rev. 595 (1989); Palmer & DeGiulio, *Terminal Operations and Multimodal Carriage: History and Prognosis*, 64 Tul. L. Rev. 281 (1989); Zawitoski, *Federal, State, and International Regulation of Marine Terminal Operators in the United States*, 64 Tul. L. Rev. 439 (1989). See also Zawitoski, *Limitation of Liability for Stevedores and Terminal Operators Under the Carrier's Bill of Lading and COGSA*, 16 J. Mar. L. & Com. 337 (1985), and Note, *Carriage of Goods by Sea: Application of the Himalaya Clause to Subdelegates of the Carrier*, 2 Mar. Law. 91 (Oct. 1977).

²⁶⁰See, e.g., *Secrest Mach. Corp. v. S.S. Tiber*, 450 F.2d 285, 1972 AMC 815 (5th Cir. 1971); *Bernard Screen Printing Corp. v. Meyer Line*, 464 F.2d 934, 1972 AMC 1919 (2d Cir. 1972), cert. denied, 410 U.S. 910 (1973); *Brown & Root v. M/V Peisander*, 648 F.2d 415, 1982 AMC 929 (5th Cir. 1981); *Certain Underwriters at Lloyds' v. Barber Blue Sea Line*, 675 F.2d 266, 1982 AMC 2638 (11th Cir. 1982); *B. Elliot (Canada) Ltd. v. John T. Clark & Son of Maryland, Inc.*, 704 F.2d 1305, 1983 AMC 1742 (4th Cir. 1983); *Koppers Co. v. S/S Defiance*, 704 F.2d 1309, 1983 AMC 1748 (4th Cir. 1983); *Seguros Ilimitani S.A. v. M/V Popi P*, 929 F.2d 89, 1991 AMC 1529 (2d Cir. 1991); *Taisho Marine & Fire Ins. Co. v. Maersk Line, Inc.*, 796 F. Supp. 336, 1993 AMC 705 (N.D. Ill. 1992), *aff'd mem.*, 7 F.3d 238, 1994 AMC 608 (7th Cir. 1993).

achieved such general acceptance that broad exculpations of stevedores and others will be approved without reference to bargaining. Furthermore, the present favorable attitude of the United States Department of Transportation to such clauses should be noted: benefits available to carriers should also be available to stevedores and terminal operators.²⁶¹

The opinion mentioned the treaty origins of COGSA, but drew the same conclusion from the treaty that was drawn from the statute.

*C. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*²⁶²

In this case the Supreme Court ruled that a clause calling for foreign arbitration of a cargo damage dispute in a bill of lading does *not* lessen the carrier's liability under COGSA.²⁶³ The decision had been anticipated because of the Court's 1991 holding in *Carnival Cruise Lines, Inc. v. Shute*,²⁶⁴ and because of its trend towards "overzealous formalism," in the words of the lone dissenter, Justice Stevens.²⁶⁵

The Supreme Court's statement of the facts tracks the version presented by the Court of Appeals in most respects. Unfortunately, the facts from the district court²⁶⁶ are more complicated and alternative forms of strategy and tactics might have put a different result to this dispute.

In the Supreme Court's version of the facts, Bacchus Associates of New York, a wholesale fruit distributor in New England, was the shipper and consignee of a shipload of oranges and lemons shipped from Agadir, Morocco to New Bedford, Massachusetts. Bacchus had purchased the fruits from Galaxi Negoce S.A. of Morocco. The cargo was carried onboard the Panamanian flag vessel *Sky Reefer*. Thousands of boxes of oranges shifted during the voyage, crushing and spoiling the fruit and causing a loss of \$1 million to Bacchus.²⁶⁷

When Bacchus negotiated for the carriage of the fruit it needed a refrigerated vessel, and the *Sky Reefer* was available; she was owned by M.H. Maritima, S.A. of Panama but had been time chartered to Honma Sempaku Co., Ltd. of Japan, who in turn time-chartered the vessel to Nichiro Gyogyo Kaisha, Ltd. of Japan. Bacchus then chartered her from Nichiro.

²⁶¹See Larsen, Sweeney, Falvey & Zawitoski, *The Treaty on Terminal Operator Liability in International Trade*, 25 J. Mar. L. & Com. 339 (1994).

²⁶²515 U.S. 528, 1995 AMC 1817 (1995).

²⁶³*Id.* at 541.

²⁶⁴499 U.S. 585, 1991 AMC 1697 (1991). The Court enforced a Florida choice of forum clause in the passage contract of a Liberian flag vessel on residents of Washington state who were able to serve defendants there. See 515 U.S. at 535-36.

²⁶⁵*Id.* at 556 (Stevens, J., dissenting).

²⁶⁶*Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 1993 WL 137483, *3 (D. Mass. 1993).

²⁶⁷515 U.S. at 531.

The voyage charter party contained a clause calling for arbitration in London. (The stated facts do not refer to possible arbitration clauses in the Maritima-Honma time charter nor the Honma-Nichiro time charter.) Thus, as between Bacchus and Nichiro, a cargo damage dispute ought to have been arbitrated in London, subject to the law of the charter party, in which there is no aspect of public policy against the arm's length bargaining between shipowner and charterer. Furthermore, because the bill of lading issued by Nichiro to Bacchus (calling for arbitration in Japan) had not yet been negotiated to a third party, COGSA did not apply due to the charter party exclusion in 46 U.S.C. app. §§ 1301(b) and 1305.²⁶⁸

Questions as to the cause of the \$1 million damage to the fruit by "crushing of boxes" during the voyage raise the issue of the responsibility of the charterer for loading the cargo through the stevedore hired by it. At this point, the further complication of payment and subrogation becomes important, as well as the insurer's decision to pursue a judicial remedy in the United States against the ship *in rem* and the shipowner *in personam* under the theories of unseaworthiness and negligence. Neither defendant was a party to the Nichiro-Bacchus voyage charter calling for London arbitration;²⁶⁹ thus, the subrogated plaintiff's decision must have combined strategy and tactics: the certainty of the enforcement of a London arbitration clause in the charter party against the uncertainty of a Tokyo arbitration clause in the bill of lading. For the defendants, the non-applicability under COGSA of that charter party bill of lading also presented uncertainty: if COGSA does not apply, is it replaced by the Harter Act or common law bailment for hire? The defendants' choice of battle over the arbitration clause was absolutely the wisest choice for them. A further uncertainty was *Carnival Cruise Lines, Inc. v. Shute*, which was lurking in the wings even though *Sky Reefer* involved an arbitration clause rather than a choice of forum clause.

The plaintiff, a Spanish cargo insurer, paid the consignee \$733,442.90 on the loss and sued the vessel owner, Maritima, *in personam*, and the ship, *in rem*, in the United States District Court for the District of Massachusetts.²⁷⁰

Maritima defended on the basis of the time charter to Nichiro, whereby Nichiro, as carrier, had issued the bill of lading covering the goods to the shipper; the bill of lading had a choice of law clause selecting Japanese law as the law of the contract²⁷¹ and a forum selection clause referring all disputes to arbitration in Tokyo before the Tokyo Maritime Arbitration

²⁶⁸*Id.*

²⁶⁹*Id.*

²⁷⁰See *supra* note 266.

²⁷¹"The contract evidenced by or contained in this Bill of Lading shall be governed by the Japanese law." 515 U.S. at 531.

Commission of the Japan Shipping Exchange.²⁷² The ship owning interests moved to stay the action and compel arbitration in Tokyo under the bill of lading and the Federal Arbitration Act (FAA).²⁷³ The plaintiffs opposed the motion on the ground that the arbitration clause was unenforceable as a contract of adhesion and under COGSA as a clause lessening the carrier's liability.²⁷⁴ The alleged issue was a perceived conflict between the FAA and COGSA and the priority of the amended FAA over the unamended COGSA.²⁷⁵

The District Court rejected both of the plaintiffs' contentions, stayed the actions, and compelled arbitration in Tokyo, but certified the question of the invalidity of the arbitration clause under COGSA to the First Circuit as appealable under 28 U.S.C. § 1292(b). The District Court, however, retained jurisdiction pending arbitration.²⁷⁶

The First Circuit²⁷⁷ had doubts about the foreign arbitration clause, but assumed its invalidity because it lessened the carrier's COGSA liability under the Second Circuit's widely followed en banc opinion in *Indussa Corp. v. S.S. Ranborg*,²⁷⁸ which overruled *William H. Muller & Co. v. Swedish American Line (The Oklahoma)*,²⁷⁹ an earlier decision reaching the opposite conclusion.

Indussa contains the policy rationale against foreign forums and foreign law because of the potential "immunization" of carriers from *small* claims (clearly not the *Sky Reefer* case—\$1 million in damages—but certainly

²⁷²In full, the clause read as follows:

Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japanese Shipping Exchange, Inc., in accordance with the rules of TOMAC and any amendment thereto, and the award given by the arbitrators shall be final and binding on both parties.

Id.

²⁷³Specifically, they relied on 9 U.S.C. § 3, which provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

²⁷⁴515 U.S. at 532.

²⁷⁵Id. at 533.

²⁷⁶Id. at 532. The court's reasoning relied on *Citrus Mktg. Bd. of Israel v. M/V Ecuadorian Reefer*, 754 F. Supp. 229, 1991 AMC 1042 (D. Mass. 1990).

²⁷⁷29 F.3d 727, 1994 AMC 2513 (1st Cir. 1994).

²⁷⁸377 F.2d 200, 1967 AMC 589 (2d Cir. 1967). The opinion is the en banc unanimous resolution of the appeal. Seven of the eight judges agreed with Judge Henry J. Friendly that the choice of forum clause violated § 1303(8). Judge Leonard P. Moore concurred in the result but held the *Oklahoma*, see *infra* note 279, distinguishable.

²⁷⁹224 F.2d 806, 1955 AMC 1687 (2d Cir.), cert. denied, 350 U.S. 903 (1955).

Indussa—\$2,600 in damages).²⁸⁰ Despite the obvious nexus to the American forum because of unloading here and the statutory language in § 1312 applying COGSA to imports and exports, Judge Friendly noted that enforcing the foreign forum clause could require the American plaintiff to move proofs and witnesses thousands of miles to an unfamiliar legal system and an unfamiliar language.²⁸¹ (*Indussa* also had another interpretive problem in that the forum could have been Norway, the owner's nation, or Costa Rica, the charterer's nation.²⁸²) Furthermore, under the terms of the Hague Rules, Belgian law could have been applied as the place where the bill of lading was issued. Judge Friendly, however, concluded that the plaintiff's choice of the American forum could not be ousted.²⁸³

With a few exceptions, *Indussa* had been followed in bill of lading cases since 1967,²⁸⁴ and, until recently, neither choice of forum nor choice of law clauses were common in bills of lading because of the American "Clause Paramount."²⁸⁵ The strength of the *Indussa* rationale continued to be

²⁸⁰377 F.2d at 201.

²⁸¹Judge Friendly wrote:

We think 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. at 203.

²⁸²The forum clause in *Indussa* provided, "Any dispute arising under this Bill of Lading shall be decided in the country where the Carrier has his principal place of business. . . ." Id. at 201. In accordance with § 1301(a), the "carrier" included the owner (Norwegian) or the charterer (Costa Rican).

²⁸³"[W]e think it preferable to relieve cargo asserting claims in this Circuit under the Carriage of Goods by Sea Act and also our district judges from the burden of *Muller*, without further delay or imposition upon a busy Supreme Court." 377 F.2d at 204.

²⁸⁴See, e.g., *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721, 1982 AMC 588 (4th Cir. 1981); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1988 AMC 1495 (8th Cir. 1986); *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441, 1988 AMC 318 (5th Cir. 1987); *State Estab. for Agr. Product Trading v. M/V Wesermunde*, 838 F.2d 1576, 1988 AMC 2328 (11th Cir.), cert. denied, 488 U.S. 916 (1988); *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840, 1988 AMC 2848 (5th Cir. 1988), cert. denied, 489 U.S. 1033 (1989). See generally Nakazawa & Moghaddam, COGSA and Choice of Law Clauses in Bills of Lading, 17 Tul. Mar. L.J. 1 (1992), and Comment, Forum Selection in Maritime Bills of Lading Under COGSA, 12 Fordham Int'l L.J. 459 (1989).

²⁸⁵The typical Clause Paramount reads as follows:

This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

See generally 46 U.S.C. app. § 1312. Another version of the Clause Paramount adds, "or to any law similar to the 1924 Hague Rules or Hague-Visby Rules if such law is compulsorily applicable to this Bill of Lading in the country where suit is brought. . . ." COGSA, rather than the Hague-Visby Rules, was applied in *Nippon Fire & Marine Ins. Co. v. M.V. Tourcoing*, 167 F.3d 99, 1999 AMC 913 (2d Cir. 1999), a case in which the Clause Paramount referred to both instruments.

asserted despite the Supreme Court's preference for a foreign forum in *M/S Bremen v. Zapata Off-Shore Co.*,²⁸⁶ a towage contract where the London forum clause was not pre-printed but negotiated. The Supreme Court had also indicated its preference for arbitration in international commercial transactions, demonstrated by the cases cited by Justice Kennedy in *Sky Reefer*.²⁸⁷ Because of a conflict with the Eleventh Circuit,²⁸⁸ the Supreme Court granted certiorari in *Sky Reefer*.²⁸⁹

The First Circuit had affirmed the trial court's compulsion of arbitration in Tokyo, despite *Indussa*, because the FAA was assumed to be the later and more specific expression of congressional intent and thereby entitled to priority over COGSA.²⁹⁰ While COGSA has never been amended since its enactment in 1936, the FAA of 1925 had been amended in 1947 and 1970. Fortunately, the Supreme Court did not go into the question of the priority of enactment, although that issue was extensively argued by the parties. Because of its dualistic reading of COGSA, the Supreme Court found no conflict between the FAA and COGSA. Thus, the issue decided by the

²⁸⁶407 U.S. 1, 1972 AMC 1407 (1972).

²⁸⁷See 515 U.S. at 538 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974)).

²⁸⁸See *State Estab. for Agr. Product Trading v. M/V Wesermunde*, 838 F.2d 1576, 1988 AMC 2328 (11th Cir.), cert. denied, 488 U.S. 916 (1988).

²⁸⁹513 U.S. 1013 (1994).

The Supreme Court almost reviewed the question of foreign forum selection clauses in *Carbon Black Export, Inc. v. SS Monrosa*, 254 F.2d 297, 1958 AMC 1335 (5th Cir.), cert. granted, 358 U.S. 809 (1958), cert. dismissed, 359 U.S. 180, 1959 AMC 1327 (1959). In *Carbon Black*, the bill of lading clause provided, "no legal proceeding may be brought against the Captain or ship owners or their agents in respect to any loss of or damage to any goods . . . except in Genoa." The cargo owner brought an action *in personam* against the Italian shipowner and an action *in rem* against the carrying vessel. The District Court dismissed based on *The Oklahoma*, see *supra* note 279. The Fifth Circuit refused to enforce the forum selection clause in the *in rem* proceeding as a violation of public policy. Certiorari was initially granted, but in a 5-4 change of mind after oral argument, the petition was dismissed as improvidently granted because the cargo damage action could still be maintained *in rem*, even though no longer maintainable *in personam*, because the forum selection clause protected only the master, shipowner, and agents and *not* the ship. Justices Frankfurter, Whittaker, Harlan, and Stewart dissented. See also *Perusahaan Umum Listrik Negara Pusat v. M/V Tel Aviv*, 711 F.2d 1231, 1985 AMC 67 (5th Cir. 1983), where the court held that an arrest *in rem*, by itself, did not tip the balancing test in favor of American jurisdiction. *Id.* at 1238.

The context of *Carbon Black* was different from the compulsory arbitration of *Sky Reefer*, in that the carrier interest sought to use the discretionary authority of the courts to dismiss on forum non conveniens grounds, 22 years before the Supreme Court treated this defense in a systematic way in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 1982 AMC 214 (1981). In 1959, the task for plaintiffs was to find factors of legal, economic, and political significance to persuade an American court that foreign defendants truly belonged before the court despite protestations of unfairness or even forum selection or law selection clauses; the factor that proved effective in 1959 was arrest of the vessel *in rem*. See Annot., *Effect of American Citizenship or Residency of Libelant who has Alternate Forum Abroad on Applicability of Doctrine of Forum Non Conveniens in Admiralty Action Brought in United States District Court*, 70 A.L.R. Fed. 875 (1984).

²⁹⁰29 F.3d at 731-33.

Supreme Court concerning COGSA had been of secondary concern to the arbitration issue in the First Circuit.

The Supreme Court had to decide whether bill of lading clauses requiring foreign arbitration under foreign law lessens the carrier's COGSA liability. The Supreme Court, per Justice Kennedy,²⁹¹ held that the carrier's COGSA liability was *not* lessened by the presence of these clauses.²⁹² Here the Court's reliance on the 1924 treaty and foreign decisions was crucial. Five justices agreed with Justice Kennedy's opinion; Justice O'Connor concurred; Justice Breyer did not participate; and Justice Stevens dissented.

Justice Kennedy examined *Indussa* and the line of cases following its reasoning and rejected *Indussa* itself on the ground that the statutory language ("lessen liability") of § 1303(8) refers to two issues: a substantive guarantee that liability will not be lessened,²⁹³ and the procedural issue for enforcing the guarantee.²⁹⁴ Respecting the latter, he found no statutory language to prevent the parties from "agreeing to enforce these obligations in a particular forum."²⁹⁵ The Court's principal authority was its 1991 decision in *Shute*,²⁹⁶ enforcing a Florida forum selection clause in a passage contract against a personal injury plaintiff from Washington state. That case found that the language of the forum clause did not "lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability. . . ."²⁹⁷

The *Sky Reefer* Court said that "lessening such liability" excluded increases in "transaction costs of litigation"²⁹⁸ and referred to a 1927 English decision, *Maharani Woollen Mills Co. v. Anchor Line*,²⁹⁹ decided before the Hague Rules were in force as a treaty, and also referred to a very influential law review article by Professor Sturley.³⁰⁰ Thus, the Court reached the

²⁹¹Anthony M. Kennedy was born in 1936 in Sacramento, California. He received his A.B. from Stanford University in 1958 and his J.D. from Harvard University in 1961 and also studied at the London School of Economics. Following his admission to the California bar, he practiced law in San Francisco and Sacramento for 13 years while also teaching as an adjunct professor at McGeorge School of Law. In 1975, he was appointed to the Ninth Circuit. Upon the retirement of Justice Lewis Powell in 1987, a major struggle between the Democratic Senate and President Ronald W. Reagan over a conservative agenda for the Court led the Senate to reject the nomination of Judge Robert H. Bork. Following the withdrawal of the nomination of Judge Douglas Ginsburg, President Reagan nominated Judge Kennedy, who was confirmed without opposition.

²⁹²515 U.S. at 536.

²⁹³*Id.*

²⁹⁴*Id.* at 534.

²⁹⁵*Id.* at 535.

²⁹⁶499 U.S. at 603.

²⁹⁷*Id.* (referring to 46 U.S.C. app. § 183c).

²⁹⁸515 U.S. at 536.

²⁹⁹(1927) 29 Lloyd's List L. Rep. 169 (C.A.) (per Scrutton, J.).

³⁰⁰See Influence, *supra* note 243, at 776-96 (describing conflicting interpretations of the Hague Rules as the predictable product of independent aspects of domestic law with respect to Himalaya and choice

conclusion that, excepting those Hague Rules signatories, such as Australia and South Africa, with statutes expressly forbidding clauses that oust local courts, no other signatories to the Hague Rules prohibited foreign forum selection clauses under the rationale of Art. 3(8) of the Hague Rules (46 U.S.C. app. § 1303(8)). As such, the United States was obliged to honor its treaty commitment to permit foreign forums and even foreign law.³⁰¹

Justice Kennedy noted the argument that Japanese law, as interpreted by the Japanese arbitration panel, would surely lessen carrier liability in at least one respect: the carrier's non-delegable duty of proper stowage contained in COGSA is not found in the Japanese Hague Rules because of a statutory exception providing a defense to carriers for the acts or omissions of stevedores.³⁰² Furthermore, the United States' version of the Hague Rules requires COGSA to be applied to imports as well as exports,³⁰³ although the bill of lading clause selected Japanese law.

The Court did not rule on this issue because it considered it premature, inasmuch as the "award-enforcement stage"³⁰⁴ had not yet been reached. This suggestion of a second litigation ignores the reality of the case being decided. The cargo interests sued for cargo damage; the facts do not indicate a shipowner counterclaim for unpaid freight, damage to the ship, or general average contribution, thus there could not be an award against cargo to be enforced and Japanese law ensured there could never be an award in favor of the cargo interest. Justice Kennedy cited *Mitsubishi*³⁰⁵ to the effect that "we would have little hesitation in condemning the agreement as against public policy" if persuaded that "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right. . . ."³⁰⁶ But with no arbitral award to be enforced, is Justice Kennedy suggesting a review of the facts or law of an arbitration proceeding?

Justice O'Connor concurred in the result, but did not reject the *Indussa* reasoning, because arbitration clauses, unlike forum selection clauses, do not oust domestic courts. She was troubled by the reliance on the older British

of forum clauses and concluding that identification and explanation of the role of domestic law would increase judicial awareness so that no more conflicts would arise).

³⁰¹515 U.S. at 537-38.

³⁰²*Id.* at 539.

³⁰³46 U.S.C. app. § 1300.

³⁰⁴515 U.S. at 540.

³⁰⁵473 U.S. at 637.

³⁰⁶515 U.S. at 540. Graydon Staring has noted that the enforcement of foreign forum clauses must occur through the equitable power of specific performance, and suggests that equitable defenses—fraud, unconscionability, lack of clean hands, and strong public policy—may be used. Staring, *Forgotten Equity: The Enforcement of Forum Clauses*, 30 *J. Mar. L. & Com.* 405, 411 (1999).

case, noting that she would disturb the unbroken line of *Indussa* authority only to the extent necessary to decide this case.³⁰⁷

Justice Stevens dissented here, as he did in *Shute*,³⁰⁸ rejecting the “novel” construction of § 1303(8). He found the majority’s interpretation to be “flatly inconsistent with the purpose of COGSA.”³⁰⁹ He preferred the pre-Harter act authority of *Liverpool & Great Western Steam Co. v. Phenix Insurance Co.*,³¹⁰ as a declaration that exculpatory clauses violate public policy and are void, and most importantly the Harter Act decision in *Knott v. Botany Worsted Mills*,³¹¹ rejecting a British forum selection clause because it relieved carrier liability. Justice Stevens found the majority’s reading of § 1303(8), dividing it into substantive and procedural aspects, “perverse.”³¹² He also pointed to the national policies that transaction costs should not exceed the potential recovery and the negotiability of bills of lading should not suffer because of unenforceability.³¹³

Justice Stevens found application of the domestic passage ticket case to a foreign arbitration clause to be a piece of wooden reasoning not even compelled by *Shute*.³¹⁴ He also claimed to be “baffled” by the Court’s suggestion that the consistency of the Harter Act interpretation of *Knott* in *Indussa* is unfaithful to the treaty commitments in the Hague Rules.³¹⁵ His view of the Australian and South African statutes against ousting the jurisdiction of local courts is that those nations believe non-enforcement of foreign forum selection clauses to be consistent with the international obligation, thereby agreeing with the constant interpretation of § 1303(8)

³⁰⁷Id. at 542.

³⁰⁸499 U.S. at 603.

John Paul Stevens was born in Chicago in 1920. He attended the University of Chicago, where he received his A.B. in 1941, served in the U.S. Navy (1942–45), and earned his J.D. from Northwestern University in 1947. He then clerked for U.S. Supreme Court Justice Wiley B. Rutledge (1947–48) and practiced in Chicago from 1948–70, serving as an adjunct professor at the University of Chicago in 1954 and at Northwestern University in 1954–55. He was appointed to the Seventh Circuit in 1970 by President Richard M. Nixon, and was elevated to the Supreme Court in 1975 by President Gerald R. Ford. In his early years on the Court, he was regarded as a moderate between the Burger-Rehnquist wing and the Brennan wing, but by 1999 he had become the Court’s most “liberal” member. Justice Stevens has authored many dissents and concurrences which can be characterized as blunt and confrontational. For a 7–2 majority, however, he resurrected the privilege to travel for welfare recipients as a privilege and immunity of U.S. citizens under Article IV, § 2 and the Fourteenth Amendment. See *Saenz v. Doe*, 119 S. Ct. 1518 (1999).

³⁰⁹515 U.S. at 550.

³¹⁰See supra note 68.

³¹¹179 U.S. 69 (1900).

³¹²515 U.S. at 551.

³¹³Id. at 551–52.

³¹⁴Id. at 552.

³¹⁵Id. at 553.

since *Indussa*.³¹⁶ Lastly, he suggested a reading of the FAA and COGSA that gives effect to both: a foreign arbitration clause may be invalid as illegal under a separate federal statute in the same way that a clause obtained through fraud, forgery, mistake, or unconscionability can be invalid without in any way being hostile to arbitration generally, given that arbitration is favored by congressional policy and the 1958 New York Convention on arbitral awards.³¹⁷

Because of the interlocutory appeal at the pleadings stage, the Supreme Court has not foreclosed the issue of fundamental fairness in these clauses, nor has it ruled on choice of law clauses in bills of lading. The carrier interests had to invoke the FAA to stay the proceedings, and the issue of whether arbitration in Tokyo under Japanese law lessened the carrier's COGSA liability is still open for a trial on the merits or in a proceeding to vacate the arbitration award.³¹⁸ The Court in fact quoted *Shute* to the effect that "forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness."³¹⁹ Frequent and hostile criticisms of foreign legal systems will certainly result from the course the Supreme Court has taken and that will surely lead to the political confrontations that it sought to dispel 30 years ago in *Sabbatino*³²⁰ and most recently in *Kirkpatrick*.³²¹

VII CONCLUSION

In its most recent COGSA decision, the Supreme Court has abandoned the prism provided by history, policy, and precedent in favor of a speculative interpretation of the treaty. Shippers contemplating bills of lading with foreign law and foreign arbitration clauses may want to consider the years of costly litigation with Iranian companies following the collapse of the Shah when the Khomeini government tried to force disputes between American business and Iranian concerns into Iranian revolutionary tribunals under Iranian revolutionary law.³²² An absence of foreign arbitration clauses may

³¹⁶*Id.* at 553-54.

³¹⁷*Id.* at 555-56.

³¹⁸*Id.* at 540-41.

³¹⁹*Id.* at 539.

³²⁰*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

³²¹*W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, Int'l, 493 U.S. 400 (1990).

³²²See, e.g., *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir.), cert. denied, 516 U.S. 989 (1995); *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir.), cert. denied, 474 U.S. 948 (1985); *Rockwell Int'l Systems, Inc. v. Citibank, N.A.*, 719 F.2d 583 (2d Cir. 1983); *Itek Corp. v. First Nat'l Bank of Boston*, 704 F.2d 1 (1st Cir. 1983); *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982); *KMW Int'l v. Chase Manhattan Bank, N.A.*, 606 F.2d 10 (2d Cir. 1979).

even become a competitive factor between foreign shipowners, in view of the small percentage of United States trade carried in United States flag vessels.

The principal disservice of *Sky Reefer* to the concept of law as a means of settling disputes is that where one trial on the merits sufficed under *Indussa*, *Sky Reefer* opens up the possibility of two trials in every major cargo damage dispute: a foreign court or arbitral decision "on the merits" followed by an American decision on the fundamental fairness of the foreign decision. Surely, this possibility requires corrective congressional action—and such a course is included in the MLA's pending proposal to revise COGSA.³²³

Thus, despite its 7–1 vote, the American maritime bar appears prepared to overrule the Supreme Court by legislation. This is a far cry from the past, when the Court was a bold force for positive change. In a future article, I plan to show how the canons of statutory construction and the principles of treaty interpretation could have been applied by the Justices to avoid this result.

See generally Zimmert, Standby Letters of Credit in the Iran Litigation: Two Hundred Problems in Search of a Solution, 16 L. & Pol'y Int'l Bus. 927 (1984).

³²³See supra note 189.

The April 16, 1999 draft of the COGSA revision proposal states in § 7 (Contracts of Carriage):

(i)(2) In General.—Except as provided in paragraph (4), a provision in a contract of carriage or other agreement to which this subsection applies that specifies a foreign forum for litigation or arbitration of a dispute to which this Act applies is null and void and of no effect if—

(A) the port of loading or the port of discharge is, or was intended to be, in the United States; or

(B) the place where the goods are received by a carrier or the place where the goods are delivered to a person authorized to receive them is, or was intended to be, in the United States.

(3) Court-Ordered Domestic Arbitration.—Except as provided in paragraph (4), if a contract of carriage or other agreement to which this subsection applies specifies a foreign forum for arbitration of a dispute to which this Act applies, then a court, on the timely motion of either party, shall order that arbitration shall proceed in the United States.

(4) Subsequent Agreement of Parties.—Nothing in this subsection precludes the parties to a dispute involving a claim under a contract of carriage or other agreement to which this subsection applies from agreeing to resolve the dispute by litigation or arbitration in a foreign forum if that agreement is executed after the claim arises.

