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IS *SKY REEFER* IN JEOPARDY? THE MLA'S PROPOSED CHANGES TO MARITIME FOREIGN ARBITRATION CLAUSES

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Abstract: After almost sixty years of change in the international commercial arena, the United States needs to revise its maritime law to reflect international practice. Recently, the U.S. Supreme Court, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, held that foreign arbitration clauses in maritime bills of lading will be enforced. In an attempt to reverse this decision, the Maritime Law Association included in its proposal to revise the Carriage of the Goods by Sea Act a clause that specifically denies the enforcement of foreign arbitration clauses. This Comment argues that Congress should not adopt the proposed revision because maritime commerce is not confined within national borders, and the United States should continue to align its practices with international expectations. In particular, this Comment asserts that, although as a whole the proposed revision would be beneficial, the Maritime Law Association should reconsider the issue of enforcing foreign arbitration clauses in bills of lading.

In June 1995, the U.S. Supreme Court settled a dispute among the circuit courts when it ruled in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*[1] that bills of lading containing arbitration clauses do not lessen a carrier's liability under section 1303(8) of the Carriage of Goods by Sea Act (COGSA)[2] and can therefore be enforced. The Court found that the Federal Arbitration Act (FAA)[3] did not necessarily preempt COGSA. Responding to the U.S. Supreme Court's decision, the U.S. Maritime Law Association (MLA) offered Congress a proposal to revise COGSA. This revision, if adopted, would render foreign arbitration clauses unenforceable in cases involving the discharge or loading of goods within the United States. If the MLA's proposal is enacted by Congress, it will override the U.S. Supreme Court's decision in *Sky Reefer*, forcing arbitration and litigation in the United States. Although the proposed revision would guarantee a continued legal market for American maritime lawyers, it also would contradict the international maritime practice of enforcing bills of lading that contain foreign arbitration clauses.

Historically, maritime trade is not restricted to one country; therefore, there have been overtures towards harmonizing the maritime practice of

1. 115 S. Ct. 2322 (1995).
2. 46 U.S.C. app. §§ 1300–1315 (1994).
3. 9 U.S.C. § 1 (1994).

all countries. Accordingly, the United States needs to keep adopting practices of international maritime commerce.

Part I of this Comment discusses the legislative background pertinent to an understanding of international maritime commerce. Part II focuses on case law preceding the *Sky Reefer* decision. It then summarizes the *Sky Reefer* facts, explains the rationale, and explores the possible effects of the holding. The MLA's proposed revision is discussed in Part III, and Part IV analyzes and critiques the reasons for and objections to an enactment of the proposal. Finally, this Comment concludes by recommending that any revisions to COGSA be consistent with the *Sky Reefer* decision.

I. THE LEGISLATIVE BACKDROP: DOMESTIC AND INTERNATIONAL RULES GOVERNING CARRIAGE OF GOODS BY SEA

A. Domestic Rules: The Harter Act and the Carriage of Goods by Sea Act

In the late 1800s, U.S. courts applied common law principles to evaluate bills of lading.[4] Bills of lading, which regulate transactions between a carrier and shipper, have three functions: they act as "a receipt, a contract of carriage, and a document of title."[5] Under common law, bills of lading included unreasonable exceptions for negligence.[6] Consequently, Congress enacted the Harter Act in 1893[7] in an attempt to limit the negligence exceptions that private carriers were including in bills of lading to escape liability.[8]

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4. *See* Knott v. Botany Mills, 179 U.S. 69, 71–72 (1900) (determining that prior to enactment of Harter Act, exemptions permitted in contract of carriage); Grant Gilmore & Charles L. Black Jr., *The Law of Admiralty* § 3-23 (2d ed. 1975).

5. *See* William Tetley, *Marine Cargo Claims* 6 (2d ed. 1978).

6. *See, e.g.*, Liverpool & Great W. Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 453, 458 (1889) (holding that bill of lading clause exempted carrier from liability for negligence caused by its servants); *see also* C.A. Seguros Orinoco v. Naviera Transpapel C.A., 677 F. Supp. 675, 681 (D.P.R. 1988) (before enactment of Harter Act, carriers stipulated numerous exceptions for liability to cargo damage); H.R. Rep. No. 52-1988, at 2–3 (1892) (prohibiting carriers from inserting certain provisions into bills of lading).

7. 46 U.S.C. app. § 190 (1994).

8. The Committee on Interstate and Foreign Commerce noted that "an imperative duty rests upon Congress to pass such legislation as may be necessary to remove from trade all unnecessary burdens and restrictions." Kenneth M. Klemm, Comment, *Forum Selection in Maritime Bills of Lading Under* COGSA, 12 Fordham Int'l L.J. 459, 462 n.18 (1989).

The Harter Act represented a compromise more than a crackdown on "unfair" negligence exceptions in bills of lading.[9] It allowed many exemptions from liability for cargo loss or damage, such as damages resulting from errors in navigation or management of the vessel, acts of God, public enemy attacks, inherent defect or vice of the object being carried, necessity to save the ship, and negligent packaging on the part of the shipper.[10] In addition, it also left intact the carrier's traditional freedom from liability from fires not caused by the carrier's design or neglect.[11] In contrast, however, the Act prohibited exculpatory clauses that relieved carriers from liability for damage caused by negligence in loading, stowing, or discharging goods,[12] or due diligence in equipping the vessels in order to make them seaworthy.[13] Ultimately, the Act struck a balance between the interests of shipowners and owners of goods. For example, where a shipowner provided an unseaworthy ship, the shipowner was liable for any cargo damage. In instances where the shipowner provided a seaworthy vessel and cargo was damaged due to unforeseen causes, however, the shipowner would not be liable because the owner had original control over the goods in the cargo containers.

The Harter Act represented:

> [M]ore that a decade of groping from the formula which would express in a satisfactory manner the desired distinction between faults which a shipowner should be forbidden to avoid by contract, and faults (consisting of errors of judgment and carelessness during the voyage), as to which he should be allowed exoneration . . . .

Id.

9. *See* Gilmore & Black, *supra* note 4, § 3-24, at 143.

10. The Harter Act provides:

> *Limitation of liability for errors of navigation, dangers of the sea and acts of God.* If the owner of any vessel transporting merchandise of property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

46 U.S.C. app. § 192 (1994).

11. 46 U.S.C. app. § 182 (1994).

12. *See* 46 U.S.C. app. § 190 (1994).

13. *See* 46 U.S.C. app. § 191 (1994).

In 1936, Congress passed the Carriage of Goods by Sea Act[14] to supplement the Harter Act. COGSA defined the rights and liabilities of carriers and shippers in foreign commerce that either loaded or discharged goods in U.S. ports.[15] It was enacted for the same reasons as the Harter Act: American carriers, displeased because they were absolutely liable for damages from unseaworthiness,[16] pushed for legislation that enabled them to contract out of these liabilities via bills of lading.

COGSA places certain limitations on the ability of the carrier to exempt itself from liability.[17] In particular, section 1303(8) prohibits any clause that reduces a carrier's liability:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage . . . 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.[18]

Section 1303(8) does not specify which clauses lessen a carrier's liability; currently, only clauses regarding location of storage[19] and trade customs[20] are prohibited.

B. International Rules: The Hague Rules and the Hamburg Rules

The passage of the Harter Act prompted other countries to protect their shippers through similar legislation.[21] This birth of carrier-shipper standards created a lack of uniformity, compelling the International Law

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14. Carriage of Goods by Sea Act, ch. 229, Pub. L. No. 74-521, 49 Stat. 1207 (1936) (codified as amended at 46 U.S.C. app. §§ 1300–1315 (1994)).

15. *See* H.R. Rep. No. 74-2218, at 7–8 (1936).

16. *See* Horn v. Cia de Navegacion Fruco, S.A., 404 F.2d 422, 432 (5th Cir. 1968). In this case, a claim was brought against an owner whose vessel was under a charter party, for cargo damage caused by improper stowage. The court stated that, under the Harter Act, an owner whose vessel does not meet the seaworthiness standard is liable for cargo damage regardless of whether the defect and the disaster are related. *Id.* at 432.

17. *See* 46 U.S.C. app. §§ 1303–1304 (1994).

18. 46 U.S.C. app. § 1303(8).

19. *See* Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7, 14–16 (2d Cir. 1969).

20. *See* Sun Oil Co. v. M/T Carisle, 771 F.2d 805, 814–15 (3d Cir. 1985).

21. *See* Klemm, *supra* note 8, at 465 n.36.

Association,[22] through its subgroup, the Comite Maritime International (CMI),[23] to draft the Hague Rules.[24]

The Hague Rules were internationally adopted in 1924. Although later revised as the Hague-Visby Rules,[25] the United States only ratified the original Rules on May 26, 1937.[26] The Hague Rules are a set of international compromises based on the Harter Act[27] and apply from the time goods are loaded on to a ship until the time the goods are discharged from the ship.[28] The first compromise reduced a carrier's obligation to make a ship seaworthy.[29] The Hague Rules only require that carriers exercise minimal due diligence in making a ship seaworthy.[30] Second, except for negligence in navigation, management, or in causing a fire on board, carriers must safely transport the goods aboard the vessel.[31] The Hague Rules limit a carrier's liability to one hundred English pounds per package.[32] By limiting liability, the Rules protect cargo owners from liability-limiting clauses in bills of lading and carriers from having to compensate cargo owners for small packages containing extremely valuable goods.[33]

The Hague Rules were intended to create an international, standard bill of lading while allowing shippers and carriers to exercise freedom of contract in unregulated areas.[34] For example, article 3(8) of the Rules,

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22. *See* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 9-7, at 294 (1987).

23. *See* Comite Maritime International, *International Conventions on Maritime Law* (1987). The CMI is a private organization that includes the national maritime law associations of about 41 countries. These countries include the United States, Canada, Japan, India, Australia, New Zealand, and most of the maritime countries of Europe and some of Latin America. *See* Nicholas J. Healy & David J. Sharpe, *Admiralty Cases and Materials* 331 n.11 (2d ed. 1986).

24. Bill of Lading Convention, *opened for signature* Aug. 25, 1924, 51 Stat. 233, T.S. No. 931 (entered into force for United States, Dec. 29, 1937) [hereinafter Hague Rules].

25. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ("Visby Amendments"), Feb. 23, 1968, (entered into force June 23, 1977), *reprinted in* 6 Michael F. Sturley, *Benedict on Admiralty* doc. 1-2, at 1-25 (rev. 7th ed. 1993).

26. Hague Rules, *supra* note 24, 51 Stat. at 269–74, T.S. No. 931, at 35–49.

27. *See* Anthony Diamond, *Responsibility for Loss of, or Damage to, Cargo on a Sea Transit: The Hague or Hamburg Conventions?*, in *Carriage of Goods by Sea* 110 (Peter Koh Soon Kwang ed., 1986).

28. *See* Tetley, *supra* note 5, at 10. "'Tackle to tackle' means when ship's tackle is hooked on, or, if shore tackle is being used, when goods cross the ship's side." *Id.*

29. *See* Diamond, *supra* note 27, at 110.

30. *Id*

31. *Id.* at 111.

32. *Id.*

33. *Id.*

34. *See* Schoenbaum, *supra* note 22, § 9-7, at 294–95.

like COGSA, prohibits clauses that reduce carriers' liability[35] but allows countries to decide whether it is within their public interest to enforce arbitration clauses.[36] The Rules however, did not specify whether arbitration clauses should be enforced because arbitration is a procedural matter subject to national discretion.[37] Moreover, countries would probably not have ratified a set of rules that imposed on their national legal procedures.

In an attempt to replace the Hague Rules,[38] the United Nations Convention on the Carriage of Goods by Sea enacted the Hamburg Rules of 1978.[39] The Hague Rules were believed to place an undue burden on a cargo owner.[40] As a result, the Hamburg Rules focused on the cargo owner.[41] Also, an important distinction from the Hague Rules is that the Hamburg Rules specify terms of jurisdiction and arbitration.[42] In particular, article 22 of the Hamburg Rules regulates arbitration clauses by specifying the format, forum, and applicable rules to operate

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35. Hague Rules, *supra* note 24, art. 3(8), 51 Stat. at 240, T.S. No. 931, at 15. Article 3(8) of the Hague Rules states:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this article, or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

Id.; *see also* 46 U.S.C. app. § 1303(8) (1994).

36. *See* William Tetley, *Marine Cargo Claims* 589 (3d ed. 1988).

37. *See* Tetley, *supra* note 5, at 295.

38. *See* Diamond, *supra* note 27, at 115.

39. United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978 [hereinafter Hamburg Rules], *reprinted in* 6 Sturley, *supra* note 25, doc. 1-3, at 1-32.6. Only 22 countries have ratified the Hamburg Rules, and none of them are major maritime players such as the United States, England, or Japan. For a detailed history of the development of these rules, see Joseph C. Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods by Sea*, 7 J. Mar. L. & Com. 69 (1975).

40. *See* Diamond, *supra* note 27, at 116. On a grander scale, this burden translated into the transfer of wealth from cargo countries to carrier countries. *Id.* Two of the United Nations agencies, UNCTAD and UNCITRAL were involved in a 10-year investigation of the effectiveness of the Hague Rules and the possibility of creating another international maritime convention on regulating bills of lading. *Id.* at 115. In these investigations, the agencies allege that cargo countries included developing countries. *Id.* at 116. The fact that the Hague Rules were initiated by the United Kingdom, which at that time was the strongest carrier country in the world, and the fact that the Hague Rules seem to disfavor cargo countries, seem to demonstrate why the U.N. agencies were so critical of the Hague Rules. *Id.* at 110, 115. The term "cargo countries" refers to countries that are primarily involved in producing and exporting the goods whereas the term "carrier countries" refers to countries that are primarily involved in shipping the goods.

41. *Id.* at 116.

42. *See* Hamburg Rules, *supra* note 39, arts. 21–22.

on the arbitration.[43] In essence, article 22 merely codifies the practice already in existence under the Hague Rules.

As previously mentioned, since the Carriage of Goods by Sea Act was enacted in 1936, Congress has neither updated COGSA nor ratified nor acceded to either the Hamburg Rules or the Hague-Visby Rules.[44] In the United States, conflicting interests between carriers and cargo owners have prevented the ratification of either the Hamburg or the Hague-Visby Rules.[45] Both interest groups however, agree that the existing rules need to be updated.[46]

C. *The Federal Arbitration Act and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.*

Congress enacted the Federal Arbitration Act (FAA)[47] to ensure the recognition and enforcement of arbitration. The FAA serves two purposes. First, it reverses the long standing hostility that U.S. courts have harbored towards arbitration agreements.[48] Second, it gives arbitration agreements the same level of importance as other contracts.[49] Chapter 1, section 1 defines maritime transactions as "charter parties, bills of lading of water carriers, agreements relating to wharfage," or any other matters in foreign commerce that are subject to admiralty jurisdiction.[50] Specifically, section 2 applies to maritime law and provides that:

> A written provision in any maritime transaction or a contract evidencing . . an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be

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43. *Id.* art. 22.

44. By 1984, only Hungary, Egypt, Uganda, Tanzania, Tunisia, Barbados, Morocco, Rumania, Chile, and Lebanon had ratified the Hamburg Rules. Belgium, Denmark, Poland, Ecuador, Singapore, Egypt, Sri Lanka, France, Sweden, Germany, Switzerland, Lebanon, Netherlands, Spain, Syria, Norway, Tonga, and the United Kingdom had ratified or acceded to the Hague-Visby Rules. *See* Diamond, *supra* note 27, at 113, 116.

45. Maritime Law Ass'n, *Revising the Carriage of Goods by Sea Act: Final Report of the Ad Hoc Liability Rules Study Group as Revised by the Ad Hoc Review Committee* 3 (1996) (on file with *Washington Law Review*).

46. *Id.*

47. 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–3 (1994)).

48. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219–20 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974).

49. *See Gilmer*, 500 U.S. at 24.

50. *See* 9 U.S.C. § 1.

> valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation any contract.[51]

Section 2 reflects Congress's intent to favor a liberal federal arbitration policy, notwithstanding contrary state procedural or substantive arbitration law.[52] Thus, the purpose of this section is to ensure that one federal substantive law will encompass all arbitration agreements that fall within this act.[53] Section 201 in chapter 2 states that foreign arbitral awards shall be recognized and enforced in the United States.[54] Similarly, chapter 3, section 301 requires recognition and enforcement of international commercial arbitration.[55]

On the international level, the United States signed the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") on December 29, 1970.[56] The New York Convention requires that all contracting states recognize and enforce each other's arbitral awards.[57] It also limits the defenses contracting countries may raise in order to oppose an arbitral award.[58] Article II(1) is of specific importance because it states:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.[59]

Therefore, one of the New York Convention's main purpose is to prevent and eliminate unnecessary litigation following arbitration.

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51. 9 U.S.C. § 2.

52. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

53. *Id.*

54. 9 U.S.C. § 201 (1994).

55. 9 U.S.C. § 301 (1994).

56. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 [hereinafter New York Convention]. As of 1994, 101 countries have ratified and acceded to the New York Convention. *See* William K. Slate II, *International Arbitration: Do Institutions Make a Difference?*, 31 Wake Forest L. Rev. 41, 44 (1996).

57. *See* Slate II, *supra* note 56, at 44.

58. *Id.*

59. New York Convention, *supra* note 56, art. II(1), 21 U.S.T. at 2519.

II. CASE LAW

Beyond the legislative backdrop, maritime arbitration and forum selection clauses are also governed by a history of case law. Because COGSA section 1303(8) does not explicitly state whether enforcing a bill of lading's forum selection or arbitration clauses lessens a carrier's liability,[60] case law in this area conflicts. In *M/S Bremen v. Zapata Off-Shore Co.*,[61] the U.S. Supreme Court held that reasonable foreign forum selection clauses in bills of lading should be enforced.[62] Although many courts enforce foreign forum selection clauses, the same approach has not been applied to foreign arbitration clauses in bills of lading. Some courts have held that arbitration clauses should be enforced, yet others hold that these clauses should be invalid per se.[63]

A. Forum Selection Clauses

In *M/S Bremen*, the U.S. Supreme Court recognized that forum selection clauses in bills of lading could be valid depending on the circumstances of each case. Although this case was not governed by COGSA, the Court stated that forum selection clauses should be accepted as a general policy unless the party involved could demonstrate with certainty that the choice of forum was unreasonable.[64]

In *Bremen*, the Court justified its holding by acknowledging several factors. The Court noted that the voyage was lengthy.[65] Consequently, the issue of jurisdiction would have been complicated because an incident giving rise to a legal claim had the potential of occurring at any point during the voyage.[66] Thus, eliminating the uncertainty of a potential forum and pre-establishing a forum for litigation was not unreasonable.[67] In addition, the Court found that the predictability of a

60. *See* 46 U.S.C. app. § 1303(8) (1994).

61. 407 U.S. 1 (1972).

62. *Id.* at 9–10.

63. *See, e.g.*, Citrus Mktg. Bd. of Israel v. M/V Ecuadorian Reefer, 754 F. Supp. 229 (D. Mass. 1990) (holding that COGSA did not invalidate arbitration clauses), *overruled by* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322 (1995); Organes Enter., Inc. v. M/J Khalij Frost, No. 88 Civ. 4710, 1989 WL 37660, at *5 (S.D.N.Y. Apr. 12, 1989) (finding that arbitration clauses in bills of lading regulated by COGSA are unenforceable per se), *overruled by* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322 (1995).

64. *Bremen*, 407 U.S. at 12–15.

65. *Id.* at 13.

66. *Id.*

67. *Id.*

forum was crucial to a maritime contract and an integral part of international business.[68]

As a result, the Court established the precedent for enforcing foreign forum selection clauses that had been freely negotiated by both parties.[69] The Court reasoned that it would not be responsible for placing a heavy burden on the future development of the United States' dealings in international commerce by insisting that all disputes be resolved by the U.S. legal system.[70] The Court further stated that restricting maritime litigation to the United States clashed with both the need to unburden overloaded courts and the need to recognize that businesses operate both locally and in world markets.[71]

Nearly twenty years later, the Court ruled on the enforceability of adhesive forum selection clauses not governed by COGSA, which are clauses that are not freely negotiated by the parties. In *Carnival Cruise Lines Inc. v. Shute*,[72] the Court upheld the enforceability of a forum selection clause written on a passenger ticket.[73] The clause required passengers to litigate all claims in Florida.[74] The Court rejected the argument that enforcing adhesive forum selection clauses contradicted *Bremen* by listing several reasons to support its position. First, a company such as "a cruise line has a special interest in limiting the fora in which it could be subject to suit."[75] Second, the forum selection clause spares the costs to the parties involved and the courts of pretrial motions for change of venue.[76] Third, as a consequence of sparing costs, customers enjoy a reduced price in their passage tickets.[77] Last, the Court stated that the selected forum, Florida, provided a "court of competent jurisdiction"[78] consistent with the Limitation of Vessel Owner's Liability Act (Limitation Act)[79] and traveling to Florida would not lessen a claimant's rights to a trial.[80]

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68. *Id.* at 13–14.
69. *Id.* at 11–12.
70. *Id.* at 8–9.
71. *Id.* at 12.
72. 499 U.S. 585 (1991).
73. *Id.* at 596–97.
74. *Id.* at 587–88.
75. *Id.* at 593.
76. *Id.* at 593–94.
77. *Id.* at 594.
78. *Id.* at 596.
79. 46 U.S.C. app. §§ 181–196 (1994).

The first case to address the validity of forum selection clauses in bills of lading governed by COGSA was *Indussa Corp. v. S.S. Ranborg*.[81] In *Indussa*, the Second Circuit held that COGSA section 1303(8) invalidated forum selection clauses because such clauses lessened the carrier's liability.[82] In *Indussa*, the bill of lading defined the carrier's principal place of business, Norway, as the forum for all dispute settlements.[83] Thus, the court reasoned that although a foreign country may apply COGSA or similar legislation—such as the Hague Rules—there was no guarantee that the foreign court would interpret the law in the same manner as U.S. courts.[84]

B. Arbitration Clauses

Although the U.S. Supreme Court has spoken on the enforceability of forum selection clauses in bills of lading, lower courts disagree on the validity of arbitration clauses despite their similarity to forum selection

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Section 183c of the Limitation Act states:

> It shall be unlawful for the . . . owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any . . . contract . . . any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner . . . from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such . . . contract . . . are declared to be against public policy and shall be null and void and of no effect.

46 U.S.C. app. § 183c.

80. *Shute*, 499 U.S. at 596.

81. 377 F.2d 200 (2d Cir. 1967), *overruled by* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322 (1995).

82. *Id.* at 203–04.

83. *Id.* at 201.

84. *Id.* at 203. Since the Second Circuit's decision, forum selection clauses have generally been invalidated by other courts. For example, relying on the Second Circuit, the Fourth and Fifth Circuits have invalidated forum selection clauses per se. *See* Conklin Garrett, Ltd. v. M/V Finnrose, 826 F.2d 1441 (5th Cir. 1987) (finding that although foreign forum selection clause established Finland as litigation forum, under COGSA district court should have retained subject matter jurisdiction over suit), *overruled by* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322 (1995); Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon, 642 F.2d 721 (4th Cir. 1981) (holding that "despite clause in bill of lading requiring litigation of suit in German court," where the bill was "not agreed to through hard bargaining," suit would be litigated in United States), *overruled by* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322 (1995).

clauses.[85] One reason for such differential treatment is section 2 of the FAA.[86] In *Indussa*, the court limited its decision to forum selection clauses and excluded arbitration clauses.[87] The court stated that although the FAA, "adopted in 1925 . . . validated a written arbitration provision 'in any Maritime transaction'. . . and defined that phrase to include 'bills of lading of water carriers'. . . COGSA, enacted in 1936 . . . made no reference to that form of procedure."[88] Therefore, in dictum, the court noted that because the FAA was supplemented after COGSA, the FAA should prevail as controlling law.[89]

In *Citrus Marketing Board of Israel v. M/V Ecuadorian Reefer*,[90] the U.S. District Court for the District of Massachusetts held that COGSA did not invalidate arbitration clauses per se.[91] Given the U.S. Supreme Court's inclination towards favoring forum selection clauses[92] as well as Congress's enactment of the FAA, the *Ecuadorian Reefer* court decided that arbitration clauses controlled by COGSA should be upheld.[93] The court reasoned that the FAA was sufficient to determine the validity of arbitration clauses regardless of whether COGSA governed the bills of lading.[94]

In contrast, other courts refuse to enforce arbitration clauses. In *State Establishment for Agricultural Product Trading v. M/V Wesermunde*,[95] the Eleventh Circuit Court of Appeals held that a clause mandating arbitration in London, England, violated COGSA because it lessened the carrier's liability.[96] In this case, the parties incorporated COGSA by contract because COGSA did not apply by its own force.[97] The Eleventh Circuit relied on *Indussa* to support its decision but disregarded the

85. Arbitration clauses clarify which laws and procedures shall regulate the bills of lading. *See* Lars Gorton et al., *Shipbroking and Chartering Practice* 155 (3d ed. 1990).

86. *See supra* notes 47–51 and accompanying text.

87. *See Indussa*, 377 F.2d 200.

88. *Id.* at 204 n.4.

89. *Id.*

90. 754 F. Supp. 229 (D. Mass. 1990).

91. *Id.* at 234.

92. *See supra* notes 64 and 73.

93. *Ecuadorian Reefer*, 754 F. Supp. at 233–34.

94. *Id.*

95. 838 F.2d 1576 (11th Cir. 1988), *overruled by* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322 (1995).

96. *Id.* at 1581–82.

97. *Id.* at 1582.

Indussa court's note restricting its holding to forum selection clauses and excluding arbitration clauses.[98]

In *Organes Enterprises, Inc. v. M/V Khalij Frost*,[99] the U.S. District Court for the Southern District of New York, although agreeing with the Eleventh Circuit's decision in *Wesermunde*, held that arbitration clauses in bills of lading regulated by COGSA were strictly unenforceable.[100] Although the court noted *Indussa*'s disclaimer,[101] it decided that the FAA did not pertain to arbitration clauses in bills of lading governed by COGSA.[102] The *Khalij Frost* court preferred such a sweeping decision because analyzing arbitration clauses case-by-case would defeat the purposes of COGSA either to achieve simplicity or uniformity.[103]

Although lower courts have taken different approaches to forum and arbitration clauses in bills of lading governed by COGSA, the U.S. Supreme Court has held that foreign arbitration clauses are enforceable in cases where the clauses were not found in bills of lading nor governed by COGSA.[104] In *Scherk v. Alberto-Culver Co.*,[105] Alberto-Culver sued Scherk for violating section 10(b) of the Securities Exchange Act of 1934.[106] Relying on the foreign arbitration clause in the contract, Scherk moved to stay the proceedings or to dismiss the suit.[107] Reversing the court of appeals, the Court held that it would violate public policy not to enforce arbitration clauses in well-negotiated private international commercial contracts.[108] The Court also stated that the Securities Exchange Act did not invalidate arbitration clauses.[109] In its reasoning, the Court relied on *Bremen* even though that case addressed forum selection clauses and not arbitration clauses.[110] The Court explained,

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98. *Id.* at 1581 (citing Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (1967), but disregarding *Indussa*, 377 F.2d at 204 n.4).

99. No. 88 Civ. 4710, 1989 WL 37660 (S.D.N.Y. Apr. 12, 1989).

100. *Id.* at *4.

101. *Id.* at *3.

102. *Id.* at *5.

103. *Id.*

104. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

105. 417 U.S. 506 (1974).

106. *Id.* at 509. The Securities Exchange Act is codified as amended at 15 U.S.C. § 78a (1994).

107. *Scherk*, 417 U.S. at 516 n.9. The clause stated that any dispute arising from the contract would be subject to arbitration in Paris and the parties agreed that the laws of Illinois would govern the arbitration. *Id.* at 509.

108. *Id.* at 516–17.

109. *Id.* at 513–14.

110. *Id.* at 518.

however, that arbitration clauses are closely related to forum selection clauses.[111] The Court found that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute."[112] Therefore, the Court focused on supporting international commercial contracts instead of concerning itself with whether foreign venues would properly interpret and enforce U.S. law.[113]

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*,[114] another case claiming statutory violation, the Court held that an arbitration clause establishing Japan as the arbitration forum was valid and enforceable.[115] Due to the concerns of "international comity, respect for the capacities of foreign . . . tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes," the Court enforced the arbitration clause, regardless of whether it might have decided otherwise in a domestic context.[116] The Court recently expanded the enforceability of foreign arbitration clauses from clauses found in privately negotiated international commercial contracts to those found in standard bills of lading governed by COGSA.[117]

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

1. *Facts*

Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer[118] involved a crushed cargo of oranges aboard a ship en route from Morocco to Massachusetts.[119] Bacchus Associates (Bacchus), a fruit wholesaler, contracted with Galaxie Negoce, S.A. (Galaxie), a fruit supplier, to purchase a shipload of fruit.[120] Bacchus chartered the ship M/V *Sky*

111. *Id.* at 519.
112. *Id.*
113. *Id.* at 515–19.
114. 473 U.S. 614 (1985).
115. *Id.* at 617, 640.
116. *Id.* at 629.
117. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322 (1995).
118. *Id.*
119. *Id.* at 2325.
120. *Id.*

Reefer to transport the fruit from Morocco to Massachusetts.[121] The owner of the ship was M.H. Martima, S.A. (Martima), but the vessel was time-chartered to Nichiro Gyogyo Kaisha, Ltd. (Nichiro).[122] After receiving the cargo from Galaxie, Nichiro issued Galaxie a form bill of lading.[123] According to the letter of credit, Galaxie tendered the bill of lading to Bacchus.[124] Once the cargo reached Massachusetts, Bacchus discovered that the oranges had been crushed, resulting in approximately one million dollars in damages.[125] Bacchus' marine cargo insurer, Vimar Seguros y Reaseguros, paid $733,442.90 in compensation and in turn became subrogated to Bacchus' rights.[126] Vimar Seguros y Reaseguros and Bacchus brought an in personam suit against Martima and an in rem suit against the vessel.[127] In order to compel Bacchus to comply with the bill of lading's arbitration clause, Martima filed a motion to stay the proceedings.[128] The U.S. District Court for the District of Massachusetts granted the motion and ordered the parties to arbitration. The First Circuit affirmed the district court's order to arbitrate.[129]

2. *Lower Courts' Holdings and Rationales*

The district court held that because of the FAA, the petitioners were required to arbitrate their claim in Japan even if the arbitration clause was "adhesive" and not freely contracted by the parties.[130] The court also stated that the arbitration would not lessen the carrier's liability under

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121. *Id.*

122. *Id.*

123. *Id.* The arbitration clause in the bill of lading stated:

(1) The contract evidenced by or contained in this Bill of lading shall be governed by the Japanese law.

(2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission . . . and the award given by the arbitrators shall be final and binding on both parties.

Id. at 2325.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 2326.

130. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, No. Civ. A. 91-13345WF, 1993 WL 137483, at *3 (D. Mass. Apr. 19, 1993), *aff'd*, 29 F.3d 727 (1st Cir. 1994), *aff'd*, 115 S. Ct. 2322 (1995).

COGSA section 1303(8).[131] At the petitioner's request, however, it certified for interlocutory appeal the issue of whether section 1303(8) of COGSA prevented the enforcement of arbitration clauses in bills of lading.[132]

On appeal, the U.S. Court of Appeals for the First Circuit affirmed the district court's decision.[133] The court of appeals, instead of focusing on whether foreign arbitration clauses lessened carriers' liability under COGSA, stated that section 1303(8) of COGSA did not render arbitration clauses unenforceable because the FAA was the controlling statute.[134] According to the court, the FAA prevailed over COGSA because it was reenacted eleven years after COGSA was enacted.[135] The court said that, in general, when two statutes conflict the most recently enacted statute takes precedence over the previously enacted statute.[136] In addition, a statute containing specific language supersedes a statute containing general language.[137] Furthermore, the court noted that COGSA section 1303(8) does not particularly mention forum selection or arbitration clauses.[138] The FAA, on the other hand, specifically addresses the enforceability of arbitration clauses in marine bills of lading.[139] Therefore, the court held that the arbitration clause in the bill of lading was enforceable and accepted the FAA as the controlling statute.[140] The U.S. Supreme Court granted certiorari.[141]

3. *The Majority Decision*

The U.S. Supreme Court affirmed the court of appeal's decision but declined to follow its analysis.[142] Instead of focusing on the potential

131. *Id.* at *2. This provision was enacted in order to protect shippers from carriers who presumably have a superior bargaining power. *See* Gilmore & Black, *supra* note 4, § 3-25, at 145–47.

132. *Sky Reefer*, 115 S. Ct. at 2326.

133. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 29 F.3d 727, 728 (1st Cir. 1994), *aff'd*, 115 S. Ct. 2322 (1995).

134. *Id.* at 730–31.

135. *Id.* at 732.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 571 (1994).

142. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2324 (1995). Justice Kennedy authored the opinion joined by Chief Justice Rehnquist and Justices Scalia,

conflict between COGSA and the FAA, the Court attempted to harmonize both statutes.[143] In order to accommodate both statutes, the Court answered two questions: (1) whether under COGSA, a foreign arbitration clause in a bill of lading lessens a carrier's liability;[144] and (2) whether foreign arbitrators will apply COGSA.[145]

The Court answered the first and most important question by holding that, when examined closely, COGSA section 1303(8) does not invalidate foreign arbitration clauses.[146] The Court provided four justifications for its holding. First, the Court stated that COGSA should be read as drawing a distinction between substantive and procedural rights.[147] The Court explained that COGSA section 1303(8) protects cargo owners from being subject to clauses that diminish their substantial legal rights.[148] Therefore, procedural matters that may encumber a cargo owner are not regarded as lessening a carrier's liability because a cargo owner's substantial rights are still intact. Second, the Court relied on its previous decision in *Carnival Cruise Lines, Inc. v. Shute*,[149] where the Court held that forum selection clauses do not infringe upon a claimant's substantial rights to a trial by court according to section 183 of the Limitation Act,[150] which is analogous to COGSA section 1303(8). Third, the Court stated that countries that follow the Hague Rules enforce foreign arbitration clauses in bills of lading.[151] Therefore, to keep in harmony with international practices, the United States should also enforce foreign arbitration clauses. Fourth, the Court stressed the need to heed Congress's enactment of the FAA, which requires the acknowledgment of arbitration clauses.[152] As to the second question, the Court answered that it would be premature to establish whether a Japanese arbitrator would apply COGSA or not and whether, as a result, petitioner would receive less protection.[153]

Souter, Thomas, and Ginsburg. Justice O'Connor filed an opinion concurring in the judgment. Justice Stevens filed a dissenting opinion, and Justice Breyer did not take part in the decision.

143. *Id.* at 2326, 2330.

144. *Id.* at 2326–29.

145. *Id.* at 2329–30.

146. *Id.* at 2326–29.

147. *Id.* at 2327.

148. *Id.*

149. 499 U.S. 585 (1991); *see also Sky Reefer*, 115 S. Ct. at 2327.

150. *Shute*, 499 U.S. at 596 (discussing 46 U.S.C. app. § 183c); *see also supra* note 79.

151. *Sky Reefer*, 115 S. Ct. at 2328.

152. *Id.* at 2329.

153. *Id.* at 2329–30.

4. Justice Stevens's Dissent

Justice Stevens preferred to adopt a traditional view of the law and characterized the majority's opinion as "overzealous."[154] He dismissed the majority's decision with three points. First, Justice Stevens noted that the original purpose of COGSA was to place cargo owners on the same footing as carriers, and the majority's interpretation of COGSA completely undermines this purpose.[155] Second, the majority's reliance on *Shute* was misplaced because that case did not involve COGSA and it involved a domestic forum selection clause.[156] Third, Justice Stevens stated that, although the United States has international obligations, these obligations should not extend to contracts of adhesion.[157]

Addressing the court of appeals' decision based on the FAA, Justice Stevens noted that the FAA and COGSA do not conflict.[158] The FAA provides that where there is no contrary law, arbitration agreements shall be enforced.[159] According to Justice Stevens, COGSA is the contrary law.[160]

Echoing Justice Stevens's concern for adhering to the original purpose of COGSA, the MLA proposed a revision of the statute. The revision, if adopted by Congress, would not only restore the protection to cargo owners allegedly removed by the Court in *Sky Reefer*, but would also increase the level of protection to cargo owners.[161]

III. MLA'S PROPOSED REVISION OF COGSA

In light of the *Sky Reefer* decision, the Maritime Law Association drafted a proposal to revise COGSA, especially section 1303(8). It is appropriate for the MLA to propose revisions to COGSA, and Congress should consider this proposal in light of the need for updating the existing law. Congress should not adopt the MLA's proposed revision concerning section 1303(8), however, because this revision would reverse the United States' first logical step towards international conformity regarding foreign arbitration clauses as evidenced in the *Sky*

154. *Id.* at 2337 (Stevens, J., dissenting).
155. *Id.* at 2334–35 (Stevens, J., dissenting).
156. *Id.* at 2335 (Stevens, J., dissenting).
157. *Id.* at 2336 (Stevens, J., dissenting).
158. *Id.* at 2336–37 (Stevens, J., dissenting).
159. 9 U.S.C. § 2 (1994).
160. *Sky Reefer*, 115 S. Ct. at 2337 (Stevens, J., dissenting).
161. Maritime Law Ass'n, *supra* note 45, at 41.

Reefer decision. Instead, COGSA should be modified to clearly state that foreign arbitration clauses in bills of lading will be enforced.

The MLA proposes to revise of section 1303(8) as follows,

> 8)(a) Any clause, covenant, or agreement in a contract of carriage relieving a ~~the~~ carrier or a ~~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 Act, shall be null and void and of no effect: *Provided*, That this subsection shall not apply to a provision in a service contract, as defined in section 3(21) of the Shipping Act of 1984, to the extent that the provision affects only the rights and liabilities of the parties who entered into the service contract. A benefit of insurance in favor of a ~~the~~ carrier, or similar clause, shall be deemed to be a clause relieving a ~~the~~ carrier from liability.
>
> (b) Any clause, covenant, or agreement made before a claim has arisen that specifies a foreign forum for litigation or arbitration of a dispute governed by this Act shall be null and void and of no effect if:
>
> (i) the port of loading or the port of discharge is or was intended to be in the United States; or
>
> (ii) 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;
>
> provided, however, that if a clause, covenant, or agreement made before a claim has arisen specifies a foreign forum for arbitration of a dispute governed by this Act, then a court, on the timely motion of either party, shall order that arbitration shall proceed in the United States.[162]

The proposed revision changes the reference to "the carrier" to "a carrier" to ensure that the rights and responsibilities of all parties involved in the transportation of the goods are governed by the Act.[163] Furthermore, the proposal also stipulates that section 1303(8) shall not apply to provisions in service contracts.[164] A service contract allows parties with equal bargaining power to reduce the carrier's liability

162. *Id.* app. 2, at 14. The underlined portion is the recommended amendment.

163. *Id.* app. 1, at 13.

164. *Id.*

below what was permitted by COGSA.[165] According to the proposed proviso, however, the reduced liability is binding only to the contracting parties.[166] A third party taking part in any carrying of the goods, such as stevedores or terminal operators, may rely on COGSA for protection.[167]

The second paragraph is the most significant addition. Whereas the original statute was broad and general, this revision explicitly addresses forum selection and arbitration clauses.[168] The proposed revision renders any forum selection clause or any foreign arbitration clause unenforceable in cases where the goods are loaded or discharged—or intended to be loaded or discharged—in a U.S. port, or if the carrier receives or delivers—or intended to receive or deliver the goods—in the United States.[169] In instances where the case is brought to a U.S. court because of in rem jurisdiction, this provision would not apply. Similarly, in cases where COGSA is not applicable by its own right, but is specifically contracted by the parties, this section would not apply because none of the loading, discharging, receiving, or delivering of the goods took place in the United States. When the foreign arbitration clause is held to be unenforceable, the parties may still arbitrate in the United States.[170] If neither party accepts arbitration in the United States, then the case will be tried by a U.S. district court without any possibility of arbitration.[171]

This proposed revision to section 1303(8) is not a complete bar to foreign arbitration clauses.[172] The parties may still decide upon foreign arbitration after a claim has arisen.[173] In addition, a cargo owner willing to consent to foreign arbitration may do so through appropriate contracting.[174]

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165. *Id.* at 39.

166. *Id.*

167. *Id.* at 40. Stevedores or terminal operators are employed by cargo owners to transport goods into a vessel. Generally, they work on the docks and are not considered to be mariners.

168. *Id.* app. 1, at 14.

169. *Id.* at 41.

170. *Id.* at 42.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

IV. ANALYSIS OF THE OBJECTIONS TO THE MLA PROPOSAL

There are several compelling reasons for objecting to the MLA proposal. First, the *Sky Reefer* decision should not be superseded because the Court aligned U.S. commercial practices with those of other main countries. Second, the United States should act in accordance with general international commercial practices to harmonize and expedite international proceedings.[175] Third, the MLA proposal violates the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[176]

A. Sky Reefer *Was Correctly Decided*

In *Sky Reefer*, the U.S. Supreme Court correctly held that COGSA does not render foreign arbitration clauses unenforceable. Also, the Court appropriately supported its holding with an analysis of the *Carnival Cruise* case because of the similarities between COGSA section 1303(8) and section 183c of the Limitation Act. By comparing these two statutes, it is apparent that the language in COGSA section 1303(8) "is far less susceptible to an interpretation covering forum selection clauses" than section 183c of the Limitation Act.[177] Section 183c is divided in two parts. The first part disallows general exculpatory clauses, and the second part prohibits clauses that specifically lessen a claimant's right to a trial by court.[178] The second part could very well be read as nullifying forum selection clauses because it prohibits any clause that lessens the rights of the claimant.[179] However, COGSA section 1303(8) is analogous only to the first part of section 183c.[180] Therefore, if the Limitation Act was construed as allowing forum selection clauses, then it would be impossible to find that COGSA section 1303(8) prohibits forum selection clauses as well.[181]

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175. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

176. *Cf.* New York Convention, *supra* note 56.

177. *See* Brief Amicus Curiae of American Steamship Owners Mutual Protection and Indemnity Association at 9, Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322 (1994) (No. 94-623).

178. 46 U.S.C. app. § 183c (1994).

179. § 183c; *see supra* note 79.

180. 46 U.S.C. app. § 183c; *see supra* note 79.

181. 46 U.S.C. app. § 183c; *see supra* note 79.

The Court distinguishes between substantive and procedural rights.[182] The Court correctly points out that if travel costs are enough to lessen a carrier's liability, then foreign arbitration or forum selection clauses within certain jurisdictions in the United States should also be forbidden because a claimant from Seattle would incur travel expenses to arbitrate or litigate in New York.[183] Conversely, a claimant from Seattle would incur fewer travel expenses if the bill of lading stipulated arbitration in Vancouver, Canada.

To a great extent, however, procedural rights have just as much importance as substantive rights. Most likely, small cargo owners will not find it worthwhile to invest money on foreign arbitration when the expenses of such arbitration exceed the value of the cargo. Although insured cargo owners would generally recover from insurance companies,[184] there could be circumstances where small cargo owners will not insure their cargo. In most cases, however, insurance companies would be the ones to pursue arbitration in foreign countries.[185] Most likely, insurance companies would try to incur arbitration expenses all at once by accumulating small claims until it added to a worthwhile amount.

Some of the expenses involved in going to a foreign arbitration include high arbitration fees, attorney fees, and basic travel.[186] These expenses are not so unreasonable, however, as to lessen a carrier's liability. London, England has customarily been the choice of forum due to its historical maritime expertise.[187] As a result, carriers and shippers have customarily chosen London even if it was inconvenient and

182. *Sky Reefer*, 115 S. Ct. at 2327.

183. *Id.* at 2327–28.

184. It is the practice of cargo insurance companies to pay cargo owners immediately and file a suit against the carriers as subrogees. In cargo damage disputes, the parties will often be the carrier and the insurance company. *See* Gilmore & Black, *supra* note 4, at 190–91.

185. In maritime insurance contracts, there are subrogation clauses that may read:

> The Underwriters shall be subrogated to all the rights which the Assured may have against any other person or entity, in respect of any payment made under this Policy, to the extent of such payment, and the Assured shall, upon the request of the Underwriters, execute and shall deliver such instruments and papers as the Underwriters shall require and do whatever else is necessary to secure such rights In the event of any agreement or act, past or future, by the Assured, whereby any right of recovery of the Assured against any person or entity is released or lost to which the Underwriters on payment of loss would be entitled to subrogation, but for such agreement or act, the Underwriters shall be relieved of liability under this Policy to the extent that their rights of subrogation have been impaired thereby . . . .

2 Alex L. Parks, *The Law and Practice of Marine Insurance and Average* app. 22, at 1331 (1987).

186. *See, e.g.*, UNCITRAL Arbitration Rules, art. 38(e) (1977).

187. Edgar Gold, *Maritime Transport* 72 (1981); *see* Gorton et al., *supra* note 85, at 129.

expensive for them to arbitrate in England.[188] Although the potential for abuse exists, carriers' choice of forum is not necessarily aimed at inconveniencing cargo owners. The U.S. Supreme Court probably decided *Sky Reefer* in light of the traditional practice of carriers and their choice of forum. Arguably, the Court could be applying the custom of arbitrating in London blindly. However, when considering the costs involved in arbitrating in different parts of the United States, the cost of foreign arbitration does not seem to be so unreasonable. In addition, any type of arbitration or litigation will have its costs.[189]

Although the Court treated the issue of whether foreign arbitrators will apply COGSA as premature, COGSA and the Hague Rules are essentially the same. The Japanese version of the Hague Rules provides that if damages arise from the acts or omissions of the stevedores employed by the shipper of goods, the carrier is not liable for damages to the goods.[190] COGSA, on the other hand, holds the carrier solely responsible for the stowing of carried goods.[191] The *Sky Reefer* Court correctly noted however that COGSA section 1304(2)(i) provides for a defense in cases of any loss or damage to the goods arising from acts or omissions of the shipper or any agent or representative of the shipper.[192]

B. U.S. Law Should Adapt to the Changing International Maritime Arena

It is clear that the MLA has cargo owners' interest in mind, but it is also clear that the proposed revision is really an attempt to resuscitate the U.S. maritime legal business that has been in decline for the last ten years.[193] After the recent *Sky Reefer* decision, U.S. maritime lawyers will see even less business.[194] Although concern for the U.S. legal business is very persuasive, it is also important to realize that international events are shaping commerce in a manner that requires the United States to

188. *See* Gold, *supra* note 187, at 72.

189. When it comes to litigation costs, the parties involved must pay for court charges, counsel fees, interest losses, losses due to inflation, costs for and in connection with witnesses, etc. In most countries, winning parties may get their attorneys fees reimbursed. In the United States, however, courts do not award attorney's fees as a regular practice. *See* Gorton et al., *supra* note 85, at 127.

190. Hague Rules, *supra* note 24, app. 112, art. 3(1).

191. 46 U.S.C. app. § 1303(2) (1994).

192. Vimar Seguors y Reaseguors, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2329 (1995) (citing 46 U.S.C. app. § 1304(2)(i) (1994)).

193. *See* William Tetley, *The "Sky Reefer" Hamburg Rules Address Jurisdiction*, Fairplay, Oct. 1995, at 26, 26.

194. *Id.*

discard its old suspicions of foreign courts and update its participation. As one commentator notes, "English lawyers may be accused of being behind the times . . . . [But] [i]t is . . . reassuring to note that in at least one respect the Americans are behind . . . namely in the development of their system of international arbitration law."[195] Without complete participation, the United States is handicapped in its attempt to negotiate and enforce international commercial agreements. As the Court in *Sky Reefer* recognized, businesses once essentially local now function in foreign markets.[196] Logically, the Court stated that the general skepticism against foreign arbitration "must give way to contemporary principles of international comity and commercial practice."[197]

C. *The MLA's Proposal Violates the New York Convention*

Invalidation of foreign arbitration clauses contradicts the New York Convention. Article 2(1) of the New York Convention states that each contracting state shall recognize arbitration clauses.[198] However, as Justice Marshall stated, "[A]n Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ."[199] Thus, when it is impossible to reconcile international law and domestic law, a congressional act will preempt an earlier international law.[200] Courts traditionally do not favor complete repudiation of international law unless Congress clearly demonstrates that it intended to supersede the previous existing agreement.[201] As a

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195. *See* Jonathan Goodliffe, *United States Approach to Foreign Arbitration*, Lloyd's List Int'l, Aug. 5, 1995, at 8, 8.

196. Vimar Seguors y Reaseguors, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2328 (1995) (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972)).

197. *Id.* at 2328.

198. More specifically, article 2 states:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

New York Convention, *supra* note 56, art. 2(1); *see* Andreas F. Lowenfeld, *International Litigation and Arbitration* 187 (1993).

199. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

200. Federal statutes do not "repeal" international law. It is incorrect to say that Congress has the power to "repeal treaties." However, acting within its legislative authority under the Constitution, Congress may enact laws that are inconsistent with international law. The courts will give effect to the rule later in time. *See* Louis Henkin, *Foreign Affairs and the Constitution* 164, 413–14 (1972).

201. *See Murray*, 6 U.S. at 118.

result, the proposed revision to COGSA section 1303(8) could be seen as an exception to the New York Convention because the language of the revision is restricted to cases where the loading and the discharging of the goods take place in a U.S. port.[202] The MLA's proposed revision does not prohibit the enforcement of foreign arbitration clauses in all cases where COGSA is applicable.[203] Nonetheless, the United States will not be relieved of its international obligations nor of the consequences of violating such obligations.[204] If Congress implements the proposed revision to section 1303(8) of COGSA, the courts would be obligated to enforce the revision, but the United States would be placed in an awkward position when it came to its international responsibilities. Upholding the *Sky Reefer* decision would not violate the New York Convention; thus, the United States would not face international scorn.

V. ANALYSIS OF THE REASONS SUPPORTING THE MLA PROPOSAL

One argument for adopting the MLA proposal is to ensure that cargo owners will have the option to contract with U.S. carriers. A second argument is that there is little guarantee that a foreign court will be able to apply U.S. law in the same manner that U.S. courts would. Third, there is an argument that U.S. carriers may purposefully want to arbitrate in foreign countries.

A. Cargo Owners Are Not at the Mercy of Carriers

Proponents of the new revision argue that the *Sky Reefer* decision will have severe detrimental effects. Some of the foreseeable effects of this decision are that some big carrier companies may change their vessel flags for foreign flags of convenience.[205] Because U.S. carriers will benefit from changing their flags, U.S. cargo owners will lose their only chance of contracting with carriers that would choose American

202. *See* Maritime Law Ass'n, *supra* note 45, app. 1, at 14.

203. *Id.*

204. *See, e.g.*, Advisory Opinion on Treatment of Polish Nationals in Danzig, 1932 P.C.I.J. (ser. A/B) No. 44, at 22 (Feb. 4, 1932).

205. Recently, there has been a movement of major U.S. steamship companies such as Sea-Land Services, Inc. and American President Cos. to document their new ships under foreign flags of convenience and to redocument some of their existing ships. *See* Liz Atwood, *Maritime Institute Scratches for New Training Niche as U.S. Shipping Declines*, Baltimore Sun, Jan. 6, 1994, at 7B. As of 1990, 341 American ships have been sailing under foreign flags. *See* John McPhee, *A Reporter at Large: Looking for a Ship - I*, New Yorker, Mar. 26, 1990, at 68.

arbitration forums such as New York. United States carriers could presumably be looking for a forum that is inconvenient to claimants, has expensive arbitration fees, slow turn around, a tendency towards favorable rulings for carriers, and applies favorable evidentiary rules.

Despite these possibilities, the *Sky Reefer* decision does not restrict freedom of contract. Although bills of lading will be issued with the arbitration clause already in place before the cargo owner or the shipper has a chance to negotiate, cargo owners are not entirely at the mercy of carriers.[206] The standard procedure for cargo owners to enter into a contract with a carrier is to "place an order on the market."[207] Cargo owners will place this order with their shipbrokers who in turn will circulate it to the carriers' brokers.[208] Small cargo owners may have only one or two brokers that act as their exclusive agents.[209] Because these exclusive brokers will most likely be aware of the needs and concerns of the cargo owner, it is very likely that the brokers will try to find the carrier that is most beneficial to the cargo owner, especially when it comes to arbitration clauses. Therefore, regardless of the size and power of cargo owners, bills of lading are not absolutely inflexible. Shippers are not as powerless as they may seem. The United States has a strong shipping interest group supplemented by powerful insurance companies.[210] In addition, because there is an oversupply of carriers,[211] it is more likely that carriers will change their bills of lading in accordance with shippers' desires in order to remain competitive.

Alternatively, a cargo owner could obtain a service contract from a carrier and stipulate the United States as the only forum for dispute.[212] However, this is only possible for big cargo owners such as Du Pont, J.C. Penney, Sears, and Wal-Mart because they have equal footing with

206. *See* Gorton et al., *supra* note 85, at 21–24.

207. *Id.* at 18.

208. *Id.* A shipbroker is an intermediary through which the cargo owners and the carriers negotiate. Shipbrokers are a source of information. They should be aware of the current market and be able to give accurate advice on the status of the competition. Normally, shipbrokers do not have the authority to finalize an agreement. However, shipbrokers have the duty to participate actively in the negotiations and to advise their respective employers. *Id.* at 28–29.

209. *Id.* at 24.

210. *See* Leslie J. Buglass, *Marine Insurance and General Average in the United States* 3 (3d ed. 1991).

211. It is predicted that the shipping market will enter into recession. Carriers will prefer to enter into long term engagements and freight levels will decrease. Charterers will try to obtain lower freight levels and as soon as freight start to increase the shipping market will collapse. *See* Gorton et al., *supra* note 85, at 15.

212. Maritime Law Ass'n, *supra* note 45, at 54.

carriers when it comes to bargaining power.[213] Consequently, smaller companies would still find themselves in a more vulnerable position, but they could also insist on service contracts from carriers through a trickle down effect.[214]

B. Foreign Arbitration Panels Will Not Handicap U.S. Cargo Owners

Another great point of contention is the issue of fair application of law by the foreign arbitrators.[215] Carriers could supposedly choose forums depending on the arbitration panels that applied rules inherently favorable to them. Arguably, differences in the civil and common law tradition may bring forth decisions that are completely incompatible with U.S. arbitrated decisions. In such instances, U.S. courts are open for appeal when the law applied was inconsistent with COGSA.[216] Although appealing would increase costs, the avenue for remedy is still available.

Foreign arbitration panels, however, will probably not decide cases in a manner that is extremely contrary to U.S. practice. Arbitration panels are generally composed of three arbitrators, one of whom is an umpire.[217] It is a common principle of arbitration that each party nominates one arbitrator, who in turn collaborate with each other by nominating the umpire.[218] Because it is the parties themselves that choose the arbitrators, it is logical that they will be choosing arbitrators that have a history of favoring either carrier's or cargo owner's interests. Therefore, one arbitrator will be inclined to favor carriers, the second, cargo owners. The third arbitrator or umpire will probably be neutral because the arbitrators make a joint effort in choosing the umpire. Furthermore, because arbitration panels are an important part of maritime commerce,[219] most maritime nations enforce arbitration clauses.[220] Thus, maritime arbitrators should be quite aware of the national differences and the international effects of maritime treaties. Also, it is improbable that foreign arbitrators will always apply the law

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213. Robert Mottley, *Beware of foreign arbitration*, Am. Shipper, Mar. 1, 1996, at 52, 52.

214. *Id.*

215. *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2329–30 (1995).

216. New York Convention, *supra* note 56, art. 5.

217. Gorton et al., *supra* note 85, at 128.

218. *Id.*

219. Arbitration is often preferred due to the costs, the time, and the "secrecy" of the procedures. The parties generally prefer not to solve their problems in a public proceeding. *Id.* at 129.

220. *See Sky Reefer*, 115 S. Ct. at 2328.

in a manner that is more favorable to carriers. Just as foreign arbitrators may benefit carriers, they may also apply COGSA in a manner that is stricter than U.S. courts would, thus benefiting cargo owners or shippers. Similarly, there is no guarantee that every panel of U.S. arbitrators would apply COGSA rules in the same manner. Therefore, cargo owners should not fear that foreign arbitration panels will misapply the law and only favor carriers because cargo owners are not at a complete disadvantage.

C. *U.S. Carriers Will Probably Not Want To Arbitrate in Foreign Countries*

The third reason supporting the MLA proposal is the claim that U.S. carriers will intentionally include foreign countries as the situs for their arbitration. In fact, carriers will probably not include a foreign country as their arbitration forum because carriers may be wary of choosing fora not accustomed to applying COGSA.[221] If the carrier was to choose a forum that decided to enforce the Hague-Visby or the Hamburg Rules and did not look favorably to the five hundred dollar package limitation, then the carrier could be liable for more damages.[222] Therefore, a carrier is much better off in the United States, where COGSA's five hundred dollar package limitation is enforced.

In addition, regarding rights to subpoena, if an accident that damaged cargo occurred in the United States, then the carrier may be without witnesses at trial because foreign arbitration forums have no right to subpoena U.S. citizens.[223] Furthermore, once in foreign arbitration, the plaintiff is not entitled to sue third parties responsible for certain methods of carriage such as trucking companies, feeder vessels, and barges.[224] Therefore, the carrier would be completely liable for damages caused by other third parties. Carriers would probably not want to give up the right to implead third party defendants. Consequently, carriers will find it more beneficial to include the United States as their forum rather than a foreign country.

The need to reverse "centuries of judicial hostility to arbitration agreement"[225] and the need to participate harmoniously in the ever

221. *See* Mottley, *supra* note 213, at 52.

222. *Id.*

223. *Id.*

224. *Id.*

225. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 (1974).

expanding international trade[226] overshadow any prejudiced view of the United States' role as a leading country in international commercial dealings. The *Sky Reefer* decision finally aligned U.S. commercial practices with those of the rest of the world. The *Sky Reefer* Court, when stating that opposition to arbitration and foreign forum selection clauses "has little place in an era when . . . businesses once essentially local now operate in world markets,"[227] was making an observation that has long been patent. Thus, reasons for the approval of the MLA proposal are not compelling enough to preempt much more pressing needs.

VI. CONCLUSION

As a matter of protecting the maritime legal market, it would be beneficial to confine arbitration within the United States. However, the maritime legal market is only a small fraction of the total American legal market. No substantial legislative change should be effectuated merely to protect a small interest group. In addition, when considering the unified direction that the international maritime commercial forum is taking, it would be detrimental to the United States as a whole not to participate in the changes. The *Sky Reefer* decision finally harmonized U.S. law regarding arbitration clauses with that of the rest of the international community. If Congress adopts the Maritime Law Association's proposed revision of COGSA section 1303(8), Congress would simply perpetuate a medieval approach to arbitration clauses that has finally been provided an opportunity to change.

226. *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2328 (1995).

227. *Id.* (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972)).