SUPREME COURT OF THE UNITED STATES

No. 94–623

VIMAR SEGUROS Y REASEGUROS, S. A., PETITIONER
v. M/V SKY REEFER, HER ENGINES, ETC., ET AL.
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT
[June 19, 1995]

JUSTICE STEVENS, dissenting.

The Carriage of Goods by Sea Act (COGSA),[1] enacted in 1936 as a supplement to the 1893 Harter Act,[2] regulates the terms of bills of lading issued by ocean carriers transporting cargo to or from ports of the United States. Section 3(8) of COGSA provides:

> "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect." 46 U. S. C. App. §1303(8).

Petitioners in this case challenge the enforceability of a foreign arbitration clause, coupled with a choice-of-foreign-law clause, in a bill of lading covering a shipment of oranges from Morocco to Boston, Massachusetts. The bill, issued by the Japanese carrier, provides (1)

that the transaction "`shall be governed by Japanese law,'" and (2) that any dispute arising from the bill shall be arbitrated in Tokyo. See *ante*, at 2. Under the construction of COGSA that has been uniformly followed by the Courts of Appeals and endorsed by scholarly commentary for decades, both of those

[1] 49 Stat. 1207, 46 U. S. C. App. §§1300–1315.
[2] 27 Stat. 445, 46 U. S. C. App. §§190–196.

clauses are unenforceable against the shipper because they "relieve" or "lessen" the liability of the carrier. Nevertheless, relying almost entirely on a recent case involving a domestic forum selection clause that was not even covered by COGSA, *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U. S. 585 (1991), the Court today unwisely discards settled law and adopts a novel construction of §3(8).

In the 19th century it was common practice for ship owners to issue bills of lading that included stipulations exempting themselves from liability for losses occasioned by the negligence of their employees. Because a bill of lading was (and is) a contract of adhesion, which a shipper must accept or else find another means to transport his goods, shippers were in no position to bargain around these no-liability clauses. Although the English courts enforced the stipulations, see *Compania de Navigacion la Flecha* v. *Brauer*, 168 U. S. 104, 117–118 (1897), citing *Peck* v. *North Staffordshire Railway*, 10 H. L. Cas. 473, 493, 494 (1863), this Court concluded, even prior to the 1893 enactment of the Harter Act, that they were "contrary to public policy, and consequently void." *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 442 (1889).[3] As we noted in *Brauer*, several District Courts had held that such a stipulation was invalid even when the bill of lading also contained a choice-

[3]In support of its holding in *Liverpool Steam*, the Court observed:

"The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business." 129 U. S., at 441.

of-law clause providing that “the contract should be governed by the law of England.” 168 U. S., at 118. The question whether such a choice-of-law clause was itself valid remained open in this Court until the Harter Act was passed in 1893.

Section 1 of the Harter Act makes it unlawful for the master or owner of any vessel transporting cargo between ports of the United States and foreign ports to insert in any bill of lading any clause whereby the carrier "shall be relieved from liability for loss or damage arising from negligence."[4] In *Knott* v. *Botany Mills*, 179 U. S. 69 (1900), we were presented with the question whether that prohibition applied to a bill of lading containing a choice-of-law clause designating British law as controlling. The Court held:

> "Th[e] express provision of the act of Congress 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." *Id.*, at 77.

The Court's holding that the choice-of-law clause was invalid rested entirely on the Harter Act's

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[4]The first section of the Harter Act provides:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall not be lawful for the manger, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect." 27 Stat. 445, 46 U. S. C. App. §190.

This section was rendered obsolete by §3(8) of COGSA, a broader prohibition that invalidates clauses either "relieving" or "lessening" a carrier's liability. 46 U. S. C. App. §1303(8), quoted *supra*, at 1.

prohibition against relieving the carrier from liability. *Id.*, at 72. Since *Knott*, courts have consistently understood the Harter Act to create a flat ban on foreign choice-of-law clauses in bills of lading. See, *e.g.*, *Conklin & Garrett, Ltd.* v. *M/V Finnrose*, 826 F. 2d 1441, 1442–1444 (CA5 1987); *Union Ins. Soc. of Canton, Ltd.* v. *S. S. Elikon*, 642 F. 2d 721, 723–725 (CA4 1981); *Indussa Corp.* v. *S. S. Ranborg*, 377 F. 2d 200 (CA2 1967). Courts have also consistently found such clauses invalid under COGSA, which embodies an even broader prohibition against clauses "relieving" *or "lessening"* a carrier's liability. Indeed, when a panel of the Second Circuit in 1955 interpreted COGSA to permit a foreign choice-of-law clause, *Muller* v. *Swedish American Line Ltd.*, 224 F. 2d 806, scholars noted that "the case seems impossible to reconcile with the holding in *Knott*."[5] Eventually agreeing, the en banc court unanimously overruled *Muller* in 1967. *Indussa Corp.*, 377 F. 2d, at 200.

In the 1957 edition of their treatise on the Law of Admiralty, Gilmore and Black had criticized not only the choice-of-law holding in *Muller*, but also its enforcement of a foreign choice-of-forum clause. They wrote:

> "The stipulation for suit abroad seems also to offend Cogsa, most obviously because it destroys the shipper's certainty that Cogsa will be applied. Further, it is entirely unrealistic to look on an obligation to sue overseas as not `lessening' the liability of the carrier. It puts a high hurdle in the way of enforcing that liability." G. Gilmore & C. Black, Law of Admiralty 125, n. 23.

Judge Friendly's opinion for the en banc court in *Indussa* endorsed this reasoning. In *Indussa*, the bill of lading contained a provision requiring disputes to

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[5]G. Gilmore & C. Black, Law of Admiralty 125, n. 23 (1st ed. (1957).

be resolved in Norway under Norwegian law.[6] Judge Friendly first remarked on the harsh consequence of "requiring an American consignee claiming damages in the modest sum of $2600 to journey some 4200 miles to a court having a different legal system and employing another language." 377 F. 2d, at 201. The decision, however, rested not only on the impact of the provi-

sion on a relatively small claim, but also on a fair reading of the broad language in COGSA. Judge Friendly explained:

> "[Section] 3(8) of COGSA says that `any clause, covenant, or agreement in a contract of carriage * * * lessening [the carrier's liability for negligence, fault, or dereliction of statutory duties] otherwise than as provided in this Act, shall be null and void and of no effect.' From a practical standpoint, to require an American plaintiff to assert his claim only in a distant court lessens the liability of the carrier quite substantially, particularly when the claim is small. Such a clause puts `a high hurdle' in the way of enforcing liability, Gilmore & Black, supra, 125 n. 23, and thus is an effective means for carriers to secure settlements lower than if cargo could sue in a convenient forum. A clause making a claim triable only in a foreign court would almost certainly lessen liability if the law which the court would apply was neither the Carriage of Goods by Sea Act nor the Hague Rules. Even when the foreign court would apply one or the other of these regimes, requiring trial abroad *might* lessen the carrier's liability since

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[6]The bill of lading contained the following provision:

"`Any dispute arising under this Bill of Lading shall be decided in the country where the Carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein.'" *Indussa Corp.* v. *S. S. Ranborg*, 377 F. 2d 200, 201 (CA2 1967).

there could be no assurance that it would apply them in the same way as would an American tribunal subject to the uniform control of the Supreme Court, and § 3(8) can well be read as covering a potential and not simply a demonstrable lessening of liability." *Id.*, at 203–204 (citations omitted).

As the Court notes, *ante*, at 5, the Courts of Appeal without exception have followed *Indussa*. In the 1975 edition of their treatise, Gilmore and Black also endorsed its holding, adding this comment:

"Cogsa allows a freedom of contracting out of its terms, but only in the direction of *increasing* the shipowner's liabilities, and never in the direction of diminishing them. This apparent onesidedness is a commonsense recognition of the inequality in bargaining power which both Harter and Cogsa were designed to redress, and of the fact that one of the great objectives of both Acts is to prevent the impairment of the value and negotiability of the ocean bill of lading. Obviously, the latter result can never ensue from the increase of the carrier's duties." G. Gilmore & C. Black, Law of Admiralty 146–147 (2d ed.) (emphasis in original) (footnote omitted).

Thus, our interpretation of maritime law prior to the enactment of the Harter Act, our reading of that statute in *Knott*, and the federal courts' consistent interpretation of COGSA, buttressed by scholarly recognition of the commercial interest in uniformity, demonstrate that the clauses in the Japanese carrier's bill of lading purporting to require arbitration in Tokyo pursuant to Japanese law both would have been held invalid under COGSA prior to today.[7]

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[7]Of course, the objectionable feature in the instant bill of lading is a foreign arbitration clause, not a foreign forum selection clause. But this distinction is of little importance; in relevant respects, there is no difference

The foreign arbitration clause imposes potentially prohibitive costs on the shipper, who must travel—and bring his lawyers, witnesses and exhibits—to a distant country in order to seek redress. The shipper will therefore be inclined either to settle the claim at a discount or to forgo bringing the claim at all. The foreign-law clause leaves the shipper who does pursue his claim open to the application of unfamiliar and potentially disadvantageous legal standards, until he can obtain review (perhaps years later) in a domestic forum under the high standard applicable to vacation of arbitration awards.[8] See *Wilko* v. *Swan*,

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between the two. Both impose substantial costs on shippers, and both should be held to lessen liability under COGSA. The majority's reasoning to the contrary thus presumably covers forum selection as well as arbitration. See *ante*, at 5; *ante,* at 1–2 (O'CONNOR, J., concurring in judgment). The only ground on which one might distinguish the two types of clauses is that another federal statute, the Federal Arbitration Act, makes arbitration clauses enforceable, whereas no analogous federal statute exists for forum selection clauses. For the reasons expressed *infra*, at 14–16, this distinction is unpersuasive.

[8]I am assuming that the majority would not actually uphold the application of disadvantageous legal standards—these, even under the narrowest reading of COGSA, surely lessen liability. See *ante*, at 11–13. Nonetheless, the majority is apparently willing to allow arbitration to proceed under foreign law, and to determine afterwards whether application of that law has actually lessened the carrier's formal liability. As I have discussed above, this regime creates serious problems of delay and uncertainty. Because the majority's holding in this case is limited to the enforceability of the foreign arbitration clause—it does not actually pass upon the validity of the foreign law clause—I will not discuss the foreign law clause further except to say that it is an unenforceable lessening of

346 U. S. 427, 436–437 (1953). Accordingly, courts have always held that such clauses "lessen" or "relieve" the carrier's liability, see, *e.g.*, *State Establishment for Agricultural Product Trading* v. *M/V Wesermunde*, 838 F. 2d 1576, 1580–1582 (CA11), cert. denied, 488 U. S. 916 (1988), and even the Court of Appeals in this case assumed as much, 29 F. 3d 727, 730, 732, n. 5 (CA1 1994).[9] Yet this Court today holds that carriers may insert foreign-arbitration clauses into bills of lading, and it leaves in doubt the validity of choice-of-law clauses.

Although the policy undergirding the doctrine of *stare decisis* has its greatest value in preserving rules governing commercial transactions, particularly when their meaning is well understood and has been accepted for long periods of time,[10] the Court nevertheless has concluded that a change must be made. Its law-changing decision is supported by three arguments: (1) the statutory reference to "lessening such liability" has been misconstrued; (2) the prior understanding of the meaning of the statute has been "undermined" by the *Carnival Cruise* case; and (3) the new rule is supported by our obligation to honor the 1924 "Hague Rules." None of these arguments is persuasive.

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liability to the extent it gives an advantage to the carrier at the expense of the shipper.

[9]The Court of Appeals enforced the arbitration clause, despite its concession that the clause might violate COGSA, because of its perception that COGSA must give way to the conflicting dictate of the Federal Arbitration Act. 29 F. 3d, at 731–733. I consider, and reject, this argument *infra*, at 14–16.

[10]See Eskridge & Frickey, The Supreme Court 1993 Term—Foreword: Law as Equilibrium, 108 Harv. L. Rev. 26, 81 (1994).

The Court assumes that the words "lessening such liability" must be narrowly construed to refer only to the substantive rules that define the carrier's legal obligations. *Ante*, at 6. Under this view, contractual provisions that lessen the amount of the consignee's net recovery, or that lessen the likelihood that it will make any recovery at all, are beyond the scope of the statute.

In my opinion, this view is flatly inconsistent with the purpose of COGSA §3(8). That section responds to the inequality of bargaining power inherent in bills of lading and to carriers' historic tendency to exploit that inequality whenever possible to immunize themselves from liability for their own fault. A bill of lading is a form document prepared by the carrier, who presents it to the shipper on a take-it-or-leave-it basis. See Black, The Bremen, COGSA and the Problem of Conflicting Interpretation, 6 Vand. J. Transnat'l L. 365, 368 (1973); *Liverpool Steam*, 129 U. S., at 441. Characteristically, there is no arms-length negotiation over the bill's terms; the shipper must agree to the carrier's standard-form language, or else refrain from using the carrier's services. Accordingly, if courts were to enforce bills of lading as written, a carrier could slip in a clause relieving itself of all liability for fault, or limiting that liability to a fraction of the shipper's damages, and the shipper would have no recourse.[11] COGSA represents

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[11]See *United States* v. *Farr Sugar Corp.*, 191 F. 2d 370, 374 (CA2 1951), aff'd, 343 U. S. 236 (1952):

"One other fact requires special note. The shipowners stress the consensual nature of the ["Both-to-Blame"] clause, arguing that a bill of lading is but a contract. But that is so at most in name only; the clause, as we are told, is now in practically all bills of lading issued by steamship companies doing business to and from the United States. Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if

Congress' most recent attempt to respond to this problem. By its terms, it invalidates any clause in a bill of lading "relieving" or "lessening" the "liability" of the carrier for negligence, fault, or dereliction of duty.

When one reads the statutory language in light of the policies behind COGSA's enactment, it is perfectly clear that a foreign forum selection or arbitration clause "relieves" or "lessens" the carrier's liability. The transaction costs associated with an arbitration in Japan will obviously exceed the potential recovery in a great many cargo disputes. As a practical matter, therefore, in such a case no matter how clear the carrier's formal legal liability may be, it would make no sense for the consignee or its subrogee to enforce that liability. It seems to me that a contractual provision that entirely protects the shipper from being held liable for anything should be construed either to have "lessened" its liability or to have "relieved" it of liability.

Even if the value of the shipper's claim is large enough to justify litigation in Asia,[12] contractual provisions that impose unnecessary and unreasonable costs on the consignee will inevitably lessen its net

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he has actually examined it and all its twenty-eight lengthy paragraphs, of which this clause is No. 9. This lack of equality of bargaining power has long been recognized in our law; and stipulations for unreasonable exemption of the carrier have not been allowed to stand. Hence so definite a relinquishment of what the law gives the cargo as is found here can hardly be found reasonable without direct authorization of law." (Citations omitted.)

[12]The majority's reasoning is not, of course, limited to foreign fora as accessible as Tokyo. A carrier who truly wished to relieve itself of liability might select an outpost in Antarctica as the setting for arbitration of all claims. Under the Court's reasoning, such a clause presumably would be enforceable.

recovery. If, as under the Court's reasoning, such provisions do not affect the carrier's legal liability, it would appear to be permissible to require the consignee to pay the costs of the arbitration, or perhaps the travel expenses and fees of the expert witnesses, interpreters, and lawyers employed by both parties. Judge Friendly and the many other wise judges who shared his opinion were surely correct in concluding that Congress could not have intended such a perverse reading of the statutory text.

More is at stake here than the allocation of rights and duties between shippers and carriers. A bill of lading, besides being a contract of carriage, is a negotiable instrument that controls possession of the goods being shipped. Accordingly, the bill of lading can be sold, traded, or used to obtain credit as though the bill were the cargo itself. Disuniformity in the interpretation of bills of lading will impair their negotiability. See *Union Ins. Soc. of Canton, Ltd.* v. *S. S. Elikon*, 642 F. 2d, at 723, Gilmore & Black, Law of Admiralty 146–147 (2d ed. 1975). Thus, if the security interests in some bills of lading are enforceable only through the courts of Japan, while others may be enforceable only in Liechtenstein, the negotiability of bills of lading will suffer from the uncertainty. COGSA recognizes that this negotiability depends in part upon the financial community's capacity to rely on the enforceability, in an accessible forum, of the bills' terms. Today's decision destroys that capacity.

The Court's reliance on its decision in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U. S. 585 (1991), is misplaced. That case held that a domestic forum selection clause in a passenger ticket was enforceable. As no carriage of goods was at issue, COGSA did not apply to the parties' dispute. Accordingly, the enforceability of the ticket's terms did not implicate the commercial interests in uniformity and negotiability that are served by the

statutory regulation of bills of lading. Moreover, the *Carnival Cruise* holding is limited to the enforceability of *domestic* forum-selection clauses. The Court in that case pointedly refused to respond to the concern expressed in my dissent that a wooden application of its reasoning might extend its holding to the selection of a forum outside of the United States. See *id.*, at 604. The wooden reasoning that the Court adopts today does make that extension, but it is surely not compelled by the holding in *Carnival Cruise*.[13]

Finally, I am simply baffled by the Court's implicit suggestion that our interpretation of the Harter Act (which preceded the Hague Rules), and the federal courts' consistent interpretation of COGSA since *Indussa* was decided in 1967, has somehow been unfaithful to our international commitments. See *ante*, at 8–10. The concerns about invalidating freely negotiated forum selection clauses that this Court expressed in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1 (1972), have no bearing on the validity of the provisions in bills of lading that are commonly recognized as contracts of adhesion. Our

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[13]Nor is it compelled by logic. It is true that some domestic fora are more distant than some foreign fora—a citizen of Maine may have less trouble arbitrating in Canada than in Arizona. But that is no reason to eschew any distinction between foreign and domestic fora. If it is to adhere to *Carnival Cruise* and yet avoid an outrageous result, the Court must draw a line somewhere. The most sensible line, it seems to me, is at the United States border. Transaction costs generally, though not always, increase when that line is crossed. Passports usually must be obtained, language barriers often present themselves, and distances are usually greater when litigants are forced to cross that boundary. I think *Carnival Cruise* was wrongly decided, but adherence to the holding in that case does not require the result the majority reaches today.

international obligations do not require us to enforce a contractual term that was not freely negotiated by the parties. Much less do they require us to ignore the clear meaning of COGSA—itself the product of international negotiations—which forbids enforcement of clauses lessening the carrier's liability. Indeed, discussing *The Bremen*'s impact on COGSA, Professor Black observed:

> "[I]t is hard to see how it can be looked on as other than a `lessening' of the carrier's liability under COGSA to remit the bill of lading holder to a distant foreign court. It is quite true that the difficulty imposed would vary with circumstances; Canada is not Pakistan. But there is always some palpable `lessening,' for if the choice-of-forum clause is ever enforced, the result must be to dismiss the litigant out of the United States court he has chosen to sue in. On most moderate-sized claims, remis-
> sion to the foreign forum is a practical immunization of the carrier from liability." Black, 6 Vand. J. Transnat'l L., at 368–369.

The majority points to several foreign statutes, passed by other signatories to the Hague Rules, that make foreign forum-selection clauses unenforceable in the courts of those countries. See *ante*, at 8. The majority assumes (without citing any evidence) that these statutes were passed in order to depart from the Hague Rules, and that COGSA, our Nation's enactment of the Hague Rules, should therefore be read to mean something different from these statutes. I think the opposite conclusion is at least as plausible: these foreign nations believed non-enforcement of foreign forum selection clauses was consistent with their international obligations, and they passed these statutes to make that explicit. If anything, then, these statutes demonstrate that several foreign countries agree that the United States courts' consistent interpretation of COGSA does not

contravene our mutual treaty obligations. Moreover, because Congress is presumed to know the law, *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–699 (1979), it has been justified in assuming, based on the courts' uniform interpretation of COGSA prior to today, that no specific statute such as Australia's or South Africa's was necessary to invalidate foreign forum selection and arbitration clauses. The existence of these foreign statutes, then, proves nothing at all.[14]

Lurking in the background of the Court's decision today is another possible reason for holding, despite the clear meaning of COGSA and decades of precedent, that a foreign arbitration clause does not lessen liability. It may be that the Court does violence to COGSA in order to avoid a perceived conflict with another federal statute, the Federal Arbitration Act (FAA), 9 U. S. C. §1 *et seq.* (1988 ed. and Supp. V). The FAA requires that courts enforce arbitration clauses in contracts—including those requiring arbitration in foreign countries—the same way they would enforce any other contractual clause. See, *e.g.*, *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 478 (1989). This statute was designed to overturn the traditional common-law hostility to arbitration clauses. See *Mastrobuono* v. *Shearson Lehman Hutton, Inc.,* 514 U. S. ___, ___ (1995) (slip op., at 3); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. ___, ___ (1995) (slip op., at 4). According to the

[14]The majority's puzzling reference to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *ante*, at 10, strikes me as irrelevant. Nothing in that treaty even remotely suggests an intent to enforce arbitration clauses that constitute a "lessening" of liability under COGSA or the Hague Rules.

Court of Appeals, reading COGSA to invalidate foreign arbitration clauses would conflict directly with the terms and policy of the FAA.

Unfortunately, in adopting a contrary reading to avoid this conflict, the Court has today deprived COGSA §3(8) of much of its force. Its narrow reading of "lessening [of] liability" excludes more than arbitration; it apparently covers only formal, legal liability. See *supra*, at 9–11. Although I agree with the Court that it is important to read potentially conflicting statutes so as to give effect to both wherever possible, I think the majority has ignored a much less damaging way to harmonize COGSA with the FAA.

Section 2 of the FAA reads:

> "A written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2.

This language plainly intends to place arbitration clauses upon the same footing as all other contractual clauses. Thus, like any clause, an arbitration clause is enforceable, "save upon such grounds" as would suffice to invalidate any other, non-arbitration clause. The FAA thereby fulfills its policy of jettisoning the prior regime of hostility to arbitration. Like any other contractual clause, then, an arbitration clause may be invalid without violating the FAA if, for example, it is procured through fraud or forgery; there is mutual mistake or impossibility; the provision is unconscionable; or, as in this case, the terms of the clause are illegal under a separate federal statute which does not evidence a hostility to arbitration. Neither the terms nor the policies of the FAA would be thwarted if the Court were to hold today that a foreign arbitration clause in a bill of

lading "lessens liability" under COGSA. COGSA does not single out arbitration clauses for disfavored treatment; it invalidates any clause that lessens the carrier's liability. Illegality under COGSA is therefore an independent ground "for the revocation of any contract," under FAA §2. There is no conflict between the two federal statutes.

The correctness of this construction becomes even more apparent when one considers the policies of the two statutes. COGSA seeks to ameliorate the inequality in bargaining power that comes from a particular form of adhesion contract. The FAA seeks to ensure enforcement of freely-negotiated agreements to arbitrate. *Volt*, 489 U. S., at 478–479. As I have discussed, *supra*, at 2, 9–10, foreign arbitration clauses in bills of lading are not freely-negotiated. COGSA's policy is thus directly served by making these clauses illegal; and the FAA's policy is not disserved thereby. In contrast, allowing such adhesionary clauses to stand serves the goals of neither statute.

The Court's decision in this case is an excellent example of overzealous formalism. By eschewing a commonsense reading of "lessening [of] liability," the Court has drained those words of much of their potency. The result compounds, rather than contains, the Court's unfortunate mistake in the *Carnival Cruise* case.

I respectfully dissent.