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COGSA AND CHOICE OF FOREIGN LAW CLAUSES IN BILLS OF LADING

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I. INTRODUCTION

A German shipper enters into a bill of lading contract of carriage with a Norwegian carrier for the transportation of cargo from Germany to the United States. The Clause Paramount of the carrier's bill of lading incorporates Norway's "Hague-Visby Rules,"[1] which impose a limitation of liability in excess of the $500 per-package limitation mandated by the Carriage of Goods by Sea Act (COGSA).[2] A separate Jurisdiction Clause in the bill of lading provides for the exclusive jurisdiction of Norwegian courts.

The cargo is damaged during the voyage and the American consignee brings suit against the Norwegian carrier in an American

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1. *See* International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155 [hereinafter Hague Rules], *reprinted in* 6 BENEDICT ON ADMIRALTY 1-2.1 to -19 (Michael M. Cohen et al. eds., 7th ed. 1992) [hereinafter BENEDICT]; Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1977 RTA7 49 [hereinafter the Visby Amendments], *reprinted in* BENEDICT, *supra*, at 1-25 to -32.1; Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, Cmnd 70969, *reprinted in* BENEDICT, *supra*, at 1-32.2 to .5. The Hague Rules and the two Protocols are hereinafter collectively referred to as the "Hague-Visby Rules." The Hague-Visby Rules provide for a limitation of liability amount of 666.67 "units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher." *See* BENEDICT, *supra*, 1-32.2. The unit of account is the Special Drawing Right (SDR) as calculated "according to the method of valuation applied by the International Monetary Fund." *Id.* at 1-32.2 to .3. This amount in turn "shall be converted into national currency on the basis of the value of that currency on the date to be determined by the law of the Court seized of the case." *Id.* at 1-32.3.

The United States is a signatory to the Hague Rules, and has essentially enacted these rules, with some minor differences, in the form of COGSA. GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 3-24, at 144 (2d ed. 1975); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 9-13 (1987). The United States, however, is not a signatory to either of the subsequent Protocols. *See* BENEDICT, *supra*, at 1-25 to 1-32.5.

2. 46 U.S.C. app. §§ 1300-1315 (1988).

court. The consignee contends, *inter alia*, that Norwegian law governs the litigation and subjects the carrier to the higher per-package limitation of liability contained in the Hague-Visby Rules.[3] Should the consignee's contention prevail?

Numerous courts have addressed the validity of foreign law clauses in bills of lading subject to COGSA as a matter of law;[4] however, little conceptual consistency has emerged. Several circuit court decisions have summarily invalidated foreign choice of law and forum selection clauses in bills of lading.[5] Other courts have attempted to delineate a narrow set of circumstances under which such clauses are invalid. Still other courts have partially enforced foreign choice of law clauses that incorporate foreign regimes with limitation of liability amounts greater than COGSA's $500 limitation.[6]

This article begins by reviewing the pertinent language of COGSA, the policies underlying COGSA, and the related case law. The article concludes that when COGSA applies as a matter of law, foreign choice of law clauses are invalid per se.

II. THE STATUTE

COGSA applies to every bill of lading, or similar document of title, evidencing a contract for the "carriage of goods by sea to or from ports of the United States in foreign trade."[7] "[C]arriage of goods" is defined as the "period from the time when the goods are loaded on to the time when they are discharged."[8] All such bills of lading "shall have effect subject to the provisions of [COGSA]."[9] Thus, COGSA applies under these circumstances as a matter of law, or *ex proprio*

3. This article is concerned only with the specific issue of the validity of foreign law clauses in COGSA bills of lading. Cases dealing with foreign forum clauses are only discussed in the context of the validity of foreign *law* clauses. The question whether a foreign *forum* clause is enforceable in a bill of lading compulsorily subject to COGSA has been adequately reviewed elsewhere. *See, e.g.*, Andrew Waters, *The Enforceability of Forum Selection Clauses in Maritime Bills of Lading: An Update*, 15 TUL. MAR. L.J. 29 (1990).

4. This article does not directly address the question of the validity of a foreign law clause when COGSA does not compulsorily apply. For citations to related cases, see *infra*, note 84 and accompanying text.

5. *See, e.g.*, Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, 1967 AMC 589 (2d Cir. 1987); Union Ins. Soc'y of Canton v. S.S. Elikon, 642 F.2d 721, 1982 AMC 588 (4th Cir. 1981); Conklin & Garrett, Ltd. v. M/V Finnrose, 826 F.2d 1441, 1988 AMC 318 (5th Cir. 1987).

6. *See, e.g.*, Associated Metals & Minerals Corp. v. M/V Arktis Sky, 1991 AMC 1499 (S.D.N.Y. 1991); Francosteel Corp. v. M/V Deppe Europe, 1990 AMC 2962 (S.D.N.Y. 1990); Daval Steel Prod. v. M/V Acadia Forest, 683 F. Supp. 444, 1988 AMC 1669 (S.D.N.Y. 1988).

7. 46 U.S.C. app. § 1300.

8. *Id.* § 1301(e).

9. *Id.* § 1300.

vigore.[10]

Section 1303(8) of COGSA prohibits bill of lading clauses that relieve a carrier from liability for its negligence or fault, or that lessen a carrier's liability "otherwise than as provided" in COGSA.[11] Section 1304(5), which both establishes a general limitation on a carrier's liability for lost or damaged cargo and narrowly defines exceptions to that limitation, provides:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. . . .
>
> *By agreement* between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That [sic] such maximum shall not be less than the figure above-named. In no event shall the carrier be liable for more than the amount of damage actually sustained.[12]

Finally, § 1305 permits a carrier to increase its COGSA responsibilities and liabilities or to surrender any of its rights and immunities:

> [a] carrier should be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.[13]

Two broad conclusions may be drawn from the express language of COGSA. First, Congress, in enacting COGSA, laid down "positive rules of law" that govern the rights and responsibilities of all carriers and shippers that enter into contracts for carriage of goods to or from ports of the United States.[14] Thus, any term in a bill of lading compulsorily subject to COGSA that is contrary to any provision of

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10. SCHOENBAUM, *supra* note 1, § 9-18. COGSA also applies "to carriage of goods between U.S. ports if the parties expressly" incorporate COGSA into the bill of lading. *Id.*

11. 46 U.S.C. app. § 1303(8).

12. *Id.* § 1304(5) (first emphasis added).

13. *Id.* § 1305.

14. *See* GILMORE & BLACK, *supra* note 1, § 3-25. In contrast, the Harter Act, 46 U.S.C. app. §§ 190-196 (1988), which, in the wake of COGSA, only governs the rights and responsibilities of carriers and shippers before loading and after discharge, contains no such

COGSA must necessarily be deemed null and void.[15]

Second, COGSA allows for an increase in a carrier's liability or responsibility only when the parties specifically intend such a result. As the statute states, a carrier may be held liable for an amount greater than $500 only "[b]y agreement."[16] Section 1305 operates to increase a carrier's responsibility or to deprive a carrier of its COGSA rights only if the carrier so intended and if the bill of lading so reflects.[17]

III. THE CASE LAW

A. *Indussa and Its Progeny*

Indussa Corp. v. S.S. Ranborg,[18] *Union Insurance Society of Canton v. S.S. Elikon*,[19] and *Conklin & Garrett, Ltd. v. M/V Finnrose*,[20] are the leading and most often-cited decisions relating to the validity of foreign jurisdiction clauses in COGSA bills of lading. While the holdings of these cases concern only the validity of foreign *forum* clauses, this fact does not diminish their relevance to the issue of the validity of foreign *law* clauses. As more fully discussed below, these decisions

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positive rules of law. *Id.* Instead, it merely proscribes certain terms in bills of lading. *See* 46 U.S.C. app. §§ 190-191 (1988).

15. *See* 46 U.S.C. app. § 1312; Brown & Root, Inc. v. M/V Peisander, 648 F.2d 415, 420-21, 1982 AMC 929, 935-36 (5th Cir. 1981).

16. Neither COGSA nor its legislative history defines the term "agreement." Black's Law Dictionary defines "agreement," *inter alia*, as "the coming together in accord of two minds on a given proposition." BLACK'S LAW DICTIONARY 67 (6th ed. 1990). The test, therefore, is whether the parties in fact contemplated and intended a higher limitation of liability to govern their relationship.

17. It has been held, however, that a carrier may *not* relinquish its right to limit its liability to actual damages as provided in § 1304(5). *See* Holden v. S.S. Kendall Fish, 262 F. Supp. 862, 865-66, 1967 AMC 327, 330-31 (E.D. La. 1966), *aff'd*, 395 F.2d 910, 1968 AMC 2080 (5th Cir. 1968).

18. 377 F.2d 200, 1967 AMC 589 (2d Cir. 1967).

19. 642 F.2d 721, 1982 AMC 588 (4th Cir. 1981).

20. 826 F.2d 1441, 1988 AMC 318 (5th Cir. 1987). While no Supreme Court or circuit court decision has addressed the precise issue of the validity of foreign law clauses in COGSA bills of lading, the Supreme Court's interpretation in 1900 of the Harter Act, 46 U.S.C. §§ 190-196, may be instructive. The Harter Act was the predecessor of COGSA and is in substantial part similar to COGSA. *See* GILMORE & BLACK, *supra* note 1, at 148. In *Knott v. Botany Worsted Mills*, the Supreme Court invalidated a foreign law clause in a bill of lading subject to the Harter Act; the Court reasoned that the Harter Act "overrides and nullifies the stipulations of the bill of lading that the carrier shall be exempt from liability for such negligence, and that the contract shall be governed by the law of the ship's flag." 179 U.S. 69, 76 (1900). It is also instructive that both the *Indussa* and *Elikon* courts, in varying degrees, relied on *Knott* in striking down the foreign forum clauses confronting them. *See Indussa*, 377 F.2d at 203, 1967 AMC at 594; *Elikon*, 642 F.2d at 724 n.2, 1982 AMC at 591 n.2.

emphatically reject foreign forum clauses based on the conclusion that Congress intended all disputes arising from COGSA bills of lading to be governed by COGSA alone. This interpretation of congressional intent is even more pertinent to the question of the enforceability of a foreign law clause.

In *Indussa*,[21] Indussa, a New York corporation, was a consignee of nails and barbed wire shipped by a Belgian agency from Antwerp to San Francisco.[22] Indussa brought an action against the Norwegian carrier, alleging that the shipment had been damaged to the extent of $2600.[23] The Clause Paramount of the bill of lading mandated application of "the Hague Rules . . . as enacted in the country of shipment."[24] A U.S. Trade Clause provided that, in the event the contract of carriage was subject to COGSA, COGSA would govern before loading, after discharge, and during the entire period of time the goods were in the carrier's custody.[25] Finally, a Jurisdiction Clause provided that any dispute arising under the bill of lading would be decided in the country where the carrier had its principal place of business, and that the law of such country, in this case, Norway, would apply except as provided elsewhere in the bill of lading.[26] The district court granted the carrier's motion to dismiss for lack of jurisdiction based on the Jurisdiction Clause.[27]

Overruling its prior decision in *William H. Muller Co. v. Swedish American Line*,[28] the United States Court of Appeals for the Second Circuit reversed the district court's decision and remanded. The court reasoned that to uphold a clause in a bill of lading making any claim for damages "triable only in a foreign court . . . [would] lean[ ] too heavily on general principles of contract law" and would give inadequate effect to U.S. law governing bills of lading for shipments to and from the United States.[29]

Writing for the *Indussa* court, Judge Friendly broadly interpreted

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21. 377 F.2d at 200, 1967 AMC at 589.
22. *Id.*, 1967 AMC at 590.
23. *Id.* at 200-01, 1967 AMC at 590-91.
24. *Id.*, 1967 AMC at 590.
25. *Id.* at 201, 1967 AMC at 590-91.
26. *Id.*, 1967 AMC at 591.
27. *Id.*, 1967 AMC at 591-92.
28. 224 F.2d 806, 1955 AMC 1687 (2d Cir.), *cert. denied*, 350 U.S. 903, 1955 AMC 2406 (1955). *Muller* involved a bill of lading for a shipment from Sweden to Philadelphia and was, therefore, subject to COGSA. *See id.* at 807, 1955 AMC at 1687. Nevertheless, the court gave effect to a clause stipulating to the application of Swedish law and the exclusive jurisdiction of Swedish courts. *See id.* at 808, 1955 AMC at 1690.
29. *Indussa*, 377 F.2d at 202, 1967 AMC at 593.

the language of COGSA as forbidding American courts from subjecting bills of lading to foreign law.[30] The court noted that COGSA does not directly address the validity of a clause that confers jurisdiction upon a foreign court.[31] However, the court reasoned, to give effect to such a clause would be "almost as objectionable as enforcing a clause subjecting the bill of lading to foreign law" since the foreign court seemingly could not be bound in its choice of applicable law, except perhaps by stipulation of the parties.[32] According to the *Indussa* court, a clause making the claim triable exclusively in a foreign court would almost certainly lessen the carrier's liability if the court applied neither COGSA nor the Hague Rules.[33] The court expressed its concern that even if the foreign court applied one of these regimes, requiring trial abroad might nonetheless lessen the carrier's liability because of the absence of any assurance that the foreign court would apply either regime in the same manner as would an American court subject to the uniform control of the Supreme Court.[34] The *Indussa* court concluded that "Congress meant to invalidate any contractual provision in a bill of lading for a shipment to or from the United States" that would preclude the owners of the cargo, who could otherwise obtain jurisdiction over a carrier in the United States, from instituting an action in an American court that would apply the "substantive rules Congress had prescribed."[35]

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30. *Id.* at 203, 1967 AMC at 594.

31. *Id.*

32. *Id.*, 1967 AMC at 594-95 (citing GILMORE & BLACK, *supra* note 1, § 3-25, at 146 n.23).

33. *Id.* at 203-04, 1967 AMC at 595.

34. *Id.*

35. *Id.* at 204, 1967 AMC at 595. Interestingly, the *Indussa* court expressly exempted foreign arbitration clauses from its ruling and noted that such clauses in "a charter party, or in a bill of lading effectively incorporating such a clause in a charter party" had often been enforced. *Id.* at 204 n.4, 1967 AMC at 595-96 n.4. The court reasoned that the Federal Arbitration Act, ch. 392, §§ 1-15, 61 Stat. 669-74 (1947) (current version at 9 U.S.C. §§ 1-208 (1988)), which permits arbitration provisions in bills of lading, would prevail in the event of an inconsistency between that statute and COGSA because the Federal Arbitration Act was enacted after COGSA. *See Indussa*, 377 F.2d at 204 n.4, 1967 AMC at 595-96 n.4. Since *Indussa*, however, the Second Circuit has attempted to narrow the scope of the *Indussa* exception. In AAACON Auto Transport v. State Farm Mut. Auto. Ins., 537 F.2d 648 (2d Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977), the court explained that in footnote 4 of *Indussa*, the Second Circuit had been concerned "primarily . . . [with] those commercial situations in which the economic strength and bargaining power of the parties is roughly equal." *Id.* at 655. The case law on the validity of arbitration clauses in bills of lading in other jurisdictions is split. *See, e.g.*, Travelers Indem. Co. v. M/V Mediterranean Star, 1988 AMC 2483 (S.D.N.Y. 1988) (enforcing a foreign arbitration clause); State Establishment for Agric. Prod. Trading v. M/V Wesermunde, 838 F.2d 1576, 1988 AMC 2328 (11th Cir. 1988) (invalidating a foreign arbitration clause); Organes Enter. v. M/V Khalij Frost, 1989 AMC 1460 (S.D.N.Y. 1989) (invalidating a foreign arbitration clause).

In *Union Insurance Society of Canton v. S.S. Elikon*,[36] the United States Court of Appeals for the Fourth Circuit affirmed the sweeping language of *Indussa*. The plaintiff in *Elikon*, a foreign insurer, brought an action against the German carrier for damages to the insured cargo.[37] Clause 1 of the bill of lading provided that the bill was subject to COGSA.[38] Clause 20, however, stipulated that the laws of the Federal Republic of Germany would apply to actions on the bill, and that the courts of Bremen, Germany, would have exclusive jurisdiction over such actions.[39] The cargo insurer brought its action in a U.S. district court pursuant to COGSA.[40] Relying on the forum selection clause, the carrier challenged, in a motion to dismiss, the American court's jurisdiction.[41] The district court granted the motion,[42] relying on *The Bremen v. Zapata Off-Shore Co.*[43] The Fourth Circuit reversed, finding *The Bremen* to be inapplicable.[44]

In reaching its decision, the *Elikon* court observed that in *The Bremen* the contract was for towage of a drilling rig from Texas to Italy.[45] The rig was damaged in a storm in the Gulf of Mexico, and the rig owners sued the M/S BREMEN and its owners in a U.S. district court in Tampa, Florida.[46] In distinguishing *The Bremen*, the court noted that, rather than using preprinted form bills of lading, the rig owner in *The Bremen* solicited bids and eventually negotiated a contract with the vessel's German owner.[47] Thus, the court in *The Bremen* found that the London forum selection clause in the towage contract was part of a negotiated compromise.[48] On appeal, the Supreme Court upheld the London forum clause because of (1) the bargained for nature of the contract; (2) the reasonableness of the forum; and (3) the general policy encouraging private contractual selection of the method of dispute resolution, particularly in the context of international trade.[49]

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36. 642 F.2d 721, 1982 AMC 588 (4th Cir. 1981).
37. *Id.* at 722, 1982 AMC at 589.
38. *Id.*
39. *Id.*
40. *Id.* at 721-22, 1982 AMC at 589.
41. *Id.* at 722, 1982 AMC at 589.
42. *Id.* at 723, 1982 AMC at 589-90.
43. 407 U.S. 1, 1972 AMC 1407 (1972).
44. *Elikon*, 642 F.2d at 723, 1982 AMC at 590.
45. *Id.* at 724-25, 1982 AMC at 592.
46. *Id.* at 724, 1982 AMC at 592.
47. *Id.*
48. *Id.*
49. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 1972 AMC 1407 (1972).

The *Elikon* court further noted that the Supreme Court in *The Bremen* expressly distinguished *Indussa* by holding that COGSA was inapplicable to the M/S BREMEN towage contract.[50] While the court in *The Bremen* concluded that forum selection clauses are presumptively valid, particularly in international transactions, it did so "in the absence of any congressional policy."[51]

In contrast, the Fourth Circuit's analysis of COGSA in *Elikon* began with the recognition that COGSA reflects "explicit congressional concerns about bills of lading in foreign trade."[52] The court noted that COGSA was "intended to reduce uncertainty concerning the responsibilities and liabilities of the carriers, responsibilities and rights of shippers and the liabilities of underwriters. . . ."[53] The court extensively cited the broad language of *Indussa* and held that although both parties were "foreign nationals, COGSA not only invalidates a forum selection clause appointing a foreign tribunal and designating the application of foreign law, but appears to suggest a preference for an American forum."[54]

In 1987, the United States Court of Appeals for the Fifth Circuit in *Conklin & Garrett, Ltd. v. M/V Finnrose*[55] followed the *Indussa* and the *Elikon* decisions.[56] In that case, the shipper, a Canadian corporation, sued for cargo damage in the Southern District of Texas.[57] The defendants were the vessel's Swedish charterer and the vessel's present and former owners, both of whom were Finnish. The suit arose out of damage to a merry-go-round which had been shipped from the United Kingdom to Florida.[58] The charterer had issued a bill of lading which provided for the resolution of any dispute arising under the bill in Finland and for the application of Finnish law except as other-

50. Union Ins. Soc'y of Canton v. S.S. Elikon, 642 F.2d 721, 724, 1982 AMC 588, 592 (4th Cir. 1981) (citing *The Bremen*, 407 U.S. at 10 n.11, 1972 AMC at 1414 n.11).

51. *Id.* at 724, 1982 AMC at 592; *see also* North River Ins. Co. v. Fed Sea/Fed Pac Line, 647 F.2d 985, 988-89, 1982 AMC 2693, 2966-68 (9th Cir. 1981), *cert. denied*, 455 U.S. 948, 1982 AMC 2110 (1982); Rockwell Int'l v. Hapag-Lloyd, 1987 AMC 2537 (D. Md. 1987); Zima Corp. v. M/V Roman Pazinski, 493 F. Supp. 268, 1980 AMC 1552 (S.D.N.Y. 1980); SCHOENBAUM, *supra* note 1, § 9-18.

52. *Elikon*, 642 F.2d at 723, 1982 AMC at 590.

53. *Id.*

54. *Id.* at 726, 1982 AMC at 594.

55. 826 F.2d 1441, 1988 AMC 318 (5th Cir. 1987).

56. *Id.*; *see also* Hughes Drilling Fluids v. M/V Luo Fu Shan, 852 F.2d 840, 1988 AMC 2848 (5th Cir. 1988), *cert. denied sub nom.* Guangzhou Maritime Transp. Bureau of China v. Hughes Drilling Fluids, 489 U.S. 1033, 1989 AMC 2405 (1989).

57. *Finnrose*, 826 F.2d at 1441, 1988 AMC at 318.

58. *Id.*

wise provided in the bill of lading.[59] The bill of lading specifically provided that "[n]otwithstanding any provision found elsewhere in this B/L, insofar as the . . . carriage covered by this . . . contract is performed within the territorial limits of the United States it shall be subject to [COGSA] . . . ."[60]

The district court, relying on *The Bremen*, granted the defendants' motion to dismiss for lack of jurisdiction.[61] The Fifth Circuit reversed and, for the same reasons enunciated by the *Elikon* court, held *The Bremen* inapposite.[62] Relying extensively on the Second Circuit's decision in *Indussa* and the Fourth Circuit's *Elikon* decision, the *Finnrose* court observed that even the fact that the bill of lading required the application of COGSA in the Finnish forum did not warrant a different result; the potential still existed that the shipowner's liability would be lessened in the foreign tribunal.[63]

Finally, a few cases have attempted, in the form of dicta, to narrow the Second Circuit's decision in *Indussa* to its "special facts."[64] The facts included that an American plaintiff sued a foreign corporation for nominal damages; that the only relationship of the case to the foreign forum was the ownership of the vessel; and that the bill of lading appeared to nominate COGSA as the governing law.[65] However, the *Indussa* court itself indicated that its decision should not be confined to the parameters of its specific facts.[66] The court indicated that even if it chose to adhere to the *Muller* rule, the dissimilar facts of the two cases would provide a sound basis for distinguishing *Muller*; however, the court did not limit its decision in this manner.[67] Instead, the court elected to overrule *Muller* as "inconsistent" with

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59. *Id.*

60. *Id.*, 1988 AMC at 318-19 (alteration and omissions in original).

61. *Id.*

62. *Id.* at 1442, 1988 AMC at 322; *see also supra* text accompanying notes 36-42.

63. *Id.* at 1443-44, 1988 AMC at 322.

64. *See, e.g.*, Fireman's Fund Am. Ins. Co. v. P.R. Forwarding Co., 492 F.2d 1294, 1296 (1st Cir. 1974) (stating that "[a]t least when the special factors of *Indussa* are not present," the normal rule is that a choice of forum should be enforced, unless unreasonable under *The Bremen*); Roach v. Hapag-Lloyd, 358 F. Supp. 481, 484, 1973 AMC 1968, 1970-72 (N.D. Cal. 1973) (holding that COGSA did not apply and, in dicta, distinguishing the facts before it from those in *Indussa*). It should be noted that the first case may be easily distinguished from *Indussa* because the choice of forum clause in that case specified a New York court. *P.R. Forwarding Co.*, 492 F.2d at 1296.

65. Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, 200-02, 1967 AMC 589, 590-92 (2d Cir. 1967).

66. *Id.* at 201-02, 1967 AMC at 592.

67. *Indussa*, 377 F.2d at 202, 1967 AMC at 592.

COGSA.[68]

B. *Acadia Forest*

At least three recent decisions of the United States District Court for the Southern District of New York have enforced a choice of foreign law clause in a bill of lading governed by COGSA. *Daval Steel Products v. M/V Acadia Forest*[69] is the first of these three cases and provides the analytical basis for the subsequent two decisions. The plaintiff in *Acadia Forest* sued for damage to its shipment of steel products that allegedly occurred while the goods were being transported by the defendant carrier from Antwerp to New Orleans.[70] The bill of lading specified a $500 per-package liability limitation in the absence of a declaration of higher value and additional consideration.[71] The bill of lading also contained a Clause Paramount. The clause provided for the application of COGSA, but stipulated that when the bill of lading is "issued in a locality where there is in force a Carriage of Goods by Sea Act or ordinance or statute of a similar nature to [the Hague Rules], it is subject to the provisions of such act, ordinance or statute and rule, [sic] thereto annexed."[72] The bill of lading was issued in Belgium.[73]

The district court interpreted the phrase "thereto annexed" to include the Visby Amendments[74] and thus concluded that the Belgian

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68. *See id.* It is noteworthy that the court deferred the question of whether a valid forum non conveniens defense might operate to dismiss an action on a bill of lading subject to COGSA. *See id.* at 204, 1967 AMC at 592. Since *Indussa*, this approach has apparently won substantial approval in the courts. *See, e.g.*, Union Ins. Soc'y of Canton v. S.S. Elikon, 642 F.2d 721, 725-26, 1982 AMC 588, 593 (4th Cir. 1981) (forum non conveniens grounds sufficient to deny jurisdiction over suits brought under COGSA); Contact Lumber Co. v. P.T. Moges Shipping Co., 918 F.2d 1446, 1448-49, 1991 AMC 678, 680 (9th Cir. 1990) (action for cargo damage governed by COGSA dismissed in favor of Philippine court on grounds of forum non conveniens); Travelers Indem. Co. v. S.S. Alca, 710 F. Supp. 497, 500-02, 1990 AMC 1216 (S.D.N.Y. 1989) (Turkish forum more convenient notwithstanding applicability of COGSA), *aff'd*, 895 F.2d 1410, 1990 AMC 1216 (2d Cir. 1989); C.A. Seguros Orinoco v. Naviera Transpapel, C.A., 677 F. Supp. 675, 685-87, 1988 AMC 1757, 1769-73 (D.C.P.R. 1988) (court would dismiss consignee's action for reasons of forum non conveniens if defendant agreed to (1) submit to foreign court jurisdiction; (2) waive any foreign statute of limitations defense; and (3) file surety bond). One commentator, however, suggests that "[a]s a practical matter . . . , where COGSA applies, the application of forum non conveniens will be exceedingly rare." SCHOENBAUM, *supra* note 1, § 9-18.

69. 683 F. Supp. 444, 1988 AMC 1669 (S.D.N.Y. 1988).

70. *Id.* at 445, 1988 AMC at 1669.

71. *Id.*, 1988 AMC at 1670.

72. *Id.*

73. *Id.*

74. *Id.* at 447, 1988 AMC at 1673.

Hague-Visby Rules and their higher limitation of liability amount had effectively been incorporated into the contract.[75] The court noted that, although COGSA governed the bill of lading, § 1304(5) of COGSA expressly permits shippers and carriers to raise the shipper's maximum liability beyond that specified by COGSA.[76] A shipper and a carrier may, as parties to a contract, increase the shipper's liability limit to any level above $500 per package by incorporating "any document or standard" they select.[77]

Both the analysis and holding of *Acadia Forest* conflict with *Indussa* and its progeny and with the language of COGSA itself.[78] *Acadia Forest* may be criticized in several respects. First, the *Acadia Forest* court essentially relies on two authorities, neither of which lend much support to its holding. It cites Gilmore and Black as authority for its conclusion that bills of lading are drawn up by carriers.[79] The court, however, ignored Gilmore and Black's qualification that the "function [of the bill of lading] as the embodiment of the contract of carriage is now largely absorbed by . . . COGSA. . . ."[80] Hence, COGSA, not contract law, governs the validity of the terms of a bill of lading when COGSA applies *ex proprio vigore*.

The *Acadia Forest* court also cites *Watermill Export v. M/V Ponce*[81] for the proposition that the language of the Clause Paramount stipulating that the "bill of lading is 'subject to' COGSA or the Hague-Visby Rules, depending on where it is issued, has the effect of incorporating into the bill of lading by reference the relevant body of rules."[82] The court misconstrued the *Ponce* decision. *Ponce* concerned a bill of lading for shipment of goods "between ports of the

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75. *Id.*, 1988 AMC at 1672 (citing Watermill Export v. M/V Ponce, 506 F. Supp. 612, 1981 AMC 2457 (S.D.N.Y. 1981)).

76. *Id.*

77. *Id.*, 1988 AMC at 1673.

78. Indeed, the court's holding probably would not survive even the *The Bremen* analysis. In that case, the Supreme Court, applying contract principles to enforce the forum clause, observed that the "forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations . . . with the consequences of the forum clause figuring prominently in their calculations." 407 U.S. 1, 14, 1972 AMC 1407, 1412 (1972). The bill of lading in *Acadia Forest*, like many bills of lading, clearly would have failed this test. As the district court in *Acadia Forest* observed, the terms of a bill of lading are determined unilaterally by the carrier. *See* Daval Steel Prod. v. M/V Acadia Forest, 683 F. Supp. 444, 447, 1988 AMC 1669, 1672 (citing GILMORE & BLACK, *supra* note 1, § 3-44).

79. *Acadia Forest*, 683 F. Supp. at 447, 1988 AMC at 1672.

80. *See* GILMORE & BLACK, *supra* note 1, § 3-44.

81. 506 F. Supp. 612, 1981 AMC 2457 (S.D.N.Y. 1981).

82. *Acadia Forest*, 683 F. Supp. at 447, 1988 AMC at 1672.

East coast [sic] of the United States and San Juan, Puerto Rico."[83] As such, COGSA did not apply *ex proprio vigore*. The parties, however, "incorporated COGSA" into the bill of lading and thus it "fully govern[ed] their relationship" pursuant to § 1312.[84] Therefore, absent "extraordinary circumstances," any contract term that contradicted COGSA was "null and void."[85] COGSA would be treated as simply another contract term "only if [§ 1312], for some reason, [did] not apply to make the contract of carriage fully subject" to it.[86] The *Ponce* court reasoned that COGSA acquires "statutory rank," that is, it operates as a matter of law, when incorporated by reference into a bill of lading.[87]

In *Acadia Forest*, the parties contracted for the carriage of goods by sea from a foreign port to an American port.[88] According to *Ponce*, COGSA would apply compulsorily, and any contradictory contract term would be rendered null and void. Thus under the *Ponce* analysis, the Hague-Visby Rules clause in the *Acadia Forest* bill of lading would be invalid because it is an inconsistent contract term. The *Acadia Forest* court, however, reached the opposite conclusion by looking to the terms of the bill of lading, rather than to COGSA, in determining which law to apply.[89]

Second, the *Acadia Forest* decision can be criticized for completely disregarding the significance of the *ex proprio vigore* quality of COGSA. As *Indussa* had unequivocally established, COGSA, by its

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83. *Ponce*, 506 F. Supp. at 613, 1981 AMC at 2457.

84. *Id.* at 614, 1981 AMC at 2459.

85. *Id.*

86. *Id.*

87. *Id.* at 615, 1981 AMC at 2461. It should be noted that *Ponce* represents a minority view. Most courts confronted with the issue have held that a bill of lading that is not compulsorily subject to COGSA does not become so by virtue of a clause incorporating COGSA. These courts have held that when such a clause exists, it is treated merely as a term of the contract, which may be superseded by other inconsistent terms. *See, e.g.*, Institute of London Underwriters v. Sea-Land Serv., 881 F.2d 761, 766, 1989 AMC 2516, 2517 (9th Cir. 1989) (holding that when COGSA does not apply *ex proprio vigore*, a COGSA clause in the bill of lading is treated only as a contractual term); North River Ins. Co. v. Fed Sea/Fed Pac Line, 647 F.2d 985, 989, 1982 AMC 2963, 2968 (9th Cir. 1981) (rejecting the view that COGSA preempts all contract terms when its force arises only from its contractual incorporation), *cert. denied*, 455 U.S. 948, 1982 AMC 2110 (1982); Pannell v. United States Lines Co., 263 F.2d 497, 498, 1959 AMC 935, 937 (2d Cir.) (determining that the parties' specific definition of "package" in bill of lading superseded COGSA's definition when COGSA, while incorporated into bill of lading, did not apply *ex proprio vigore*), *cert. denied*, 359 U.S. 1013, 1959 AMC 1064 (1959).

88. *See* Daval Steel Prod. v. M/V Acadia Forest, 683 F. Supp. 444, 445, 1988 AMC 1669, 1669 (S.D.N.Y. 1988).

89. *See id.*

terms, does not permit a foreign law exception.[90] Thus, the M/V ACADIA FOREST's bill of lading clause appointing Belgian law should have been deemed invalid on its face. Furthermore, once buried, no part of that foreign law should have been permitted to spring back to life.

Third, assuming *arguendo*, that COGSA permits parties to a bill of lading to elect Belgian law as controlling, should the court also consider related decisional law in determining the rights and liabilities of the parties? After all, American judicial interpretations, such as the fair opportunity doctrine,[91] are significant aspects of COGSA in the United States. Foreign case law should arguably receive no less deference, and yet, by deferring to foreign case law, an American court would be required to undertake the dubious task of "forecast[ing] the result of litigation in a foreign court."[92]

Fourth, it might be argued that *Acadia Forest* merely stands for the proposition that only the *higher* limitation of liability amount of the foreign regime is enforceable pursuant to § 1304(5). The enforcement of a higher limitation amount under that section, however, presupposes an "agreement" between the parties to the bill of lading.[93] It is inconceivable that the parties, by generally incorporating the Hague-Visby Rules, intended only for the specific limitation of liability provision to apply.[94] This result could have been achieved simply by specifying the desired limitation amount. Thus, the carrier could reasonably contend that the foreign limitation amount should apply only as part of the entire foreign law package, including both statutory and decisional law.

Finally, even a strict contract law analysis of the M/V ACADIA FOREST's bill of lading arguably should have yielded a different holding. In particular, the court did not consider the well-settled

90. Nowhere does *Acadia Forest* refer to the Second Circuit's *Indussa* decision.

91. For an analysis of the fair opportunity requirement under COGSA's section 1304(5), see Daniel A. Tadros, *COGSA's Section 4(5)'s "Fair Opportunity" Requirement: U.S. Circuit Court Conflict and Lack of International Uniformity; Will the United States Supreme Court Ever Provide Guidance?*, 17 TUL. MAR. L.J. 17 (1992); Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act*, 19 J. MAR. L. & COM. 1, 1-2 (1988).

92. Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, 202, 1967 AMC 589, 592 (2d Cir. 1967).

93. *See* 46 U.S.C. app. § 1304(5).

94. Almost certainly this is never the intent of the parties to a COGSA bill of lading. As the author of the bill of lading, the carrier would obviously not intend this result, nor would the typical sophisticated shipper so construe such a clause. In inserting a Hague-Visby clause, the carrier most likely intends to appoint the governing law for actions brought in other jurisdictions.

principle of contract construction that a specific contract provision prevails over an inconsistent general provision.[95] As noted earlier, the bill of lading in *Acadia Forest* contained a specific limitation of liability provision mandating application of COGSA's $500 limitation amount.[96] This clause should have been deemed to supersede the Clause Paramount's general incorporation of Belgian law for limitation purposes.[97]

IV. CONCLUSION

In conclusion, COGSA was promulgated by Congress in an attempt to achieve "uniformity and simplification" of bills of lading in foreign trade.[98] Congress intended to reduce uncertainties concerning the rights and responsibilities of all parties to a bill of lading.[99] Congress also intended to protect carriers engaged in foreign trade to and from the United States against the "all-encompassing" liability to which they were subjected prior to the enactment of COGSA.[100]

This commitment to uniformity in American law and thus to the application of COGSA arguably was evidenced, in the international context, by the reservations and objections expressed by the United States upon ratifying the Hague Rules. The United States declared that "should any conflict arise between the provisions of the [Hague Rules] and the provisions of [COGSA], the provisions of [COGSA] shall prevail."[101] The United States also objected to and rejected Kuwait's decision to increase the maximum amount of liability stipulated in the Hague Rules from 100 to 250 British pounds.[102]

At the same time, however, the important policy consideration of protecting the *shipper* from a potentially lower limitation of liability

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95. *See, e.g.*, SPM Corp. v. M/V Ming Moon, 965 F.2d 1297, 1300-02, 1992 AMC 2409, 2414-16 (3d Cir. 1992); Goldberg v. Bear, Stearns & Co., 912 F.2d 1418, 1421 (11th Cir. 1990).

96. *See supra* note 65 and accompanying text.

97. The carrier in our hypothetical fact pattern might also reasonably insist that it intended that foreign law, and its higher limitation amount, would apply only if U.S. courts retained jurisdiction pursuant to the bill of lading's Jurisdiction Clause.

98. State Establishment for Agric. Prod. Trading v. M/V Wesermunde, 838 F.2d 1576, 1580, 1988 AMC 2328, 2334 (11th Cir.), *cert. denied*, 488 U.S. 916, 1989 AMC 2407 (1988).

99. *Id.*; *see also* Union Ins. Soc'y of Canton v. S.S. Elikon, 642 F.2d 721, 723, 1982 AMC 588, 590 (4th Cir. 1981).

100. Wirth, Ltd. v. S.S. Acadia Forest, 537 F.2d 1272, 1279, 1976 AMC 2178, 2188 (5th Cir. 1976).

101. Hague Rules, *supra* note 1, Reservations and Declarations, June 29, 1937, *reprinted in* BENEDICT, *supra* note 1, at 1-19.

102. *Id.* § 1-1.6.