

## THE BREMEN, COGSA AND THE PROBLEM OF CONFLICTING INTERPRETATION

*Charles L. Black, Jr.\**

All aspects of the important *Bremen* decision<sup>1</sup> will be explored in these *Comments* and elsewhere. I propose to present just two ideas, without needless connective verbal tissue between them: I. The *Bremen* case has nothing to do with the Carriage of Goods by Sea Act (COGSA);<sup>2</sup> both choice-of-forum and choice-of-law clauses should continue to be invalidated in bills of lading subject to that Act. II. The best solution for international conflicts of interpretation as to COGSA (and doubtless as to other statutes based on international conventions) would be an international court of appeals, exercising a discretionary jurisdiction, but empowered to affirm or reverse the judgments of national courts on these points of interpretation.<sup>3</sup>

### I. THE BREMEN AND COGSA

The *Bremen* decision does not purport to touch COGSA cases: "That Act is not applicable in this case."<sup>4</sup> The question must then be whether there are good grounds in law for invalidating choice-of-forum and choice-of-law clauses in bills of lading covered by COGSA, even if it be assumed that such clauses (at least choice-of-forum clauses) are correctly dealt with in *Bremen*. My answer is in the affirmative. The right answer for choice-of-forum clauses very much depends on the answer for choice-of-law clauses. It is best, therefore, to begin with the latter.

The bold-faced fact here is that the United States COGSA literally stipulates that *it* shall be the law applicable to all bills of lading in

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\* Luce Professor of Jurisprudence, Yale Law School. B.A., 1935, M.A., 1938, University of Texas; LL.B., 1943, Yale Law School.

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

2. 46 U.S.C. §§ 1300-15 (1970).

3. I have been putting this idea before classes at the Yale Law School for several years, and have had much interesting comment and reaction from students. I must particularly mention Richard Grande, Esq., a student at the Yale Law School, 1971-72, who became especially interested and worked on the subject in seminar. While I benefited greatly from discussions with him, he is in no way responsible for my conclusions or reasonings herein.

4. 407 U.S. at 10 n.11.

United States foreign trade, inbound or outbound. That is what the enacting clause says:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act.<sup>5</sup>*

It is hard to think there is any room for construction here. What is stated is a *conflicts* norm, choosing the substantive sections of the United States COGSA as the law of the described bills. Since it can hardly be argued that Congress has in general no power to enact a conflicts norm as part of the regulation of "Commerce with foreign Nations" (an argument which would quite incomprehensibly elevate the whole elusive subject of "choice of law" to a constitutional level) the question, essentially one of due process, must be whether the conflicts norm chosen by our COGSA is so unreasonable as to be merely arbitrary. Plainly, this is not so; the bills of lading covered by the Act have a most substantial connection with the United States.

I would think the choice-of-law clause matter might well end right there. But it cannot hurt to go just a little way into the supportive context and background.

As to context, the main item is COGSA section 3(8), which forbids the "lessening" of the carrier's obligation as imposed by COGSA's other sections.<sup>6</sup> A stipulation for foreign law must have the effect of lessening carrier liability, or it is valueless to the carrier who inserted it, and the denial of its benefits does no harm to him.<sup>7</sup> But the proffering of this contextual support should not be taken to imply that there is any way but one to interpret the plain language of the enacting clause.

As to background, it is notorious that the Harter Act,<sup>8</sup> ancestral to COGSA, was passed just exactly to *prevent* the application of foreign law, especially British law, to shipments in or out of the United

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5. 49 Stat. 1207 (1936), 46 U.S.C. § 1300 (1970).

6. 46 U.S.C. § 1303(8) (1970).

7. I omit discussion of the case in which the stipulation could be shown to be of benefit to the bill of lading holder. It seems fair, in the light of the whole history of the subject, and of the adhesory nature of the bill, to assume that carriers' benefit is usually sought, and that, when the holder seeks to avoid the clause, it is not for his benefit. In any case, it would seem the holder waives his benefit, if any, by bringing suit in the American court.

8. 46 U.S.C. §§ 190-96 (1970).

States.<sup>9</sup> Like COGSA, the Harter Act stated a *conflicts* as well as a *substantive* norm. Section 1, for example, said:

It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall 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.<sup>10</sup>

This language is inartful but clear; in its inartful clarity it states just the same conflicts norm as does COGSA, so far as bills of lading in inbound or outbound foreign trade are concerned.

The Harter Act was explicitly so interpreted, and the power of Congress to make the conflicts choice upheld, in *Knott v. Botany Mills*, decided in 1900.<sup>11</sup> The carriage was inbound to New York from Buenos Aires, in a British vessel; the bill of lading stipulation was for British law. The Court, holding that the Harter Act governed, spoke tersely but sufficiently: "The power of Congress to include such cases in this enactment cannot be denied in a court of the United States."<sup>12</sup>

It is astounding that *Knott* has played so little part in modern discussion of the COGSA choice-of-law question. Unless one can drive a wedge between the Harter Act language and that of COGSA's enacting clause (and one cannot do so, unless it be by noting that COGSA is a little more elegant than Harter on the conflicts point), this case should have been the ruling case, entirely settling the invalidity of choice-of-law clauses, both for Harter and for COGSA bills. My own hunch is that the very terseness and compression of the above quoted sentence resulted in its standing almost unnoticed through decades, though plainly right and controlling. Alas, sometimes a court has to spread it thin, worry it a lot, even say it three times, before it will be taken seriously.

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9. A. KNAUTH, *THE AMERICAN LAW OF OCEAN BILLS OF LADING* 120 (4th ed. 1953).

10. 46 U.S.C. § 190 (1970).

11. 179 U.S. 69 (1900). The deliberateness of this holding is underscored by the fact that the Supreme Court *chose* the Harter Act ground, in affirming a Second Circuit decision wherein the Circuit Court's opinion had held it unnecessary to reach this ground. See *Botany Worsted Mills v. Knott*, 82 F. 471, 473 (2d Cir. 1897).

12. 179 U.S. at 74.

The law seems, then, to be clear: COGSA makes the "choice of law"—its own substantive law—for inbound and outbound bills in United States foreign trade. As a work of supererogation, one might note that, whatever may be the case in towage contracts, almost all bills of lading are boilerplate contracts of purest adhesion; all the statutory law dealing with them starts from the policy premise that their holders need protection from the overreaching of their utterers. If COGSA spoke with less clarity, it might be worthwhile to go through this thousand-times-told tale. As it is, we do not even need to worry about "contacts," "factors," "reasonableness" or any of the other things that conflicts people like to talk about. Congress has done that work for us, in the COGSA enacting clause.

If the choice-of-law clause is invalid, the double way to invalidity of the choice-of-forum clause is clear. First, to force a shipper to sue in a foreign court is to take away from him all assurance that he will enjoy the protection of *any* provision of the American COGSA. The conflicts norm stated in our COGSA is not binding on any foreign court, as the Supreme Court, in the *Knott* days of terse sufficiency, implied in the sentence quoted above. A Swedish court, for example, may respect a choice-of-law clause stipulating for Swedish law; indeed, it will very likely do so in a case involving shipment from or to Sweden. Even without a choice-of-law clause, the Swedish court's own conflicts rules may quite properly lead to a choice of Swedish law; the American Congress's choice-of-law norm, like the "common law" choice-of-law norm of an American court, cannot bind the Swedish judiciary. The *Knott* statement<sup>13</sup> was precise, in its inclusion and in its limits. It results that a choice-of-forum clause, in a bill covered by our COGSA, must be held, *in an American court*, directly to violate our COGSA's enacting clause, since the enforcement of the choice-of-forum clause, by dismissal of the American suit, puts the litigant into the power of a court which may or may not see to it that the command of our COGSA is followed, or that any particular provision or interpretation of our COGSA is given effect.<sup>14</sup>

Secondly, on the level of sheer practicality, it 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

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13. *Id.*

14. For interesting and artful uses of these clauses, innocent as they may appear, see the section, "Methods of Evasion of the Acts," in A. KNAUTH, *supra* note 9, at 161 *et seq.*

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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, remission to the foreign forum is a practical immunization of the carrier from liability. I hope we have not relapsed into such arid conceptualism as to make anything of the classification of this practical "lessening" as "procedural" rather than "substantive."

I would conclude, then, that the American courts are bound to hold choice-of-forum and choice-of-law clauses invalid in COGSA bills, inbound or outbound, for reasons specially applicable to COGSA (because they arise from its text) and not shaken by *Bremen*. The latter case does not require the Supreme Court to overrule, either literally or in effect, either the considered holdings of two of the best admiralty Courts of Appeals,<sup>15</sup> or its own four-square precedent in *Knott v. Botany Mills*.<sup>16</sup>

## II. THE PROBLEM OF CONFLICTING INTERPRETATION

It remains lamentable that there should be so much advantage in choice of law or choice of forum, after the long efforts toward "unification" represented by COGSA. Leaving aside minor textual differences among the Acts of the different nations, the trouble is that the technique for producing uniformity in the world's bill of lading law—the technique of procuring agreement on a text—is fatally defective; a text must be interpreted, and interpretations will surely diverge. No one can read the American COGSA cases—on deviation, on the Both-to-Blame Clause, on the definition of a "package" and so on—without becoming aware that only direct Providential guiding of the judicial hand could produce uniformity of interpretation among Israel, Barbados, Belgium and Egypt.

Palliatives might be suggested. It might be worthwhile to translate into several languages, and make widely available, all judicial decisions on the Hague Rules.<sup>17</sup> Judges in all countries might then at least be enabled to behave in responsibility to the fact that, in interpreting the national legislation implementing the Rules, they are interpreting a text that was meant to produce international uniformity of result. (I have had many American COGSA cases under my eyes; I do not recall one in which the discussion or the decision was in any way influenced

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15. *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (en banc); *Carbon Black Export, Inc. v. The S.S. Monrosa*, 254 F.2d 297 (5th Cir. 1958), writ of cert. dismissed, 359 U.S. 180 (1959).

16. 179 U.S. 69 (1900).

17. I owe this suggestion, excellent in itself, to my colleague Professor W. M. Reisman.

by awareness of the unifying aim of COGSA, and of the Hague Rules behind it.)

I do not think that would be enough. It never has been enough as amongst our federal Courts of Appeals, with respect to interpretations of federal law texts.

No one who knows anything about the inertia of movements toward international agreement on texts would see any hope in continual piecemeal amendment of the Hague Rules, followed by corresponding national statutory change.

There is one way—the way we have here solved the problem mentioned in the last paragraph but one. I think it is the only way to insure a satisfactory ongoing approximation to uniformity in the actual working law of ocean bills. Let me pass over altogether, for a moment, the questions of political feasibility and of constitutionality. I will then say that the solution would have to be a single international court of appeals, whereto judgments interpreting COGSA, rendered in the national courts of last resort, could be brought by the nonprevailing party. Such a court should control its own jurisdiction; appeals to it should be heard at its discretion, as with our own Supreme Court's certiorari procedure, for much non-uniformity is trivial or at least tolerable, like some intercircuit differences in our system. But, on application by a party, the court should have the *power* to take up and to decide any case hinging on the interpretation of COGSA.

Let me return now to the hard questions passed over above.

Are we politically ready for this international court? Probably not—but if not, we are not ready for real international uniformity in the effective law of ocean bills of lading—or in any other part of international commercial law. I cannot answer this political question; I am acting here on the thought that the only way to start finding out the answer is to put the idea forward and see what happens. (I would only say that provisions for easy and short-notice denunciation and withdrawal might somewhat help to procure acceptance.)

Could the United States constitutionally assent to a binding review of the COGSA-interpreting judgments of its own Supreme Court (or its Courts of Appeals, in cases in which our Supreme Court denies certiorari) by an international private-law tribunal, whose appellate jurisdiction would be invoked by private litigants? I would answer “yes,” though I will do no more here than sketch the bare outlines of two theories leading to this answer.

First, the treaty power has already been held to be an independent source of national empowerment, supplementing and going beyond article I, section 8.<sup>18</sup> I would think that the treaty

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18. *Missouri v. Holland*, 252 U.S. 416 (1920).

power might just as well be held to stand in the same relation to article III, so as to provide for additional "vesting" of judicial jurisdiction, or, in the perhaps less disturbing alternative, so as to fill out the "exceptions and regulations" power expressly given to Congress, with respect to the Supreme Court's appellate jurisdiction. A direction to the Supreme Court to obey in COGSA cases the mandate of the COGSA court of appeals might be held an article III "regulation" made by the exercise of the treaty power, or by legislation passed to execute the treaty. Indeed, even if self-executing, the treaty should be duplicated and reinforced (just as the substantive parts of treaties are often duplicated and reinforced) by congressional action of conforming tenor, particularly since no such step as the one I am suggesting should be taken without clearly expressed congressional concurrence.

Secondly, Congress possesses broad power to regulate foreign commerce. The step I propose is beyond doubt reasonably instrumental, in fact, to the facilitation of foreign commerce; certainly, its possession of this character is within the scope of rational congressional judgment. Here again, a "regulation" of foreign commerce might be at the same time a "regulation" of the Supreme Court's exercise of its appellate jurisdiction.

It could go without saying (though it has often been said) that neither the treaty power nor the commerce power can be used to do anything *forbidden* by the Constitution.<sup>19</sup> Quite obviously, the usual Bill of Rights material (including article I, section 9 material, and the like) is in no intrinsic way implicated here; if it ever became accidentally implicated, our own Supreme Court could and should mould its own judgment and mandate accordingly, for it would then be faced with a situation in which the treaty setting up the international court had, in its workings, gone where the treaty power cannot go, or with a situation in which the commerce power had gone onto forbidden ground. The only prohibitions one needs to worry about lie in the possible implications of article III: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>20</sup>

Would the consent of the United States to the work of an international court of appeals, acting only on international commercial cases involving treaty interpretation, violate the implications of these words? I think not. Within the United States, there would still

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19. *Reid v. Covert*, 354 U.S. 1 (1957).

20. U.S. CONST. art. III, § 1.

be "one supreme Court."<sup>21</sup> The judgments of the international court of appeals could work only through that "one supreme Court." Our Supreme Court could, first of all, decide whether the whole arrangement was constitutional, by obeying or disobeying the first mandate it received from the new court, reversing one of its judgments. (I am assuming that no one would think it either politically possible or wise to give the international court any coercive power to enforce its judgments in the United States or elsewhere.) Our Supreme Court would permanently have the power (and the duty) to refuse to obey any mandate producing, in its own independent judgment, any violation of the Bill of Rights, or other prohibitory material in our Constitution (or even in laws subsequent to the consenting treaty). The question whether a treaty (or the working-out of a treaty) violates our Constitution, or transgresses law which under our system prevails over the treaty, is *not* a question of COGSA interpretation, and would not (and I think could not) be taken from any American court, in cases within that court's judicial jurisdiction.

The practical substance of the matter would be no more than a definite but not fatally diverging variation on Congress's everyday power to give the Supreme Court rules of decision in statute law (or on the power of the treaty-making organs to give the courts rules of decision by treaty).<sup>22</sup> Congress has done this, for example, in COGSA. Congress could do it every day, by amending COGSA, and could, if it wished, shape this daily amendment in strict conformity to the advisory judgments of an international court sitting in Switzerland—or even in strict conformity to the expressed opinions of some leading jurisconsult. In the arrangement I am proposing, Congress (or the treaty-forming organs, or both) would be saying that, when the rule of decision must be derived by interpretation of COGSA, that rule shall ultimately be found by reference to the judgment of the international court of appeals.<sup>23</sup> This would imply that the judgments of our Supreme Court were in these matters to be tentative, until the interpretation of COGSA on the disputed point was finally firmed by the international court (though of course an unappealed judgment, or one as to which the international court "denied certiorari," would be *res judicata*). This is different from anything we now do, but I cannot see that it is unconstitutionally different—

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21. Herein lies the crucial difference between the proposal here presented and the now much-discussed "National Court of Appeals"—both as a matter of constitutional law and as a matter of wise policy.

22. U.S. CONST. art. VI, cl. 2.

23. *Cf.* *United States v. Sharpnack*, 355 U.S. 286 (1958).



particularly since it is so fairly instrumental to the just and uniform regulation of foreign commerce.

On this analysis, the only difference between daily or hourly amendment of COGSA, an undoubtedly permissible procedure, and a congressional direction that the Supreme Court give effect to the interpretations made from time to time by the international court, would be that, theoretically, the latter procedure, in reference to the actually appealed case, might be thought to entail a forbidden retroactivity. I have said "theoretically" because in fact no firm expectations can be (or at least ought to be) built on the prelitigation resolution, by parties' counsel, of genuine issues of statutory interpretation, and there would in actual substance be no more "retroactivity" in the Supreme Court's acting on the international court's interpretations of doubtful provisions than there now is in the Supreme Court's acting on its own interpretations of such provisions. If a case of so really outrageous surprise occurred as to amount to a violation of due process, our Supreme Court would have the power and the duty to disobey the mandate, since the Court could never surrender or be stripped of its power to give effect to the American Constitution, in cases before it. It seems unlikely that such a case would occur.

I think this is a modest proposal, and that not in the Swiftian sense. Practically, the step would constitute no more than an implementation (close to "necessary," as well as "proper") of the entirely legitimate interest of the United States (as of all countries) in the uniformity of international commercial law. If there is an altogether different way in which this uniformity—in *result* as well as in *text*—could be achieved, I would be glad to hear what it is.

Of course, the scheme I have here put forward could be applied to other subjects than the Hague Rules and COGSA. I have used COGSA simply as a paradigm. And I have only sketched the proposal, so as to have it in the open for comment. Perhaps an international commercial court of appeals, accessible to private litigants, will be possible no sooner than fifty years from now, or even a hundred. But we can start thinking about it today.

