

10-1-2013

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Recommended Citation

Thomas P. White, *Lost at Sea: Rescuing Cruise Line Crewmembers From the Perils of Foreign Arbitration*, 45 U. Miami Inter-Am. L. Rev. 171 (2013)

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STUDENT NOTES/COMMENTS

Lost at Sea: Rescuing Cruise Line Crewmembers From the Perils of Foreign Arbitration

Thomas P. White^{a1}

I. INTRODUCTION

For most, waiting in line to board a cruise-ship represents the beginning of an extravagant vacation that includes crossing the Caribbean with a beach towel in one hand, daiquiri in the other, and a view of the ocean only obstructed by sunglasses. But standing in line to board a cruise-ship represents a very different beginning for the people who serve the passengers that daiquiri, or wash that beach towel. For these crewmembers, often hailing from Central or South America, and Eastern Europe, standing in line marks the beginning of an extraordinary opportunity to provide for their families by working at sea. As each foreign crewmember makes it to the front of the line, the momentary glance at the employment contract presented to them, often in a language they cannot read, will be the least memorable part of this exciting experience. But for an unlucky few, this forgettable experience will have startling repercussions on their rights in United States courts.

Rigidor Lagarde was one such crewmember.¹ On his first day of work, Lagarde found himself in line with the rest of the crew, a collection of nationalities, all seeking a new life working on the open seas.² Waiting before the looming cruise-ship, Lagarde's mind was with his family in an impoverished Filipino community. With little education, or grasp of the English language, Lagarde had left the Philippines to work on a cruise-ship to support his

^{a1} J.D. Candidate, May 2014, University of Miami School of Law. I would like to thank Tanya Meister-Griffith for the incredible guidance she provided in the construction of this article, and Professor Michael Karcher for the direction he provided. I would also like to thank my family and friends for their constant support, and for the time spent discussing this article.

1. Lagarde Aff. ¶¶ 1, 4.

2. *Id.* at ¶ 6.

family.³ Upon reaching the front of the line, he signed his employment contract as he was instructed to do, and as he had watched fellow crewmembers do.⁴ Forced to sign in a hurry with no opportunity to read the contract or ask questions, Lagarde and the others could only agree to the contract.⁵ Given no opportunity to modify or negotiate, the crewmembers had only the choice to sign or be left in a foreign country with no employment.⁶ Further, Lagarde was not provided a contract in his native tongue. Given only an English version, the contract included words such as “arbitration,” that he could not read or understand.⁷ With no comprehension of his rights, or those that he had just waived, Lagarde began a long career working as a waiter on cruise ships, until he suffered a severe injury on the job that would require back surgery.⁸ Like countless other foreign crewmembers, Lagarde was startled to learn that amongst provisions he was neither able to understand, nor given time to read, the word “arbitration” would foreclose his ability to recover in a United States courtroom, under United States law. Without the protection of United States law, Lagarde’s struggle left him handicapped, unable to gain employment, and without compensation: the standard result for a foreign crewmember injured at sea.

Under maritime law, modern seamen enjoy tremendous legal protections specifically implemented to counteract the difficult conditions and bargaining power available at sea. In the United States, the Merchant Marine Act of 1920, more commonly referred to as the Jones Act, provides specific methods of recovery for employees injured while working as seamen. Unlike most other professions, under the Jones Act, sailors are permitted to bring negligence actions against their employers; a codified illustration of the historic protections that have long been provided to sailors.⁹ Further, Congress enacted this statute to “provide liberal recovery”¹⁰ for sailors, and adopted a “lower showing of proximate cause than would be required in a non-admiralty case.”¹¹ In a recent case regarding causation under the Federal Employers’ Liability Act

3. *Id.* at ¶¶ 11, 13, 14.

4. *Id.* at ¶ 6.

5. *Id.* at ¶¶ 6-8.

6. *Id.*

7. Lagarde Aff. ¶¶ 13, 14.

8. *Id.* at ¶¶ 4, 16, 17.

9. 46 U.S.C. § 30104 (2008).

10. *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 432 (1958).

11. *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1295 (11th Cir. 2011) (Barkett, J. dissenting).

(FELA), the Supreme Court affirmed this standard, explaining that a plaintiff must only show the employer's negligence "played a part—no matter how small—in bringing about the injury."¹² Similarly, under United States common law, an injured seaman is also provided "maintenance and cure," which demands that the employer of such a seaman provide all living and medical expenses for his crewmember until that crewmember has recovered from said injury, or reached maximum medical improvement (MMI).

While the cruise industry often provides foreign seamen exceptional opportunities to earn money both for themselves and their families, the employment contracts crewmembers sign can turn this dream into a nightmare. Recently, the cruise industry has begun including foreign arbitration and choice of law clauses. Upon signing these clauses, seamen such as Lagarde agree that any case or claim that arises from their employment must be arbitrated outside the United States, usually under the laws of a different nation. Typically, arbitration occurs in the nation that the seaman hails from, under the laws of the flag-state of the cruise ship on which the seaman works. As nearly 90% of commercial vessels calling on U.S. ports fly a foreign flag, the majority of cruise-ships are not registered in the U.S.¹³ Therefore, forced to seek recovery outside the United States, under foreign law, foreign crewmembers are denied the protections of the Jones Act and "maintenance and cure," because the laws under which they must arbitrate do not provide similar protections.

Although foreign arbitration clauses have deprived the rights of all foreign crewmembers employed in the United States, the problem has become especially acute in the cruise industry, which employs a large number of foreign crewmembers and has almost universally implemented such clauses in its contracts.¹⁴ In 2011,

12. *CSX Transp., Inc. v. McBride*, 131 S.Ct. 2630, 2644 (2011) (citing *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 507-08 (1957)).

13. *Maritime Industry Background*, CRUISE LINES INTERNATIONAL ASSOCIATION, INC., <http://www.cruising.org/regulatory/resources/maritime-industry-background> (last visited Jan. 15, 2013); *Why are cruise ships registered in foreign countries?*, USA TODAY, <http://www.usatoday.com/story/travel/cruises/2012/12/11/why-are-cruise-ships-registered-in-foreign-countries/1760759/> (last visited Oct. 9, 2013) (indicating that only one major cruise ship is registered in the United States, and that most large carriers' ships are flagged in the Bahamas, while Panama, Bermuda, Italy, Malta and the Netherlands are also popular).

14. *See Aggarao v. MOL Shipping Mgmt. Co., Ltd.*, 675 F.3d 355, 360 (4th Cir. 2012) (enforcing a foreign arbitration clause in the employment contract of a Filipino seaman employed on a cargo vessel).

the cruise industry generated \$40.4 billion of revenue, employing 347,787 workers.¹⁵ Florida serves as the center of the cruise industry within the United States, with more than 60 percent of cruise passengers departing from a Florida port, and three-fourths of the industry headquartered in South Florida, including Carnival Corporation & plc., Royal Caribbean Cruises, Ltd., and Norwegian Cruise Line all within Miami-Dade County.¹⁶ With such a large portion of the industry operating out of South Florida, the United States District Court for the Southern District of Florida has become the epicenter for crewmember injury claims. However, under the Eleventh Circuit's recent opinions, the cases of foreign crewmembers do not remain in the Southern District Court for long. Instead, all of these cases follow nearly an identical progression. Most foreign crewmembers, seeking a jury, file in Florida state court. From there, the cruise lines will remove the claim to federal court, under admiralty jurisdiction. There, they will move to compel arbitration in accordance to the crewmember's employment contract, to a different country, under different law. At this point, the jurisprudence of the Eleventh Circuit demands that the District Court grant arbitration. Routine as clockwork, this process acts as a one-way ticket to arbitration for any foreign cruise line crewmember hurt on the job.

By enforcing the arbitration clauses included in the employment contracts of foreign seamen like Lagarde, the Eleventh Circuit has instructed its lower courts that the modern policy of favoring foreign arbitration clauses outweighs the centuries old protections that have been afforded to seamen. By compelling arbitration on this historically protected class, the Eleventh Circuit and its sister circuits have discarded the words of Justice Story that have dictated the claims of seamen since our nation's founding; that seamen are the "wards of admiralty."¹⁷ Although the now defunct reasoning employed in the Eleventh Circuit's case of *Thomas v. Carnival Corp.*, and the "prospective waiver" doctrine may yet again provide relief for Lagarde and his peers, there remains an alternative that the courts have not yet substantially considered.¹⁸ This alternative would demand the exportation of

15. *The Contribution of the North American Cruise Industry to the U.S. Economy in 2011*, BREA BUSINESS RESEARCH (prepared for "Cruise Lines International Association, August 2012), 46-47 available at http://www.cruising.org/sites/default/files/pressroom/2011EconomicStudies/EconStudy_Full_Report_2011.pdf.

16. *Id.* at 54-55.

17. *Harden v. Gordon*, 11 F.Cas. 480, 483 (C.C.D. Me. 1823) (Story, J.).

18. *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009).

the protections granted to FELA railway workers to find that arbitration clauses are unenforceable against Jones Act seamen. However, while the Eleventh Circuit continues to favor arbitration over centuries of judicial and legislative treatment of seamen as a protected class, seamen like Lagarde will continue to suffer the very fate that Justice Story warned of in 1823.

The purpose of this article is to illustrate the inequitable result of the Eleventh Circuit's position to favor international arbitration clauses at the expense of the longstanding judicial precedent to treat seamen as a protected class. Additionally, this article will examine possible developments in the current law that the court could employ to return statutory rights to Lagarde and his peers. Part II(a) provides a glance at the judicial practice of treating seamen as a protected class that has been consistently reaffirmed by the Supreme Court. Conversely, Part II(b) offers a background on arbitration and the two-part analysis that courts have applied in challenges to such agreements. Part II(c)-(d) examines the key decisions of the Eleventh Circuit that preceded that court's decision in *Lindo v. NCL*, the case addressed in Part III. Finally, with this background in place, Part IV endeavors to critique potential legal developments and ultimately endorses the application of particular provisions of FELA to return the Jones Act protections that foreign cruise line crewmembers have been deprived.

II. BACKGROUND

A. *Seamen: The Protected Class*

The tradition of the United States judiciary to regard seamen as a legally protected class dates to the infancy of the nation. In 1823, the revered Justice Story pronounced a "great public policy of preserving [seamen as an] important class of citizens for the commercial service and maritime defence of the nation."¹⁹ Such treatment can be traced to the ancient history of English common law. The Supreme Court has long recognized that both U.S. and English law treat seamen "as if they needed the protection of the law, in the same sense that minors and wards need the protection of parents and guardians, and hence have been often described as 'wards of admiralty.'"²⁰ The Court has recently reaffirmed the importance of this special treatment:

19. *Harden*, 11 F.Cas. at 483.

20. *Robertson v. Baldwin*, 165 U.S. 275, 298-99 (1897) (Harlan, J. dissenting).

Justice Story identified this animating purpose behind the legal regime governing maritime injuries when he observed that seamen “are emphatically the wards of the admiralty” because they “are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour.” *Harden v. Gordon*, 11 F.Cas. 480, 485, 483 (No. 6,047) (CC Me. 1823). Similarly, we stated in *Wilander* that “[t]raditional seamen’s remedies . . . have been ‘universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected.’”²¹

This doctrine has not been lost to history, and as recently as 2009, the Supreme Court recognized the great protections afforded to seamen.²²

More recently, this precedent has seemingly lost its luster in the Eleventh Circuit. There, a line of cases has developed regarding crewmember arbitration that permits the cruise industry to trample the statutory rights of its foreign crewmembers. However, before delving into the Eleventh Circuit’s controversial rulings, it is important to consider where the competing interest of favoring foreign arbitration derives.

B. The New York Convention and the Federal Arbitration Act

The application of foreign arbitration in the U.S. began in 1925, when Congress first enacted the Federal Arbitration Act (“FAA”).²³ The FAA implemented a pro-arbitration policy, compelling the enforcement of freely negotiated arbitration agreements, with certain restrictions.²⁴ The U.S. became a party to the United Nations Convention on the Recognition and Enforcement of For-

21. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995) (quoting *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104, 66 S.Ct. 872, 882, 90 L.Ed. 1099 (1946) (Stone, C.J., dissenting)).

22. See *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009).

23. Jarred Pinkston, *New York’s Unwelcoming Harbor: The New York Convention’s Inapplicability to Claims Arising From Seamen’s Employment*, 3 B.Y.U. INT’L L. MGMT. REV. 233, 233 (2007).

24. *Id.*; see also Justin Samuel Wales, *Beyond the Sail: The Eleventh Circuit’s Thomas Decision And Its Ineffectual Impact on the Life, Work, And Legal Realities of The Cruise Industry’s Foreign Employees*, 65 U. MIAMI L. REV. 1215, 1226 (2011) (noting that the FAA was passed with the hope that it would place private arbitration agreements within employment contracts on “equal footing with other contracts”) (citing Matthew Nickson, *Closing U.S. Courts to Foreign Seamen: The Judicial*

foreign Arbitral Awards (New York Convention), which was subsequently enacted in 1970 by the Convention Act.²⁵ Both the FAA and the Convention Act have been codified in Title 9 U.S.C., chapter 1 containing the FAA, and chapter 2 containing the Convention Act.²⁶ Under the New York Convention and later Supreme Court precedent, foreign arbitration has enjoyed an “emphatic federal policy in favor of arbitral dispute resolution.”²⁷ Under the Convention Act, Article II(3) provides that a court may refer parties to arbitration at the request of one party when such an agreement has been made providing for arbitration.²⁸ “This obligation does not arise, however, (i) if the agreement ‘is null and void, inoperative or incapable of being performed,’ Art. II(3), or (ii) if the dispute does not concern ‘a subject matter capable of settlement by arbitration,’ Art. II(1).”²⁹ Articles III and IV, on the other hand, apply post-arbitration, providing for the enforcement of an award.³⁰ Article V, also applies post-arbitration, providing a list of seven circumstances in which a court may refuse to recognize and enforce an award, among which that an arbitration award may not be enforced “if an arbitration award is ‘contrary to the public policy of [a] country’ called upon to enforce it.”³¹

C. *Bautista v. Star Cruises*

Bautista v. Star Cruises represents one of the first cases in which the Eleventh Circuit chose to enforce a foreign arbitration agreement in a crewmember’s employment contract.³² While the results of this case would be limited to the enforcement of such clauses against crewmembers from the Philippines, *Bautista* represents the first step in the Eleventh Circuit’s jurisprudence that would result in the deprivation of U.S. statutory rights of not just Filipino, but all crewmembers.

Excision of the FAA Seaman’s Arbitration Exception from the New York Convention Act, 41 TEX. INT’L L. J. 103, 106 (2003)).

25. Nickson, *supra* note 24, at 104 n. 3.

26. Rory Bahadur, *Constitutional History, Federal Arbitration And Seamen’s Rights Sinking in a Sea of Sweatshop Labor*, 39 J. MAR. L. & COM. 157 (2008).

27. Daniel M. Schwarz, *A Regression From The New York Convention: Questions Raised By Thomas v. Carnival Corporation*, 64 U. MIAMI L. REV. 1441, 1445 (2010) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)).

28. *Mitsubishi Motors*, 473 U.S. at 659.

29. *Id.*

30. *Id.*

31. *Id.*

32. 396 F.3d 1289 (11th Cir. 2005).

The dispute in *Bautista* began when the steam boiler of a cruise ship, owned by the defendant, exploded while the vessel was docked in the Port of Miami.³³ Of the crewmember plaintiffs in the suit, six were killed in the explosion and four were injured.³⁴ As Filipino crewmembers, the content of their employment contracts had been regulated by a Filipino state agency, the Philippine Overseas Employment Administration.³⁵ Included in the state-crafted contracts was an arbitration clause that required arbitration in any “cases of claims and disputes arising from [the seamen’s] employment.”³⁶

While *Bautista* would be the catalyst for substantial litigation over crewmember arbitration in the late 2000s, the principal argument in the case was different than its progeny. In *Bautista*, the plaintiffs argued that Section 1 of the FAA had exempted seamen, such as themselves, from the enforcement of foreign arbitration agreements, generally enforced by the Convention Act.³⁷ This exemption provides that “nothing herein contained shall apply to contracts of employment of seamen.”³⁸ However, the Eleventh Circuit disagreed, holding that the Section 1 exemption under the FAA conflicted with the Convention Act and was therefore inapplicable.³⁹ In reaching this conclusion, the court adopted the reasoning of the Fifth Circuit’s decision in *Francisco v. Stolt Achievement* and foreclosed any challenge to foreign arbitration clauses under the FAA Section 1 seamen exemption.⁴⁰

D. *Thomas v. Carnival Corp.*

After *Bautista*, cruise lines began to apply foreign arbitration clauses to the employment contracts of all foreign crewmembers. This practice persisted with approval from the district courts⁴¹ until the 2009 decision of *Thomas v. Carnival Corp.*, which returned substantial protection to foreign crewmembers.⁴² How-

33. *Id.* at 1292.

34. *Id.*

35. *Id.* at 1293.

36. *Id.*

37. *Id.* at 1296.

38. 9 U.S.C. § 1 (1947).

39. *Bautista*, 396 F.3d at 1292; *see also* Wales, *supra* note 24, at 1227.

40. *Bautista*, 396 F.3d at 1299 (citing *Francisco v. Stolt Achievement* MT, 293 F.3d 270 (5th Cir. 2002)).

41. *See e.g.*, *Allen v. Royal Caribbean Cruise, Ltd.*, No. 08-22014, 2008 U.S. Dist. WL 5095412 (S.D. Fla. Sept. 30, 2008); *Lathan v. Carnival Corp.*, No. 08-23002, 2009 WL 6340059 (S.D. April 9, 2009).

42. *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1113 (11th Cir. 2009).

ever, *Thomas* represented a substantial break, not only from the Eleventh Circuit's application of foreign arbitration clauses, but also from that of many of the court's sister circuits.⁴³ As a result, the *Thomas* opinion became the point of considerable analysis, drawing both criticism and praise from the legal community.⁴⁴ The *Thomas* opinion represents an effort by the Eleventh Circuit to return the statutory rights that had been chipped away and eventually denied to foreign crewmembers since the court's *Bautista* opinion.

In *Thomas*, the plaintiff was employed as a waiter on a Carnival ship that flew a Panamanian flag of convenience.⁴⁵ During the course of his employment, the plaintiff slipped, injuring his back, shoulder, and leg.⁴⁶ After visiting the onboard physician and taking time off to recover from his injuries multiple times, Carnival discharged the plaintiff, finding that his injuries rendered him unfit for his duties.⁴⁷ Because Thomas received a token "medical sign-off," and only three months of maintenance and cure, he filed suit in state court. Subsequently, Carnival removed the case to federal court, where arbitration was compelled as a result of a contract signed after his injury that directed all disputes to be arbitrated in the Philippines under Panamanian law.⁴⁸

In challenging the provision, Thomas maintained that the foreign arbitration clause, coupled with the choice of law clause, acted as a "prospective waiver" of his statutory rights.⁴⁹ As such, those provisions of the employment contract would be "contrary to

43. See *Francisco*, 293 F.3d at 270; *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148 (9th Cir. 2008); see also *Lobo v. Celebrity Cruises, Inc.*, 488 F.3d 891 (11th Cir. 2007).

44. See *Wales*, *supra* note 24, at 1215 (concluding that the *Thomas* decision has a limited effect on the actual plight of crewmembers); Joseph R. Brubaker & Michael P. Daly, *Twenty-Five Years of the "Prospective Waiver" Doctrine In International Dispute Resolution: Mitsubishi's Footnote Nineteen Comes To Life In The Eleventh Circuit*, 64 U. MIAMI L. REV. 1233, 1277 (2010) (finding that the *Thomas* decision "provides courts with a unique prophylactic measure to ensure the survival of U.S. statutory policies when the application of those policies in foreign proceedings and the domestic opportunity to review those foreign proceedings remain uncertain," while noting that it has left open several questions regarding the doctrine); Joseph R. Brubaker, *The Prospective Waiver Of A Statutory Claim Invalidates An Arbitration Clause: The Eleventh Circuit Decision in Thomas v. Carnival Corp.*, 19 AM. REV. INT'L ARB. 309, 316 (2008) (considering the unanticipated consequences of the Eleventh Circuit's decision).

45. *Thomas*, 573 F.3d at 1115-16.

46. *Id.* at 1116.

47. *Id.*

48. *Id.* at 1115-16.

49. *Id.* at 1115.

public policy”⁵⁰ of the U.S. and, therefore, unenforceable.⁵¹ The court agreed with Thomas, relying on the Supreme Court’s holding in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁵² In that case, the Supreme Court considered a similar argument, in which the plaintiff challenged a foreign arbitration agreement on the grounds that Sherman Act violations were not appropriate for foreign arbitration.⁵³ The Court rejected this argument, holding that U.S. policy would not be violated because the parties had agreed to apply U.S. law in the foreign arbitration proceedings.⁵⁴ However, in dicta, the Court held that “[i]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for anti-trust violations, we would have little hesitation in condemning the agreement as against public policy.”⁵⁵ In *Thomas*, the Eleventh Circuit reasoned that such a “tandem” had been worked on the plaintiff, and acted as a “prospective waiver” of Thomas’ Seaman’s Wage Act claim, which was a U.S. statutory remedy.⁵⁶ Further, the court held that the application of Panamanian law could potentially yield Thomas no award, leaving him with nothing to enforce in U.S. courts, and therefore, no later opportunity for review.⁵⁷

The *Thomas* opinion effectively applied the “prospective waiver” doctrine to render the arbitration agreement unenforceable, under Article V(2)(b) of the Convention. But the opinion would not deter the cruise industry from applying foreign arbitration clauses to the contracts of its foreign employees. In the wake of the *Thomas* opinion, the cruise lines began stipulating to the application of U.S. law regarding a crewmember’s statutory claims.⁵⁸ This way, the cruise lines continued to subject

50. *Id.* (citing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 21 U.S.T. 2517).

51. *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1113 (11th Cir. 2009).

52. *Id.* at 1120 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 614-15 (1985)).

53. *Mitsubishi Motors*, 473 U.S. at 628.

54. *Id.* at 640.

55. *Id.* at 652 n. 19.

56. *Thomas*, 573 F.3d at 1123.

57. *Id.* at 1123-24. (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (holding that a “prospective waiver” of U.S. statutory rights is only against public policy when there is no subsequent opportunity for review by U.S. courts to ensure that the legitimate interest in enforcing U.S. statutory law has been addressed)).

58. *See e.g.*, *Matthews v. Princess Cruise Lines, Ltd.*, 728 F.Supp.2d 1326, 1328 (S.D. Fla. 2010).

crewmembers to the inequitable practice of foreign arbitration, without contradicting the holding of *Thomas*.

III. CREWMEMBER RIGHTS SINK TO NEW DEPTHS UNDER *LINDO v. NCL*

The Eleventh Circuit's *Thomas* decision represented a surprising appeal to humanity considering the court's previous holdings enforcing arbitration clauses found in crewmember employment contracts. While the *Thomas* decision did create waves within the cruise industry, the holding would not last long. In 2011, only two years after the *Thomas* opinion, the Eleventh Circuit decided *Lindo v. NCL*.⁵⁹ Treating the *Thomas* opinion as no more than a minor indiscretion, the *Lindo* opinion returned to cruise lines the authority to deprive crewmembers of their rights by enforcing the arbitration clauses.⁶⁰ While the validity of the *Lindo* decision has been challenged since its release, it has consistently been upheld, with each decision further deconstructing *Thomas*.⁶¹ Currently, *Lindo* represents the most detailed interpretation of the Eleventh Circuit's position on the enforcement of crew arbitration, and has realigned the Eleventh Circuit's reasoning with its previous precedent and that of its sister circuits.⁶²

The facts surrounding *Lindo* read much like most crew arbitration cases brought within the Eleventh Circuit. Harold Leonel Pineda Lindo, a Nicaraguan citizen and resident, was injured while working on the Norwegian Cruise Line (hereinafter "NCL") ship, the M/S Norwegian Dawn.⁶³ NCL maintains its principle place of business in Miami, Florida, where it operates cruise ships that depart from, and return to, ports in the United States.⁶⁴ However, NCL is a Bermuda corporation, and the M/S Norwegian Dawn flies a Bahamian flag of convenience.⁶⁵ In December 2008, during his employment with NCL, and within the scope of his

59. *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257 (11th Cir. 2011).

60. *Id.* at 1257.

61. See *Williams v. NCL (Bahamas), Ltd.*, 686 F.3d 1169 (11th Cir. 2012); *Fernandes v. Carnival Corp.*, 484 F. App'x 361 (11th Cir. July 12, 2012); *Arauz v. Carnival Corp.*, 466 Fed. Appx. 815 (11th Cir. 2012).

62. See *Aggarao v. MOL Shipping Mgmt. Co., Ltd.*, 675 F.3d 355 (4th Cir. 2012); *Harrington v. Atlantic Sounding Co., Inc.*, 602 F.3d 113 (2d Cir. 2010); *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148 (9th Cir. 2008); *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005); *Francisco v. Stolt Achievement MT*, 293 F.3d 270 (5th Cir. 2002).

63. *Lindo*, 652 F.3d at 1260.

64. *Id.*; *Spector v. Norwegian Cruise Lines, Ltd.*, 545 U.S. 119, 126 (2005).

65. *Lindo*, 652 F.3d at 1260.

employment, Lindo injured his back after being ordered to carry heavy trash bags to the cruise ship from NCL's privately owned island in the Bahamas.⁶⁶ Subsequently, Lindo underwent surgery to correct the injury he sustained working for NCL.⁶⁷

Lindo's employment was governed by a collective bargaining agreement negotiated by NCL and the Norwegian Seafarers' Union, and specified that all Jones Act claims would be resolved through binding arbitration, stating:

Seaman agrees . . . that any and all claims . . . relating to or in any way connected with the Seaman's shipboard employment with Company including . . . claims such as personal injuries [and] Jones Act claims . . . shall be referred to and resolved exclusively by binding arbitration pursuant to the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards⁶⁸

Further, Lindo's contract required him to arbitrate any disputes arising out of his employment in Nicaragua (Lindo's home country), under Bahamian law (the law of the flag state of the vessel).⁶⁹

In 2009, Lindo filed action against NCL in Florida state court.⁷⁰ Following routine procedure for crewmember claims, NCL removed the action to the U.S. District Court for the Southern District of Florida and sought to compel arbitration.⁷¹ During that time, Lindo amended his claim to allege only Jones Act negligence, noting that NCL had met its maintenance and cure obligations.⁷² Soon after, the district court granted NCL's motion to dismiss the claim and compelled arbitration.⁷³

In his decision, Judge Hull began by recognizing Supreme Court precedent applying a "strong presumption in favor of freely-negotiated contractual choice-of-law and forum-selection provisions," especially within the field of international commerce.⁷⁴ In his first attempt to deconstruct the *Thomas* decision, Judge Hull described the two stages of enforcement of arbitration agreements. Consistent with Supreme Court precedent, Hull explained

66. *Id.*

67. *Id.*

68. *Id.* at 1260-61.

69. *Id.* at 1261.

70. *Id.*

71. *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1261 (11th Cir. 2011). NCL moved to remove the claim pursuant to 9 U.S.C. § 205.

72. *Id.*

73. *Id.* at 1262, 1287.

74. *Id.* at 1275.

that under Article II, the first phase of arbitral enforcement is action to compel arbitration.⁷⁵ In an action to compel arbitration, under the Convention, a court may only decline the enforcement of an arbitration clause if it finds the agreement to be “null and void, inoperative or incapable of being performed.”⁷⁶ Again, consistent with precedent, Hull then recognized the second stage of enforcement, the action of confirming an arbitral award subsequent to arbitration. In this second stage, Article V of the convention recognizes seven defenses to the confirmation of the arbitral award, including the one at issue in both *Thomas* and *Lindo*, that “the award would be contrary to the public policy of that country.”⁷⁷

Using this framework for enforceability, the court first rejected Lindo’s argument that the employment agreement was “null and void” because its “take-it-or-leave-the-ship basis” was unconscionable.⁷⁸ Judge Hull found that Lindo had failed to assert any permissible defense under Article II, as Lindo was challenging the enforcement of arbitration before arbitration actually had been compelled. Further, the court rejected the reasoning in *Thomas*, on which Lindo’s argument relied, finding that the public policy defense created by the *Thomas* decision was not a proper defense under Article II.⁷⁹ In reaching this conclusion, Judge Hull criticized *Thomas*’ reliance on the “prospective waiver” language of footnote 19 of *Mitsubishi*, dismissing footnote 19 as “undisputably dicta” and noting that the Supreme Court has never invalidated an arbitration agreement on that basis.⁸⁰ Rather, Judge Hull maintained that *Thomas* ignored the true pro-arbitration principles on which *Mitsubishi* actually relied.⁸¹

In *Lindo*, Judge Hull also explained that *Thomas* ignored the Supreme Court’s analysis in *Vimar*, which held that a court should not speculate about the outcomes of arbitration at the first stage of compelling arbitration.⁸² Further, *Thomas* ignored the

75. *Id.* at 1263.

76. *Id.* (quoting *New York Convention*, art. II(3)).

77. *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1263 (11th Cir. 2011).

78. *Id.* at 1276-77.

79. *Id.* at 1278.

80. *Id.*

81. *Id.* at 1279; see also Nicholas A. Machen, *Balancing Bargaining Power: The Eleventh Circuit Overreaches to Destroy the Public Policy Defense at the Initial Enforcement Stage of Arbitration in Lindo v. NCL (Bahamas), Ltd.*, 36 TUL. MAR. L.J. 839, 847 (2012).

82. *Lindo*, 652 F.3d at 1279. The *Lindo* court determined that *Thomas* improperly avoided the *Vimar* warning not to speculate about the outcome of an arbitration award at the enforcement stage as it reasoned that U.S. law would never be applied in

Vimar holding that the “prospective waiver” theory from *Mitsubishi* should only be applied where there is no further opportunity for review, noting that the prospect of no award existed in *Vimar* as it does in every arbitration case.⁸³ The court rejected the claim that there was only a possibility for subsequent review if the district court retained jurisdiction, by noting that even where a district court has not retained jurisdiction, an action to confirm an award may be brought as a separate action under federal law.⁸⁴

Finally, the *Lindo* decision rejects the claim that through the 2008 Amendment to the Jones Act, Congress created a “subject-matter exception” to the arbitrability of Jones Act claims.⁸⁵ The Amendment deleted the venue provision of the Jones Act, adopting the FELA venue provision for Jones Act claims.⁸⁶ However, the court declined to accept *Lindo*’s contention, that by adopting the FELA venue provision, 45 U.S.C. § 55 of FELA, which finds any contract attempting to limit liability under FELA to be void, should apply as well.⁸⁷

In her fiery dissent of the *Lindo* opinion, Judge Barkett reiterated the *Thomas* opinion, finding that the public policy defense could be raised during the first stage of compelling arbitration, and that the arbitration and choice of law clauses in *Lindo* “effected precisely the sort of prospective statutory waiver that the Supreme Court said it ‘would have little hesitation in condemning. . . as against public policy’” in footnote 19 of *Mitsubishi*.⁸⁸ Judge Barkett reached this conclusion by examining substantial Supreme Court precedent that held, under contract law, that an agreement contrary to public policy is considered to be “void,” and therefore must be inferred from the Convention’s “null and void”

the resolution of *Thomas*’ claims, because the choice of law clause required the application of Panamanian law rather than U.S. law. *See also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995).

83. *Id.*

84. *Id.*

85. *Id.* at 1286.

86. *Id.*

87. *Lindo*, 652 F.3d at 1286. 45 U.S.C. § 55 (2013) reads: “Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.”

88. *Id.* at 1288.

clause.⁸⁹ Additionally, Judge Barkett notes that the “null and void” clause of Article II was left deliberately broad, as it was “drafted in a race against time. . . inserted in the closing days of negotiations” at the New York Convention.⁹⁰ Finally, after noting the “heightened legal protections” afforded to seamen, and that they have “always been regarded as the wards of the admiralty court,” Judge Barkett reasoned that the enforcement of Lindo’s NCL’s arbitration clause contravenes the public policy of the United States, and should be denied under the “prospective waiver” doctrine.⁹¹ In conclusion, she protested “I believe the Supreme Court meant what it said in *Mitsubishi*. . . I would simply take the Supreme Court at its word, as we are required to do, and apply the [prospective waiver] doctrine to the case before us.”⁹²

IV. ANALYSIS: NAVIGATING THE LAW TO RESTORE THE JONES ACT PROTECTIONS

Moving forward, there appears to be three possible solutions in determining the validity of arbitration clauses the cruise industry has required in its employment contracts regarding Jones Act negligence claims brought by its foreign crewmembers. First, the crippling holding of *Lindo* might remain good law, allowing the cruise industry to continue exploiting its foreign crewmembers, leaving those who are injured while working on a cruise ship only the option to recover through arbitration. Rejected from any American courtroom, and with no realistic possibility to arbitrate, a continuation of *Lindo* would spell disaster for the foreign crewmember and represent an unprecedented attack on the “wards of admiralty.”⁹³

Alternatively, if the courts choose to recognize the plight of the cruise line crewmember, Judge Barkett’s dissent in *Lindo* could be adopted by reaffirming the court’s commitment to the *Thomas* decision and the application of the Supreme Court’s “prospective waiver” doctrine. However, as all of the Circuit Courts

89. *Id.*

90. *Id.* at 1289 (citing Albert Jan van den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* 154, (1981) (quoting Gary B. Born, *International Commercial Arbitration: Commentary and Materials*, 159 (2d ed. 2001)).

91. *Id.* at 1294-95 (citing *Chandris, Inc., v. Latsis*, 515 U.S. 347, 354 (1995); *Harden v. Gordon*, 11 F.Cas. 480, 483 (C.C.D. Me. 1823)).

92. *Id.* at 1297.

93. *Harden*, 11 F.Cas. at 483.

who have heard crewmember arbitration cases have rejected the *Thomas* reasoning, it would likely require the Supreme Court to accept certiorari on the issue to either accept or reject its language in *Mitsubishi's* footnote 19.

Finally, it has been contended that the arbitration clauses could be held void without utilizing the “prospective waiver doctrine.” Supreme Court precedent does demonstrate that protections under FELA should be extended to the Jones Act seaman, which would act to render any foreign arbitration clause in a crewmember’s employment contract void during the initial enforcement step of the agreement to arbitrate.

A. *Sticking With Lindo*

Although *Lindo* demonstrates that the Eleventh Circuit favors the “presumption of validity” enjoyed by foreign arbitration clauses, over the centuries old policy of treating seamen as a protected class, it is important to note the compelling reasoning employed by the Eleventh Circuit in reaching its decision. First, *Lindo* represents a key victory for alternative dispute resolution, and the support of foreign arbitration. Relying on Supreme Court precedent, the court recognized that this presumption “applies with special force in the field of international commerce.”⁹⁴ In this context, the *Lindo* decision can be considered as yet another step in the broadening of the court’s policy to presume the validity of any foreign arbitration clause.

Second, in its attempt to distinguish the two individual steps inherent in the enforcement of an arbitration clause, the *Lindo* opinion can be seen as an attempt to reaffirm the autonomy of each step after *Thomas* effectively blurred the difference between the two. Under this traditional two-stage interpretation of the Convention, Article II and Article V demonstrate that the affirmative defense of public policy may only be employed during the second stage of enforcement, subsequent to an arbitral award.⁹⁵ Through its opinion in *Lindo*, the Eleventh Circuit reaffirmed its decision to treat the affirmative defenses in Article II and Article

94. *Lindo*, 652 F.3d at 1265 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-38 (1995); *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-16 (11th Cir. 1972); *Bautista v. Star Cruises*, 396 F.3d 1289, 1295 (11th Cir. 2005); *Lipcon v. Corporation of Loyd's*, 148 F.3d 1285, 1292-94 (11th Cir. 1998)).

95. See *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1290-91 (11th Cir. 2004).

V procedurally separate, and declined to recognize any implicit overlap of defenses between the two-stage of enforcement.

Finally, through *Lindo*, the Eleventh Circuit eliminated the circuit split that the *Thomas* opinion had created.⁹⁶ The elimination of the circuit split recognizes the general policy of avoiding splits from its sister courts; it also represents a tough blow for those advocating for crewmember rights because the Supreme Court is unlikely to grant certiorari on a crewmember arbitration case as long as the circuit courts are unified on the interpretation.⁹⁷

No matter how firmly rooted in law the decision may be, the *Lindo* decision had undeniably detrimental effects on the rights of foreign seaman. The *Lindo* opinion itself fails to take into consideration the precarious position that foreign arbitration clauses leave crewmembers in. The Eleventh Circuit, in *Lindo* viewed arbitration as only a less favorable alternative for seafarers to resolve their claims. Rather, arbitration is not merely less favorable to seafarers as it often operates to “deprive [seafarers] of any remedy at all.”⁹⁸ Among the progeny of the *Lindo* decision, the case of *Fernandes v. Carnival Corp.* demonstrates how many foreign crewmembers find themselves uncompensated once their claims have been compelled to arbitration. Fernandes, a citizen of India, worked as a mechanic aboard the Carnival cruise ship SPIRIT.⁹⁹ While working on the ship, he injured his back.¹⁰⁰ After receiving little medical treatment from the shipboard physician, his injury was exacerbated by the continuation of work.¹⁰¹ Per his arbitration agreement, Fernandes’ Jones Act claim was compelled to arbitration in the Philippines under Bahamian law. Such

96. See *Aggarao v. MOL Ship Management Co., Ltd.*, 675 F.3d 355, 355 (4th Cir. 2012); *Harrington v. Atlantic Sounding Co., Inc.*, 602 F.3d 113, 113 (2d Cir. 2010); *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1148 (9th Cir. 2008); *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 270 (5th Cir. 2002).

97. See *United States v. Alexander*, 287 F.3d 811, 820 (9th Cir. 2002) (holding that “absent strong reason to do so, we will not create a direct conflict with other circuits”); see also *United States v. Games-Perez*, 695 F.3d 1104, 1115 (10th Cir. 2012) (noting “the avoidance of unnecessary circuit splits furthers the legitimacy of the judiciary and reduces friction flowing from the application of different rules to similarly situated individuals based solely on their geographic location”); *New Orleans Depot Servs. v. Dir.*, 689 F.3d 400, 409 n. 6 (5th Cir. 2012) (holding that circuit splits should be avoided unless persuasive reasons exist for creating them).

98. Petition for Writ of Certiorari at *25, *Fernandes v. Carnival Corp.*, No. 12-456 (U.S. Oct. 9, 2012), 2012 WL 4842991.

99. *Id.* at *7.

100. *Id.*

101. *Id.* at *7-8.

enforcement left Fernandes with no realistic opportunity to seek recovery, as “[h]is salary of \$1,500 a month will *never* allow him to fly the 3,000 miles from his home in India to the Philippines for an arbitration hearing. And, even if he could get there, no one in the Philippines would know Bahamian law anyway (except, of course, such version of Bahamian law as Carnival’s lawyers might present).”¹⁰² Under *Lindo*, Fernandes, Lagarde, and their peers, are not given a less favorable alternative to seek recovery through arbitration. Their rights as a “protected class” are ignored and they are often left entirely uncompensated.

B. *Returning to the “Prospective Waiver” Doctrine*

In searching for a legal argument that might better protect the rights of the foreign seaman, the most obvious answer calls for a return to the *Thomas* decision and the adoption of the Supreme Court’s “prospective waiver” doctrine. In employing this doctrine, the most compelling argument and implementation can be found in Judge Barkett’s dissent in *Lindo*.¹⁰³ However, while Barkett’s attack on the majority’s interpretation of the Convention Act, Article II(3) “null and void” provision is compelling, currently, a return to the “prospective waiver” doctrine would seem unlikely. Absent a revival of the doctrine by the Supreme Court, the Eleventh Circuit, through *Lindo* and its progeny have all but laid the application of *Mitsubishi*’s footnote 19 to rest as it applies to crewmember arbitration claims. While unlikely now, if a circuit that has not yet become entrenched in *Lindo*’s precedent were to adopt *Thomas*, such a circuit split might give the Supreme Court an opportunity to resurrect footnote 19. Until such resurrection, footnote 19 will not provide relief to any foreign crewmembers of the cruise industry, and it will be necessary to look to an alternative argument.

C. *Can FELA Provide Hope to Foreign Crewmembers Condemned to Arbitration?*

Although the adoption of the “prospective waiver” theory has been consistently rejected by the circuit courts and would now require the Supreme Court to definitively uphold its language in footnote 19 of *Mitsubishi*, there exists another legal avenue that could protect the rights of foreign crewmembers from the inequity

102. *Id.* at *25.

103. See discussion *supra* Part III.

of foreign arbitration. While not the focus of the *Lindo* opinion, this legal theory was given summary treatment in that case, when the Eleventh Circuit quickly discarded the argument before concluding the opinion.¹⁰⁴ This argument, which the Eleventh Circuit should give more than a passing glance, holds that Congress created a “subject matter exemption,” rendering Jones Act claims prohibited from arbitration.¹⁰⁵ Historically, the Court has recognized many provisions of FELA.¹⁰⁶ If the court were to specifically find that 45 U.S.C. § 55,¹⁰⁷ a provision of FELA that renders any contract void that attempts to limit the liability of FELA employee applied to the Jones Act, that provision would act to prevent the enforcement of foreign arbitration clauses against foreign crewmembers.¹⁰⁸

The application of FELA protections to the Jones Act is not a novel argument. Modeled after FELA, the Jones Act expressly provides that, “Laws of the United State regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.”¹⁰⁹ Additionally, the Supreme Court has held that the Jones Act, “expressly provides for seamen the cause of action—and consequently the entire judicially developed doctrine of liability—granted to railroad workers by the FELA.”¹¹⁰ More recently, the Court has held that “[t]he Jones Act establishes a uniform system of seamen’s tort law parallel to that available to employees of interstate railway carriers under FELA.”¹¹¹

The principal contention against the application of 45 U.S.C. § 55 has come from the Fifth Circuit’s decision in *Terrebonne v. K-Sea Trans. Corp.*¹¹² In that case, the court found that 45 U.S.C.

104. *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1286 (11th Cir. 2011).

105. *Id.*

106. *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 439 (1958).

107. 45 U.S.C. § 55 (2013) (stating “Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.”).

108. *See Harrington v. Atlantic Sounding Co., Inc.*, 602 F.3d 113, 113 (2d Cir. 2010); *Petition for Writ of Certiorari*, *supra* note 98, at *13.

109. 46 U.S.C. § 30104 (2008).

110. *Kernan*, 355 U.S. at 426; *see also American Dredging Co. v. Miller*, 510 U.S. 443, 456 (1994); *see also* *Petition for Writ of Certiorari*, *supra* note 98, at *16-17.

111. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 29 (1990); *see also* *Petition for Writ of Certiorari*, *supra* note 98, at *17.

112. *Terrebonne v. K-Sea Trans. Corp.*, 477 F.3d 271 (5th Cir. 2007).

§ 55 could not be exported to the Jones Act because the adoption of the FELA venue provision would be inappropriate, as the Jones Act included its own venue provision.¹¹³ However, since the *Terrebone* decision, in 2008 the venue provision of the Jones Act was repealed.¹¹⁴ But, even after the 2008 amendment, the *Lindo* opinion determined that those FELA provisions still did not apply, favoring instead the common law applications of the previously codified Jones Act venue provision.¹¹⁵

In his dissent from *Harrington v. Atlantic Sounding*, Judge Calabresi addresses the “historic importance and purpose of both the Jones Act and FELA, and of their unique protections for specific categories of workers, such as seamen,” that the *Lindo* opinion ignores.¹¹⁶ In his opinion, Judge Calabresi found that the “long-established precedent” in applying FELA protections to Jones Act seamen required the Second Circuit to find the arbitration agreement void.¹¹⁷ First, Calabresi points out that 46 U.S.C. § 30104 explicitly states that “Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section,” which the Supreme Court has established functions to adopt “the entire judicially developed doctrine of liability under [FELA].”¹¹⁸ The dissent relies heavily on *Boyd v. Grand Trunk Western Railroad*, which considered the enforceability of a forum-selection clause signed by a railway worker that required all disputes to be brought in Michigan.¹¹⁹ There the Supreme Court rejected the forum-selection clause, finding that a FELA governed contract limiting a plaintiff’s choice of venue violates FELA section 5 (codified at 45 U.S.C. § 55).¹²⁰ Then, Judge Calabresi pokes further holes in the majority’s reasoning, and that of *Lindo*, by citing compelling authority indicat-

113. *Id.* at 281.

114. See National Defense Authorization Act for Fiscal Year 2008, Pub.L. No. 110–181, § 3521(a), 122 Stat. 3, 596 (2008) (codified as amended at 46 U.S.C. § 30104) (eliminating 46 U.S.C. § 30104(b) (2007), providing “VENUE. – An action under this section shall be brought in the judicial district in which the employer resides or the employer’s principal office is located”).

115. *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1287 (11th Cir. 2011) (specifically noting the U.S. Supreme Court’s opinion in *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966)).

116. *Harrington v. Atlantic Sounding Co., Inc.*, 602 F.3d 113, 126 (2d Cir. 2010) (Calabresi, J. dissenting).

117. *Id.* at 134.

118. *Id.* at 133 (quoting 46 U.S.C. § 30104; *American Dredging Co.*, 443 U.S. at 456).

119. *Boyd v. Grand Trunk W. R.R.*, 338 U.S. 263 (1949).

120. *Id.* at 266.

ing that *Boyd* directly applies to the Jones Act as well.¹²¹ Finally, Judge Calabresi noted that as an arbitration clause acts to limit the forum in which a plaintiff may bring suit, “[a]n agreement to arbitrate before a specified tribunal is, in effect a special kind of forum-selection clause.”¹²² In failing to extend *Boyd*, Calabresi reasoned that the majority neglected the Congressional intent to give the “disadvantaged workmen some leverage,” not only under FELA, but also under the Jones Act.¹²³

Further, the Supreme Court made clear in *Atchison, Topeka, and Santa Fe Railway Co. v. Buell* that the substantive protections of FELA should not be supplanted by the general policy favoring arbitration.¹²⁴ In that case, the Supreme Court held that an arbitration clause found within the employment contract of a railroad worker was not enforceable, stating:

We find no merit in this argument. . . . This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. [citations omitted]. Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, “different considerations apply where the employee’s claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.”¹²⁵

As Congress intended, the Jones Act is a statute designed to provide minimum substantive guarantees to individual workers, just as FELA was.¹²⁶

Similar to Judge Barkett’s dissent in *Lindo*, Judge Calabresi’s dissent in *Harrington* recognizes the realities inherent in the enforcement of foreign arbitration clauses against Jones Act

121. *Harrington*, 602 F.3d at 134-35 (Calabresi, J. dissenting) (citing *Cal. Pub. Employees’ Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 99 (2d Cir. 2004); *Nunez v. Am. Seafoods*, 52 P.3d 720 (Ala. 2002)).

122. *Harrington*, 602 F.3d at 135 (Calabresi, J. dissenting) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)); *see also* *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995) (holding that foreign arbitration clauses are a subset of foreign forum selection clauses in general).

123. *Harrington*, 602 F.3d at 136 (Calabresi, J. dissenting) (quoting *Miles v. Illinois Cent. R. Co.*, 315 U.S. 698, 707-08 (1942)); *see also* *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995) (noting the Congressional intent to provide seamen “heightened legal protections” through the Jones Act).

124. *Atchison, Topeka, & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987).

125. *Id.* at 564-65.

126. *See* 46 U.S.C. § 30104 (2008).

seamen. Calabresi debunks the reasoning applied by both the *Harrington* majority, and the *Lindo* majority, revealing that neither court was *required* to hold that 45 U.S.C. § 55 did not apply to Jones Act claims. Rather, the courts chose to neglect the viable option of applying § 55 to Jones Act claims, such as *Lindo*'s or *Harrington*'s, in an effort to find that the policy of favoring foreign arbitration supersedes the "heightened legal protections" that seamen enjoy, which have stood the test of time and have been consistently reaffirmed by the modern Supreme Court. As such arbitration clauses would not be enforceable against FELA railroad employees, Congressional intent and Supreme Court precedent would demand similar treatment for sailors under the Jones Act.¹²⁷ Until the Eleventh Circuit grants these FELA protections to Jones Act seamen, the reality of foreign arbitration will continue to prevent cruise line employees from receiving fair compensation for injuries they received while serving as a supposed "protected class."

V. CONCLUSION

As the law currently stands, there is little hope that Lagarde will receive his day in a U.S. courtroom or receive the statutory protections entitled to him under U.S. law. Instead, like those that have come before him, Lagarde has been condemned to arbitration under another nation's law where crewmembers receive far less for the injuries they have sustained.¹²⁸ By repeatedly affirming the *Lindo* decision, the Eleventh Circuit continues to entrench its position on these foreign sailors: that the promotion of international arbitration is more important than defending this "protected class" from the inherent dangers of seamanship that have been recognized for centuries. Perhaps Judge Barkett said it best in her dissent, where she criticized the *Lindo* majority for "effectively transform[ing] the enforcement of international arbitration agreements into *the top U.S. public policy*."¹²⁹

While the circuit courts continue to embrace *Lindo*, any hope of rehabilitating the rights of the foreign crewmember will likely require the Supreme Court to correct the lower courts' interpreta-

127. Petition for Writ of Certiorari, *supra* note 98, at *28.

128. Although Lagarde was denied the opportunity to seek compensation for his injury in an American courtroom and has been subjected to arbitration governed by Panamanian law, Lagarde was more fortunate than others, as he was provided arbitration in his home country of the Philippines.

129. *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1294 (11th Cir. 2011) (emphasis added).

tion. Recently, the Supreme Court was given the opportunity to do just that, when it considered a petition for a writ of certiorari on the Eleventh Circuit case of *Fernandes v. Carnival Corp.*¹³⁰ That case provided the Supreme Court the opportunity to address the validity of adopting FELA to render the arbitration clauses of foreign seamen void, which served as a principal argument raised by the petitioner.¹³¹ But the rights of foreign seamen appear to be lost a while longer, as the Court denied the petition for certiorari on *Fernandes*.¹³² Although this injustice may not yet be “ripe” for review, eventually the Court must consider the degradation of its own precedent to defend seamen as the “wards of admiralty” in the name of international arbitration.¹³³

The devastating condition in which foreign crewmembers injured at sea find themselves demonstrates precisely why American courts have consistently protected seamen as “wards of admiralty.” With those protections nullified in the face of international arbitration, Lagarde and his peers suffer the same injuries our courts have guarded against since *Harden*. In 1823, Justice Story knew this was an unacceptable result. Today, the disregard of foreign seamen’s rights remains an unacceptable result. Neither Judge Barkett’s call to return to the “prospective waiver” doctrine in her dissent in *Lindo*, nor Judge Calabresi’s call to further adopt FELA into the Jones Act in his dissent in *Harrington* represent a “perfect fit” to return foreign seamen their Jones Act rights. However, few legal doctrines exist absent rational legal arguments against them. And until the legacy of the *Lindo* opinion is overturned, many more foreign seamen will suffer this unacceptable result despite being members of a “protected class.” The application of 45 U.S.C. § 55 to the Jones Act deserves the attention of our courts, and represents the most compelling argument to gain the correct result: welcoming cruise line crewmembers back to American courtrooms.

130. Petition for Writ of Certiorari, *supra* note 98, at *25; *see also* *Fernandes v. Carnival Corp.*, 2012 U.S. App. LEXIS 14270 (July 12, 2012).

131. Petition for Writ of Certiorari, *supra* note 98, at *25.

132. *Order List: 4/15/13*, THE SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/orders/courtorders/041513zor_p86b.pdf (last visited May 26, 2013).

133. *Harden v. Gordon*, 11 F.Cas. 480, 483 (C.C.D. Me. 1823).

