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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

Justin Samuel Wales

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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

JUSTIN SAMUEL WALES*

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I. INTRODUCTION

It has been one hundred years since White Star Line, a British-owned shipping company, berthed what would be known as the most infamous ocean liner ever built. The R.M.S. Titanic was the largest ship of its time.¹ Heralded as the epitome of luxury, the Titanic offered its privileged guests a degree of opulence fit for royalty.² First-class guests were treated to amenities previously unavailable aboard a ship, such as a swimming pool, gymnasium, and Turkish bath, as well as the finest cuisine and spa treatments.³ The Titanic's ill-fated voyage proved to be less luxurious than promised, and the story of its sinking has become legendary.

The Titanic's impact on popular culture looms large, but two lessons learned from the doomed ship are important in framing the issues discussed in this note. The first is that the Titanic, for better or worse, changed the world's perception of what it means to travel by ship.

* J.D. Candidate 2012, University of Miami School of Law; B.A. 2009, University of California, San Diego. Writing a law review casenote is not something you can do on your own. Many, many people contributed to this note. I would like to thank Dennis Lynch, William Widen, and Bonnie Lesnik for their expertise and advice, my mom for her unwavering support, the men and women of Starbucks for the free caffeine, and most importantly my wife Eva, for everything.

1. DANIEL ALLEN BUTLER, UNSINKABLE: THE FULL STORY OF THE R.M.S. TITANIC 249 (1998).

2. In fact, Sir Cosmo Duff-Gordon, Fifth Baronet of Halkin, and his wife Lucy Christiana, Lady Duff Gordon, both British Royals, were among the R.M.S. Titanic's first-class passengers. *Id.* at 110.

3. *Id.* at 18.

Before the Titanic proved it was possible to have all the conveniences of a world-class hotel on a ship, ship voyages were often thought of as a necessary burden of travel.⁴ In the decades following the Titanic's famed voyage, however, ocean liners began to advertise their ships, not merely as modes of travel, but as alternative vacations.⁵ Ship advertisements from the 1930s and 1940s employed slogans such as "American recreation goes to sea" and "Getting there is half the fun." A second, and perhaps more important, lesson to come from the Titanic's voyage is that often, beneath the surface and veneer of luxury, lies a reality that is in stark contrast with its image. As described above, the first-class passengers on the R.M.S. Titanic enjoyed luxuries never before seen on a ship. For the men, women, and children, however, who occupied the lower class decks, as well as the ship's crewmembers, the Titanic was far from luxurious.⁶

These two precepts learned from the Titanic are applicable to the modern cruise industry as well. Passenger ships have continued to push the boundaries of what is possible on a ship, becoming larger and more grand over the last century, and the realities of life below deck, especially for the foreign-born workers who are employed by the cruise industry, continue to be in stark contrast to the advertised joy and on-board luxury proffered by the cruise industry. The *MS Allure of the Seas*, built by Royal Caribbean in 2010, for example, holds the current title of largest ship ever built.⁷ Boasting the ability to accommodate 6300 passengers on eighteen decks, nearly two-and-a-half times as many as the Titanic, the massive ship is home to twenty-six restaurants, a state-of-the-art fitness facility, water-park, full-sized carousel, casino, and, of course, the first Starbucks at sea.⁸ The giants in the cruise industry continue to sell the promise of pampering and royal treatment to the public, and if the continued success and growth of the cruise industry is any indication, the public largely feels these corporations have fulfilled

4. The Titanic did not invent the idea of the pleasure cruise. It did, however, take cruises to levels never previously seen. The advent of pleasure cruises has been attributed to the berthing of the ship *The Britannia* in 1840. Lydia Boyd, *Brief History of the Passenger Ship Industry*, DUKE UNIV., <http://library.duke.edu/digitalcollections/adaccess/ship-history.html> (last modified Jan. 25, 2008).

5. *Id.*

6. *Inside the RMS Titanic*, TPD TURNER, <http://www.titanicandco.com/inside.html> (last visited Feb. 2, 2011).

7. *Allure of the Seas*, ROYAL CARIBBEAN, http://www.royalcaribbean.com/contentSitelet.do?pagename=allure_of_the_Seas (last visited Jan. 28, 2011).

8. Physical Specifications of the *M/S Allure of the Seas*, http://www.faktaomfartyg.se/allure_of_the_seas_2010.htm; *Find a Cruise: Allure of the Seas*, ROYAL CARIBBEAN, <http://www.royalcaribbean.com/findacruise/ships/class/ship/home.do;jsessionid=0000JHJ914ZODhmrCpBVjqtGu3:151bbpt04?br=R&shipClassCode=OA&shipCode=AL> (last visited Feb. 1, 2011); ROYAL CARIBBEAN, *supra* note 7.

their promises. Over thirteen million passengers cruised in 2009.⁹ With an average annual growth of 7.4%, and twenty-six state-of-the-art luxury ships currently being commissioned, the cruise industry has emerged as a continuously expanding multi-billion dollar business.¹⁰

For the workers below the deck, life at sea is a far cry from the pristine image many of us imagine when we think of a luxury cruise. Largely made up of foreign workers from underdeveloped countries, cruise ship employees lead an arduous and difficult life.¹¹ Often at sea for six to ten months at a time, the employees are contractually obligated to work ten to fourteen hour shifts, seven days a week, for pay so low that critics of the cruise industry's employment practices compare the life of a cruise ship employee to that of a sweatshop employee.¹²

The treatment of foreign cruise ship workers runs counter to not only the image portrayed by the cruise industry, but the stated intention of the United States government and courts to view foreign seamen as a "favored class."¹³ The cruise industry, although consisting primarily of corporations with headquarters in the United States, operates almost entirely outside the realm of U.S. labor laws, and what little protection the U.S. does provide for these foreign workers has largely been weakened through one-sided arbitration clauses that workers are mandated to sign before starting their employment.¹⁴

This note will attempt to give some insight into the social and legal realities of the cruise industry's foreign employees. I will address the broader question of whether protection is being offered to this traditionally protected class by analyzing the Eleventh Circuit Court's decision in *Thomas v. Carnival Corp.*, an opinion that, on its face, seems to revitalize the judiciary's commitment to protecting foreign seamen's rights.¹⁵

9. Fla. Caribbean Cruise Ass'n., *Cruise Industry Overview* (2010), available at http://www.f-cca.com/downloads/2010-overview-book_Cruise-Industry-Overview-and-Statistics.pdf.

10. *Id.*; Cruise Lines Int. Ass'n. *Cruise Market Overview Statistical Cruise Industry Data Through 2007* (2008), available at <http://www.docstoc.com/docs/17337714/2008-CLIA-Cruise-Market-Overview-Statistical-Cruise-Industry-Data>; Ross A. Klein, *High Seas, Low Pay: Working Conditions on Cruise Ships*, OUR TIMES: CANADA'S INDEPENDENT LABOUR MAGAZINE (Dec. 2001/Jan. 2002), available at <http://www.cruisejunkie.com/ot.html> (last visited Jan. 3, 2011).

11. Klein, *supra* note 10.

12. War on Want, *Sweatshops*, 1 (2002), available at <http://www.waronwant.org/attachments/Sweatshops.pdf>.

13. *Bainbridge v. Merchs.' & Miners' Transp. Co.*, 287 U.S. 278 (1932).

14. See Ross A. Klein, *Cruising—Out of Control: The Cruise Industry, The Environment, Workers, and the Maritimes*, Canadian Centre for Policy Alternatives—Nova Scotia, March 2003, at 17; Mariana Isabel Hernandez-Gutierrez, *Forum-Selection and Arbitration Clauses in International Commercial Contracts: Does the New York Convention Call for a Heightened Enforceability Standard?*, 18 WTR CURNTS: INT'L TRADE L.J. 55 (2009); Rory Bahadur, *Constitutional History, Federal Arbitration and Seamen's Rights Sinking in a Sea of Sweatshop Labor*, 39 J. MAR. L. & COM. 157 (2008).

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

In *Thomas*, the Eleventh Circuit held void a foreign choice-of-law provision contained in an employment contract between Carnival Cruise Lines and Puliurumpil Mathew Thomas, a waiter on the cruise ship *Imagination*.¹⁶ Recognizing that choice-of-law provisions could be used by employers to abrogate federal rights in the course of arbitration, *Thomas* appears to signal a shift in federal judicial practice from that of complete enforcement of private arbitration agreements to a more balanced approach which takes into consideration the long-standing federal policy of protecting foreign seafarers.¹⁷

This note will, however, show that, for the men and women who are employed in the cruise industry, the *Thomas* decision is a victory in name only. The *Thomas* decision stands for the proposition that the U.S. court system will uphold access, if not to our courts, then at least to our laws. Under the system in which the cruise industry currently operates, however, it is likely that an employee's right to legal relief will have been extinguished long before the arbitration process begins.

In support of this thesis this note will explore a number of topics relating to various aspects of the cruise industry. Part II will examine what life on a cruise ship is like for foreign employees. In doing so it will analyze how the use of flags of convenience, the practice of registering a ship under a foreign country's flag in order to have the laws of that country apply, allows the cruise industry to treat its workers in ways that would be deemed unconscionable under U.S. labor laws. Part III will consider the historical development of Congressional protection of foreign seamen. Relatedly, it will analyze how the government's policy of offering such protection to foreign seamen runs counter to its policy of promoting and enforcing international arbitration agreements. Part IV will continue the discussion of arbitration with an analysis of the *Thomas* decision and the shifts *Thomas* appears to signify. These shifts, however, will be shown to be merely illusory and this note will conclude with an overview of how the areas of law discussed here work in tandem to create a system of inequity that, despite the *Thomas* decision, not only exploits foreign cruise workers, but practically obliterates any chance afforded to them under U.S. law of receiving an adequate remedy.

II. THE LIFE OF A FOREIGN CRUISE SHIP EMPLOYEE

Cruise ship personnel can be divided into two basic types. For employees who work as entertainers, croupiers, bartenders, customer service representatives, or other highly visible positions, a job on a

16. *Id.* at 1116.

17. *Id.* at 1122.

cruise ship can be a dream job.¹⁸ Coming almost exclusively from industrialized countries, the men and women who work in these type of positions tend to be “young, single, and often in some way still supported by their parents.”¹⁹ For these workers, the motivation for choosing to work on a cruise ship is largely due to a sense of adventure and a desire to see the world.²⁰ By contrast, for the men and women who occupy the less glamorous positions on a cruise ship’s staff, such as the laundresses, cooks, pantrymen, and galley stewards, to name a few, the motivation for choosing this line of work is almost exclusively economic.²¹ These workers, who tend to come from poor, under-industrialized countries—such as Peru, Uruguay, Philippines, Indonesia, rural China, and the Caribbean—often are forced to find work abroad because of desperate economic conditions in their home country, and because they have dependents relying on them to send money back home.²² These workers enter into the system in a state of economic desperation, and, as a result, are easy targets for exploitation and abuse.²³

The exploitation often begins long before their first day of work. Private recruiting offices located in under-industrialized nations are often the only way for an unskilled worker to secure a position on a cruise ship.²⁴ Although International Labour Organization regulations require that the cruise line pay any fees charged by the recruiting offices, it is not uncommon for the recruiters to extract the fees directly from the worker.²⁵ New recruits are required to pay for their “return airfare, medical examinations, seafarers’ book, visa, and [] administrative fee[s]” all before they have had the opportunity to earn a penny as a seaman on a cruise ship.²⁶

The pre-employment debt that the cruise workers enter into, which can sometimes total as much as two thousand U.S. dollars, has two important effects on the cruise employee.²⁷ First, it drastically lowers the worker’s contractual wage. Depending on the exact terms of the contract and the recruiter fees, a worker may spend as much as half of his or her contract working to pay back the debt incurred during the hiring pro-

18. Klein, *supra* note 10.

19. War on Want, *supra* note 12, at 11.

20. *Id.*

21. *Id.*

22. *Id.* at 11–12.

23. Klein, *supra* note 10.

24. *Id.*

25. *Id.*; War on Want, *supra* note 12, at 17; Klein, *supra* note 14, at 16; International Commission on Shipping, Ships, Slaves and Competition 252 (2000) [hereinafter *IConS*].

26. War on Want, *supra* note 12, at 17.

27. *Id.*

cess.²⁸ The second, more disheartening, effect is that the worker lives in fear that, if fired before he has paid back his debt, he will lose all the money he has fronted.²⁹ This fear, combined with the precarious and often desperate financial circumstances in which the worker enters into the industry, often leads workers to accept the often grueling working conditions and meager wages that go hand-in-hand with employment onboard a cruise ship.³⁰ As Ross A. Klein, a prominent cruise industry critic, explains, the attitude among supervisors on cruise ships is “If you don’t like it here, you can go home.” The workers’ heavy pre-employment debt pressures them to accept that it is in their best interest to “quickly learn to do their jobs and not to complain” if they wish to avoid the devastation of returning to their home country and family with less money than they started.³¹

Once aboard, the employees begin to work an arduous schedule with almost no time off.³² A normal shift is often between ten and fourteen hours long, and a survey by the International Trade Federation found that over ninety-five percent of cruise ship employees work seven days a week.³³ An average contract is normally six to ten months long, with the longer contracts typically reserved for those on the lowest rungs of the cruise ship hierarchy.³⁴ For the length of the contract the foreign workers often must deal with a quality of life that is less than ideal. Crewmembers often live in cramped dorm-style quarters.³⁵ They share these quarters with an array of similarly situated employees from various countries, however, because of the often lack of common language the workers often only socialize with a workers from their home countries.³⁶ This segregated workforce is purposeful and serves as an important labor-management tool for the cruise industry. By employing crewmembers without a common language the cruise industry can prevent its employees from rallying together, striking, and often from organizing any type of independent union activity.³⁷ The workers, instead of being able to find solace and support in their coworkers, are

28. Klein, *supra* note 14, at 16.

29. Klein, *supra* note 10.

30. *Id.*

31. *Id.*

32. A full, detailed discussion concerning every aspect of exploitation of the cruise employees by the industry is beyond the scope of this article. For a detailed discussion *see* Ross A. Klein, *CRUISE SHIP BLUES: THE UNDERSIDE OF THE CRUISE SHIP INDUSTRY* (New Society Publishers 2002).

33. War on Want, *supra* note 12, at 15.

34. Klein, *supra* note 14, at 16.

35. *Testimony of Ross A. Klein, PhD Before the Subcomm. on Surface Trans. and Merch. Marine Infrastructure, Safety, and Security, 109th Cong. 8 (2008).*

36. War on Want, *supra* note 12, at 12–13.

37. *Id.*

left detached from those who could potentially be their fiercest allies.³⁸

One might expect that the employees' pay reflects the long working hours, but according to the International Trade Federation, workers who occupy the lowest positions on a cruise ship are paid as little as \$400 a month.³⁹ Sixteen percent of cruise ship workers earn less than \$500 a month and over half earn less than \$1000 a month.⁴⁰ At these rates, the cruise industry is paying its workers far less than minimum wage, and one is led to wonder how they are legally allowed to do so. The answer is that, although the industry operates largely out of North American ports, its companies are nearly all headquartered in the United States, and the majority of the passengers serviced are American, because it registers its vessels under foreign flags, it has absolutely no obligation to follow U.S. labor law.⁴¹

There are many reasons for cruise ship owners to register their ships under a foreign flag. Primary among these is that, by flying another country's flag, the ship owners, regardless of where they are from, are able to legally transform the ship into a physical extension of the sovereign country of registration.⁴² The cruise vessel is presumed to be under the jurisdiction of the country of registration, and absent specific congressional intent to have a federal law apply extraterritorially, U.S. law can be completely ignored.⁴³ It is under this rubric that the cruise industry is able to ignore, not only U.S. labor laws, but also federally mandated environmental and safety standards, as well as various U.S. tax liabilities.⁴⁴ The majority of cruise ships, around sixty percent, are registered in Panama, The Bahamas, or Liberia.⁴⁵

In addition to avoiding the application of U.S. labor standards, the use of flags of convenience also shifts the burden of correcting violations of international ship-owning standards, such as those determined

38. *Id.*

39. *Id.* Data comes from an investigation conducted by the International Trade Federation in 2001. The ITF has not published an updated investigatory report, however it is likely that even if wages have seen increases over the last decade the wages are almost necessarily far below those which most Americans would find acceptable for the amount and type of work these employees do.

40. *Id.* at 16.

41. Klein, *supra* note 10; Fla. Caribbean Cruise Ass'n, *supra* note 9.

42. Klein, *supra* note 10.

43. The topic of extraterritorial application of federal law is far beyond the scope of this note. *See, e.g., Spector v. Norwegian Cruise Line*, 545 US 119 (2005) (holding that provisions in the Americans with Disabilities Act are applicable to foreign-flagged ships because it was the expressed congressional intent to have such law apply); *see* Paul T. Hinckley, *Raising the Spector of Discrimination: The Case for Disregarding "Flags of Convenience" in the Application of U.S. Anti-Discrimination Laws to Cruise Ships*, 3 MOD. AM. 75 (2007).

44. Hinckley, *supra* note 43, at 75–76.

45. Klein, *supra* note 10.

by the United Nations Convention on the Law of the Sea (UNCLOS), the International Maritime Organization (IMO), and the International Labour Organization (ILO), to the government of the flagged country.⁴⁶ The ability of the flagged countries to enforce international law, and their interest in doing so is suspect, in view of the large financial incentive these countries have in allowing the cruise industry to go unchecked. The governments of these countries stand to receive millions of dollars in revenue from their flag registries and are often unwilling to enforce international regulations for fear that their countries will suffer economic harm if their flags cease to be flown.⁴⁷

The predisposition to lax enforcement of international labor or environmental standards is not the only reason one should look upon the governments of the flagged countries with some degree of suspicion. Due to the entrenched economic ties between the cruise industry and the flagged countries, one also has to question whether the substantive law of the flagged countries has been tailor-made to fit the expressed interests of the cruise industry. It is clearly within the cruise industry's interest to register its ships under the least restrictive regulations available, but as we will see, the cruise industry also frequently seeks to apply the law of the country of registration during arbitration once the employee-employer relationship has broken down.⁴⁸ The huge financial benefit to a country favored by the cruise industry should lead one to question whether the often higher burden on plaintiffs under the substantive law of the most popular flags is nothing so much as an incentive to secure the relationship between a flagged country and its cruise companies.⁴⁹

III. THE CONFLICTING FEDERAL POLICIES OF PROTECTING FOREIGN SEAFARERS AND PROMOTING INTERNATIONAL ARBITRATION

A. *Congressional Protection of Foreign Seafarers*

The United States has traditionally held a "long-standing presump-

46. IConS, *supra* note 25, at 87.

47. Liberia, for example generates between 15 and 20 million dollars a year from cruise lines paying for the right to register under the Liberian flag. *See* War on Want, *supra* note 12, at 26.

48. *Prokopeva v. Carnival Corp.*, No. C-08-213, 2008 WL 4276975, at *3 (S.D. Tex. 2008) (holding that reprinted choice-of-law provision mandates that the law of the flagged vessel on which Seafarer is assigned at the time the cause of action accrues, without regard to principle of conflicts of laws, is to be applied); *see also* *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1123 (11th Cir. 2009); *Javier v. Carnival Corp.*, No. 09cv2003-LAB (WMC), 2010 WL 3633173, at *8 (S.D. Cal. Sept. 13, 2010).

49. Some federally created causes of action, such as the Jones Act or the Seaman's Wage Act, are not recognized under foreign laws and many flagged countries lack laws that offer comparative protections to seafarers. Further, in countries like Panama, substantive law is decidedly pro-defendant. In Panama, for example, plaintiffs are unable to receive punitive damages on unpaid wage claims against their employer. *See Javier*, 2010 WL 3633173, at *8-10.

tion that favors the welfare of a seaman.”⁵⁰ Recognizing the unique and often exploited life of those who work at sea, the United States has declared seamen “wards of admiralty” and as such has passed numerous federal statutes designed to protect this class of worker.⁵¹ A complete presentation of legislation passed on their behalf is not within the scope of this note, however a brief discussion about the history of the passage of the Seaman’s Wage Act, Jones Act, and the clear intent of the federal government to allow foreign seaman access to U.S. courts is warranted because, as we will see in Part III, the cruise industry has been able to use arbitration and choice-of-law provisions in its employment contracts to severely limit these protections.⁵²

Congress first passed legislation allowing foreign seamen the right to bring causes of action against their employers in federal court in 1790.⁵³ This long-standing commitment to seafarer’s rights by Congress and the courts stems from both the recognition that seamen are a traditionally disadvantaged and exploited class, and the realization that offering protection to foreign seafarers would have the additional benefit of protecting the jobs of American seamen by removing the incentive to hire foreign workers unable to seek redress in a United States courtroom.⁵⁴ In 1823, Justice Story made explicit the policy of the Court when it came to seaman’s rights, stating, “Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel.”⁵⁵ This commitment to the protective relationship between foreign seaman and the federal government was reinforced by the Court in the 1920s and 1930s when it reiterated that it was the specific intention of Congress to “open the doors of the federal courts to foreign seamen.”⁵⁶ The Court reiterated in *Bainbridge v. Merchants’ Transportation Co.* that “The policy of Congress, as evidenced by its legislation, has been to deal with [foreign seamen] as a favored class. . . [and in order] to effectuate this policy, statutes enacted

50. Susan Lee, *Cruise Industry Liens Against the U.S. Penalty Wage Act*, 31 TUL. MAR. L.J. 141, 147 (2006).

51. Justice Story made this statement while riding circuit in 1823. *Harden v. Gordon* 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6,047); *see also id.*

52. Han Deng, *To Court or Arbitration: The Ninth Circuit Favors Arbitration in Foreign Seafarers’ Wage Claims* in *Rogers v. Royal Caribbean Cruise Line*, 22 U.S.F. MAR. L.J. 191, 193 (2010).

53. *Id.* at 193; *see Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1151 (9th Cir. 2008).

54. Ryan C. Davis, *Shutting the Courthouse Door: The Ninth Circuit in Rogers v. Royal Caribbean Cruise Line Finds No Exceptions for Seafarers in Arbitration Provisions*, 34 TUL. MAR. L.J. 365, 366 (2009).

55. *Harden*, 11 F. Cas. at 485.

56. *Bainbridge v. Merchs.’ Transp. Co.*, 287 U.S. 278 (1932); *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348, 354 (1920).

for their benefit should be liberally construed.”⁵⁷

As *Bainbridge* makes clear, it has long been Congress’s policy to allow foreign seamen the protection of a federal courtroom. One of the earliest means of opening up the federal doors to foreign seamen was through the passage of what is now known as the Seaman’s Wage Act.⁵⁸ Sponsored by Senator Robert La Follette in 1915, the Seamen’s Act, of which the Seaman’s Wage Act is included, was an effort to grant seafarers the same rights enjoyed by industrial workers.⁵⁹ Described as “the *Magna Carta* of the sea,” the Act codified many tenets of American jurisprudence that had been enforced since as early as 1790.⁶⁰ Among the rights guaranteed in the Seamen’s Wage Act was the right of a seafarer, whether foreign or not, to sue his or her employer for the enforcement of wage provisions.⁶¹ Among the guarantees provided to seafarers through this legislation are: the right to be paid the full amount due to him or her within twenty-four hours after the end of the voyage; the right to two days wages for each day payment is delayed; the right to be paid regardless of the earnings of the ship; as well as the right to collect penalties for unlawful discharge.⁶² Subsection (i), which explicitly states that the Seaman’s Wage Act “applies to a seaman on a foreign vessel when in a harbor of the United States,” specifically grants the right of the seafarer to use “[t]he courts. . .for the enforcement of this section.”⁶³

The Seaman’s Wage Act, and specifically the right of a seaman to sue his or her employer for unpaid wages in federal court, was upheld by the Supreme Court in *U.S. Bulk Carriers, Inc., v. Arguelles*.⁶⁴ There, a seaman, Arguelles, sued his employer in federal court instead of attempting to vindicate his rights through the arbitration agreement in his employment contract.⁶⁵ The Supreme Court reversed the district court’s holding that federal courts lacked jurisdiction, finding “no suggestion in the legislative history of the Labor Management Relations Act of 1947 that grievance procedures and arbitration were to . . . assume . . . the roles served by the federal courts protective of the rights of seamen since 1790.”⁶⁶ As we will soon see, the policy considerations that helped

57. *Bainbridge*, 287 U.S. at 282.

58. 46 U.S.C. § 10313 (2006).

59. *WORK IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, POLICY, AND SOCIETY* 356 (Carl E. Van Horn & Herbert A. Shaffner eds., 2003).

60. *Id.*

61. 46 U.S.C. § 10313 (2006); *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1152 (9th Cir. 2008).

62. 46 U.S.C. § 10313(a), (b), (f), (g) (2006).

63. 46 U.S.C. § 10313(i) (2006).

64. 400 U.S. 351 (1971).

65. *Id.* at 364.

66. *Id.* at 352, 356.

the Court decide *Arguelles*, as well as many of the cases dealing with seaman's rights since the late early-nineteenth century, are not the same policy considerations that have informed recent court decisions on the issue of whether federal claims must be arbitrated. Today's courts have made expressly clear that the federal policy favoring arbitration is so important that it has the ability to take federal claims from federal courts and place them in the hands of private arbitrators.⁶⁷

Federal courts are open to foreign seamen not only for wage claims, but other causes of action as well. The Jones Act, the better-known name of section 27 of the Merchant Marine Act of 1920, sets out to protect the "health, accident and disability benefits" of seafarers.⁶⁸ A reaction to the perceived inadequacy of The Seamen's Act in vindicating claims of negligence and personal injury, the Jones Act created a federal cause of action that allowed a seaman to sue for injuries stemming from negligence on the part of an employer:

(a) Cause of Action

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. . .

(b) Venue

An action under this section shall be brought in the judicial district in which the employer resides or the employers principal office is located.⁶⁹

Although the Jones Act, on its face, seems to only apply to U.S. seamen, the Supreme Court has construed the statute liberally and allowed foreign seaman to bring Jones Act complaints against their employers in federal court if an eight-factor balancing test shows sufficient ties between the employer and the United States.⁷⁰ Under the so-called *Hellenic* test, the following factors are weighed to determine whether an employer is a "Jones Act employer": (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured seaman; (4) the allegiance of the defendant ship-owner; (5) the place where the contract of employment was made; (6) the inaccessibility of a foreign forum; (7) the law of the forum; and (8) the employer's base of operation.⁷¹ As cruise ships tend to call on American ports, advertise to American customers, make repairs within the United States,

67. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

68. 46 U.S.C. §55101 (2006); *The Jones Act*, WORLDWIDE TRAVEL & CRUISE ASS'N. INC., http://www.cruisecco.com/Resources/jones_act.htm (last visited Oct. 24, 2010).

69. 46 U.S.C.A. § 30104 (2009).

70. 46 U.S.C. §55101; see *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 306–09 (1970).

71. *Hellenic*, 398 U.S. at 306–309.

and frequently be owned by American interests, there is little debate that the Jones Act is applicable to their foreign workers.⁷²

B. *A Preference Toward Arbitration*

The statutory rights granted to foreign seamen through the Seaman's Wage Act and the Jones Act are not enough, however, to guarantee a foreign seaman's day in federal court. Running counter to the policy of protecting foreign seafarers is the seemingly greater policy commitment of the federal government to favor and promote international arbitration.⁷³ The reasons for Congress and the courts to favor the enforcement of international arbitration agreements are obvious. A strong policy that favors international arbitration promotes "international comity, predictability, and economic efficiency."⁷⁴ Unfortunately for the foreign workers, this policy also often results in the total deprivation of the workers' ability to receive justice and violates the intent if not the letter of federal laws designed to ensure seamen's rights.

Federal arbitration law has been codified in the Federal Arbitration Act ("FAA") and the "United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" ("the Convention").⁷⁵ The FAA, which was first enacted in 1925, was passed with the expectation that it would place private arbitration agreements within employment contracts on "equal footing with other contracts."⁷⁶ The FAA applicability to maritime transactions and commercial contracts was contemplated at its inception. As the statute states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract.⁷⁷

72. *Pandazopoulos v Universal Cruise Line, Inc.*, 365 F. Supp. 208 (S.D.N.Y. 1973); *Henry v. Windjammer Barefoot Cruises*, 851 So. 2d 731 (Fla. Dist. Ct. App. 3d Dist. 2003); Wesley Kobylak, Annotation, *Applicability of Jones Act (46 U.S.C.A. Appx. § 688) to Foreign Seamen, Foreign Ships, or Other Foreign Circumstances*, 68 A.L.R. FED. 360 §8 (2009).

73. 2 ROBERT FORCE & MARTIN J. NORRIS, *THE LAW OF SEAMEN* § 1:36 (5th ed. 2003).

74. Matthew Nickson, *Closing U.S. Courts to Foreign Seamen: The Judicial Excision of the FAA Seaman's Arbitration Exception from the New York Convention Act*, 41 TEX. INT'L L.J. 103, 106 (2006).

75. 9 U.S.C. §§1-14, 201-208 (2006); A third chapter which implemented the Inter-American Convention on International Commercial Arbitration is also incorporated within chapter 9 but is not applicable to this discussion. See 9 U.S.C. §§ 301-307 (2006).

76. Nickson, *supra* note 74, at 106.

77. 9 U.S.C. § 2 (2006).

Despite this language, however, the FAA also contains an exception that takes the FAA out of the realm of certain employment disputes. The language specifically states, “nothing herein contained [within the FAA] shall apply to contracts of employment of seamen engaged in foreign or interstate commerce.”⁷⁸ While a plain-language reading of this exception would suggest that the FAA could not be used to compel a foreign seaman, who works as an employee of a cruise ship, to submit his claims to arbitration, the Supreme Court has construed the exception narrowly, holding the exception to only apply to “contracts of employment of transportation workers.”⁷⁹ In *Bautista v. Star Cruises*, the Eleventh Circuit similarly struck down the argument that the FAA’s exception for seamen’s contracts took foreign cruise employees out of the FAA’s arbitration mandate.⁸⁰ In *Bautista*, a group of Filipino crewmembers and spouses attempted to sue Star Cruises in Florida state court after being injured or killed following a boiler explosion.⁸¹ The workers had all signed an arbitration agreement within their employment contract and agreed to arbitrate all disputes in the Philippines.⁸² Star Cruises removed the case to federal district court under the Convention Act, “which permits removal before the start of trial when the dispute relates to an arbitration agreement or arbitral award covered by the convention.”⁸³ The workers, however, argued that under the plain language of the FAA, they should be excluded from the Act and not compelled to arbitrate their claim. The Eleventh Circuit rejected their arguments, finding that the exception to the FAA did not apply because it conflicted with the Convention. In so ruling, the court held that there is a hierarchal status to Title 9 and that the FAA only applies when it does not conflict with the Convention.⁸⁴

The Convention Act, used in *Bautista* to get around the plain language exception of the FAA, was passed in 1970 as a means of requiring the United States to adhere to the Convention.⁸⁵ The Convention incorporates many of the provisions of the FAA, as well as extends the power of a court to compel arbitration agreements between parties from coun-

78. *Id.* § 1.

79. The Eleventh Circuit held that the exception did not apply because it conflicted with the Convention. The Court held there is a hierarchal status to title 9 and that the FAA only applies when it does not conflict with the Convention. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

80. *Bautista v. Star Cruises*, 396 F.2d 1289 (11th Cir. 2005).

81. *Id.* at 1292.

82. *Id.* at 1293.

83. *Id.* at 1292.

84. *Id.* at 1295–1302.

85. 9 U.S.C. §§ 201–208 (2006); *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1151–53 (9th Cir. 2008).

tries who are signatories to the Convention.⁸⁶ Of the 192 United Nations member states, 142 have adopted the Convention, including countries whose flags are commonly flown by the cruise industry or are a common source of cruise-employees.⁸⁷ Unlike the FAA, the Convention contains no exceptions that could arguably prevent its application to specific types of employees, and is applicable by its own terms to all arbitration agreements “arising out of legal relationships that are ‘considered as commercial.’”⁸⁸ This language has been interpreted by the Supreme Court to include employment agreements within the definition of commercial relationship.⁸⁹

C. *Effects of Compelling Arbitration of Seafarers’ Claims*

The strong federal policy in favor of arbitration has denied cruise ship employees the ability to not only sue in federal court, but to also potentially place employees in a position that makes it difficult for arbitrators to hear their case. This, of course, discourages employees from asserting their rights at all. A standard contract between a cruise employee and the cruise lines will include, in addition to the “duration of the contract, the position accepted, and the monthly salary and hours of work,” stringent arbitration agreements that include choice-of-law and forum choice provisions.⁹⁰ The arbitration portion of a boilerplate contract used by Carnival Cruise Lines, the largest cruise line in the world, is illustrative of the types of provisions common in most employment contracts that foreign cruise ship workers are required to sign:

Any and all disputes arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination, or Seafarer’s service on the vessel, shall be referred to and finally resolved by arbitration under the American Arbitration Association/International Rules, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be one. The place of arbitration shall be London, England, Monaco, Panama City, Panama or Manila, Philippines, whichever is closer to Seafarer’s home country. The Seafarer and [Carnival Cruise Lines] must arbitrate in the designated jurisdiction, to the exclusion of all other jurisdictions. The language of the arbitral proceedings shall be English. Each party shall bear its own attorney’s fees, but [Carnival Cruise Lines] shall pay for the costs of arbitration. . . This Agreement shall be governed by, and all disputes arising under or in connection

86. *Rogers*, 547 F.3d at 1154.

87. NEW YORK CONVENTION, *Contracting States*, <http://www.newyorkconvention.org/new-york-convention-countries/contracting-states> (last visited Jan. 15, 2011).

88. *Rogers*, 547 F.3d at 1154.

89. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001).

90. *Bautista v. Star Cruises*, 396 F.2d 1289, 1289, 1293 (11th Cir. 2005).

with the Agreement or Seafarer's service on the vessel shall be resolved in accordance with, the laws of the flag of the vessel on which Seafarer is assigned at the time the cause of action accrues. . . The parties agree to this governing law notwithstanding any claims for negligence, unseaworthiness, maintenance, cure, failure to provide prompt, proper and adequate medical care, wages, personal injury, or property damage which might be available under the laws of any other jurisdiction.⁹¹

Agreements such as the one reproduced above are often presented to the employee moments before, and are a requirement of boarding the ship.⁹² In *Javier v. Carnival Corp.*, the employee, a Peruvian Carnival crew member who was injured during her employment, explained the circumstances under which she signed the employment agreement by which she agreed to arbitrate all claims in Panama and in accordance with Panamanian law:

As an employee, I was compelled to sign without reading because there are so many tasks to be completed when one first boards the vessel and commences a voyage. I could not receive my cabin keys or unpack luggage until I signed the Carnival contract. This entire event of boarding the vessel, signing the Carnival contract, and receiving cabin keys occurs in a matter of minutes and only after employees have traveled from their home country, passed through immigration, and boarded the vessel.⁹³

The proximate duress is even more significant when one considers the practical hardships faced by employees who refuse to sign such contracts. Many cruise ship employees take their jobs and commit to such conditions out of a desperate need for income. This desperation compels them to spend thousands of unearned dollars, often borrowed from loan sharks, family, or friends, to secure their job.⁹⁴ In many cases the worker has already paid for their return ticket and uniform before starting work, and has said their painful goodbyes to their families with the promise of being able to send money back home to support them.⁹⁵ After hours of travel, the employee arrives at the embarkation dock, is tired from his or her travels, and only desires a short rest before beginning their first ten to fourteen hour shift. They are presented a contract, in what is often not

91. *Prokopeva v. Carnival Corp.*, No. C-08-213, 2008 WL 4276975, at *2 n.7 (S.D. Tex. 2008); *see also* *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1123 (11th Cir. 2009) (analyzing an employment agreement between a Carnival Cruise Line employee and the company which is substantively identical to the one presented above).

92. *Javier v. Carnival Corp.*, No. 09cv2003-LAB (WMc), 2010 WL 3633173, at *1-2 (S.D. Cal. Sept. 13, 2010).

93. *Id.* at *2.

94. *War on Want*, *supra* note 12, at 17.

95. *Id.*

their native language, knowing that refusal would result in the loss of their deposit, job, home, and livelihood.

Despite the vastly unequal bargaining power held by the cruise industry vis-à-vis its employees, courts have shown themselves extremely willing to compel enforcement of arbitrations agreements such as the one shown above. The Eleventh, Ninth, and Fifth Circuits, whose jurisdiction includes the port of Miami (the most popular embarkation port in the world) and seven of the top ten most popular ports in the country, have adopted the following requirements as a prerequisite to compelling arbitration: that (1) there is an agreement in writing to arbitrate the dispute; (2) the agreement provides for arbitration in the territory of a signatory to the Convention; (3) the agreement to arbitrate arises out of a commercial legal relationship; and (4) there is a party to the agreement who is not an American citizen.⁹⁶ These requirements were, by design, created to promote arbitration. As such, courts have determined only to impose a “limited,” and frankly, superficial inquiry into whether compelling arbitration is proper and they are in seemingly unanimous agreement that a standard employment contract, such as the one discussed above, satisfies all four requirements.⁹⁷

One has to question the rationality of a system that purports to respect a legal defense of unconscionability and duress with regard to contracts, but refuses to invalidate agreements entered into under the circumstances described earlier. Courts, in interpreting the validity of cruise ship employment agreements, have held that being placed into an inferior bargaining position or having to sign a contract in a rushed manner does not render the contract invalid.⁹⁸ In fact, courts have gone so far as to say that a “Hobson’s choice to either accept a seafarer agreement and work or reject the agreement and disembark does not constitute duress.”⁹⁹

These decisions are at odds, not only with instinctive notions of

96. *Bautista v. Star Cruises*, 396 F.2d 1289, 1298 (11th Cir. 2005), *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 273 (5th Cir. 2002); *Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 652 (9th Cir.2009); Business Research & Economic Advisors, *The Contribution of the North American Cruise Industry to the U.S. Economy in 2009* (2010), available at http://clia-facts-cdn-remembers.s3.amazonaws.com/998074b443904888538_81fecal9ac777.pdf.

97. *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 339 (5th Cir.2004); *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1117–20 (11th Cir. 2009).

98. See *Bautista*, 396 F.3d at 1301–02; *Krstic v. Princess Cruise Lines, Ltd.*, No. 09-23846–CIV, 2010 WL 1542003, at *3 (S.D. Fla. Mar. 25, 2010) (bargaining disparity is not a defense to the enforceability of a contract); *Henriquez v. NCL (Bahamas) Ltd.*, No 09–21950–CIV, 2009 U.S. Dist. Lexis 129453 at *10–11 (S.D. Fla. Nov. 19, 2009) (denying the opportunity to review contract does not constitute duress).

99. *Javier v. Carnival Corp.*, No. 09cv2003–LAB (WMc), 2010 WL 3633173, at *2 (S.D. Cal. Sept. 13, 2010) (citing *Hodgson v. Royal Caribbean Cruises*, No 09–20798–CIV 2009 WL 6364071 at *12 (S.D. Fla. Aug. 4, 2009)).

unconscionability, but also with long-standing case law that holds that unequal bargaining power and a lack of opportunity to negotiate make a contract procedurally unconscionable.¹⁰⁰ The Eleventh Circuit, in *Bautista*, justified finding that these sorts of contracts, agreed upon under apparent duress, are not unconscionable when considered in the light of the strong federal policy bias in favor of promoting international arbitration.¹⁰¹ What the *Bautista* court suggested by such a ruling is against both common understandings of contractual defenses and common sense. According to the Eleventh Circuit, the defenses available under the Convention are narrower than those available in domestic contracts and the unconscionability doctrine, when applied to situations of international arbitration, is substantially heightened when compared to disputes not controlled by the Convention.¹⁰²

This type of reasoning is an example of judicial obfuscation and allows the federal policy of promoting international arbitration to obliterate standard definitions of substantive U.S. law. This type of decision creates a dangerous precedent, one which could be used to invalidate or redefine many accepted areas of jurisprudence, or worse, create a system which allows laws to be discriminately applied, or ignored, when specific groups are involved. While it is important for courts to consider policy implications and create decisions with a certain degree of flexibility, the precedent set in *Bautista* with regards to interpreting defenses under the Convention is too amorphous to be rational judicial precedent.¹⁰³

IV. THE THOMAS DECISION

As we have seen in Part III, the dual federal policies of opening up the courts to foreign seamen and promoting and enforcing international arbitration agreements are often at odds with each other. Despite the dual commitment, however, the federal policy towards arbitration has, over the past 40 years, been deemed to outweigh the commitments made to seafarer's rights.¹⁰⁴ The Eleventh Circuit's *Bautista* decision represented a low point in seamen's rights. Through judicial sleight of hand,

100. See, e.g., *Ferguson v. Countrywide Credit Indus. Inc.*, 298 F.3d 778 (9th Cir. 2002); see also 8 WILLISTON ON CONTRACTS § 18:10 (4th ed. 2004).

101. *Bautista*, 396 F.3d at 1302–03.

102. *Id.*

103. Other courts, such as those interpreting the Ninth Circuit, have denied unconscionability, not because the contract was procedurally fair, but rather because the contract was not substantively unfair. See *Javier*, 2010 WL 3633173, at *12; *Ferguson*, 298 F.3d at 783 (noting that to successfully bring a defense of unconscionability the defendant must show that the contract was both procedurally and substantively unconscionable).

104. Nickson, *supra* note 74; *Javier*, 2010 WL 3633173, at *3; *Bautista*, 396 F.3d at 1294.

the court interpreted the FAA and the Convention Act so as to produce not only an irrational result, but also one that ignores settled federal policy.¹⁰⁵

Four years after the *Bautista* decision, the Eleventh Circuit decided *Thomas v. Carnival Corp.*, which seemed to signal a shift towards a more balanced federal policy, one that attempts to satisfy both the urge to promote arbitration and to protect foreign seafarers' federally created rights.¹⁰⁶ The case involved Puliurumpil Mathew Thomas, an injured Indian national employed as a waiter on the Panamanian flagged Carnival cruise ship *Imagination*, attempting to enforce federal statutory rights in U.S. court.¹⁰⁷ Thomas sustained injuries to his spine, shoulder, and leg after slipping and falling while working a shift in the ship's dining room.¹⁰⁸ Thomas's employment agreement, signed before his accident, contained no arbitration agreement.¹⁰⁹ Following the accident, Thomas attempted to return to work, but as a result of both his injuries and subsequent disabilities, which Thomas attributed to Carnival's inadequate medical treatment, he was forced to sign off the ship.¹¹⁰ Approximately eleven months after the accident, Thomas returned to work on the *Imagination*.¹¹¹ Before gaining entry to the ship, however, he was presented with, and required to sign, a new employment agreement.¹¹² The new agreement contained provisions mandating that "any disputes would be arbitrated in the Philippines and resolved under Panamanian law."¹¹³

After two months back at work, shipboard physicians told Thomas that the injuries he sustained during his accident "rendered him unfit for continuing his duties."¹¹⁴ Thomas left the ship under a medical sign-off and brought action against Carnival in Florida state court seeking, among other things, damages under the Jones Act and past wages under the Seaman's Wage Act.¹¹⁵ The case was removed, through the determined applicability of the Convention Act, to federal court, and Carnival moved to compel arbitration.¹¹⁶ Relying on the arbitration and choice-

105. Nickson, *supra* note 74.

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

107. *Id.* at 1115.

108. *Id.*

109. *Id.* at 1116.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1115 (in addition to the Jones and Seaman's Wage Act claims, Thomas also brought unseaworthiness and failure to provide adequate maintenance and cure claims under general U.S. maritime law).

116. *Id.* at 1114-15.

of-law provisions contained in the second employment agreement, the district court granted Carnival's Motion to Compel Arbitration in the Philippines, as well as the choice-of-law provision, which called for the arbitration to be decided under Panamanian law.¹¹⁷

Thomas advanced a number of arguments during his appeal of the lower court's decision. First, he argued that the jurisdictional prerequisites set forth in the Convention Act were not satisfied.¹¹⁸ The Convention Act's writing requirement, Thomas argued, was not satisfied because the original employment contract, which was in force at the time of his injuries, contained no arbitration agreement.¹¹⁹ Thomas further contended that his employment contract could not be defined as a "commercial contract" and was therefore outside the scope of the Convention Act.¹²⁰ Alternatively, he asserted that compelling arbitration and forcing him to arbitrate his claims in a forum that would apply non-U.S. law violated U.S. policy and acted as a prospective waiver of his federally afforded rights.¹²¹ As we will see, the Eleventh Circuit was able to craft a decision that, while imperfect, seemed to value both the policy of enforcing international arbitration agreements and affording protection to foreign seafarers.

The Eleventh Circuit first addressed Thomas' contention that his employment contract did not satisfy two of the four jurisdictional prerequisites that the Convention Act required to bring an employment contract under its control.¹²² The court recognized that, "barring an affirmative defense that prevents application of the Convention Act, the Court should compel the parties to arbitrate" if the four jurisdictional requirements are met.¹²³ Thomas conceded that the requirements that the contracted arbitration venue be a signatory to the Convention and that

117. *Id.*; 9 U.S.C. §§ 205–206 (2006) provides the following provisions:

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards], the defendant or defendants may, at any time before the trial thereof, remove such action or proceeding to the district court . . . where the action or proceeding is pending. . . . A court having jurisdiction under this chapter [9 USCS §§ 201] may direct the arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.

118. *Thomas*, 573 F.3d at 1114–15.

119. *Id.*

120. *Id.*

121. Thomas also argued that his Seaman's Wage Act claim is categorically outside the scope of the Convention. The court rejected this contention on the basis of its decision in *Lobo v. Celebrity Cruises, Inc.*, 488 F.3d 891 (11th Cir. 2007). *Id.*

122. *Thomas*, 573 F.3d at 1117.

123. *Id.*

one party to the agreement be a non-U.S. citizen had been met.¹²⁴ What Thomas took issue with were the requirements that the agreement to arbitrate be in writing and that his employment contract constituted a commercial relationship.¹²⁵ The court quickly rejected Thomas' assertion that his job contract fell outside the definition of a "commercial contract."¹²⁶ Relying on its previous decision in *Bautista*, the court emphatically reaffirmed its prior holding that "seamen employment contracts *are* commercial."¹²⁷

The court found the question of whether the arbitration agreement constituted a writing under the Convention's requirements more difficult to resolve.¹²⁸ The court held that the original contract, which contained no arbitration clause, could not be said to be a writing to arbitrate the Jones Act claims because those claims accrued before the new employment agreement went into effect.¹²⁹ The court held that all but one of Thomas' wage claims against Carnival accrued before the new employment agreement took effect, and in so finding, rejected Carnival's argument that, in signing the second agreement, Thomas retroactively consented to arbitration of his past claims.¹³⁰

After determining that Thomas' claims for wages were enforceable under the Convention Act's prerequisites, the court next turned to Thomas' affirmative defenses to arbitration. Article V of the Convention allows parties in a proceeding to compel arbitration to put forth affirmative defenses as a means of quashing the arbitration.¹³¹ It states that: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country."¹³²

The argument Thomas put forth is that, because the arbitration agreement forces him to arbitrate U.S. statutory claims under non-U.S. law, the arbitration clause effectuates a waiver of his U.S. rights and is therefore against public policy.¹³³ In considering Thomas' argument, the Eleventh Circuit was heavily influenced by the U.S. Supreme Court

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* (emphasis added).

128. *Id.* at 1118.

129. *Id.* at 1118-19.

130. *Id.* at 1119.

131. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5, June 10, 1958, 330 U.N.T.S. 38.

132. *Thomas*, 573 F.3d at 1120.

133. *Id.*

decisions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹³⁴ and *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*.¹³⁵ In its 1985 *Mitsubishi* decision, the Supreme Court upheld an order compelling arbitration in Japan of Sherman Act claims between a Japanese car manufacturer and its Puerto Rican distributor.¹³⁶ The Court held that, because the parties had stipulated that American law would apply, there was no public policy violated in leaving the statutory claims to be decided by the Japanese arbitrator.¹³⁷ The Eleventh Circuit noted, however, that the Supreme Court's warning in *Mitsubishi* that if "the choice-of-forum and choice-of-law clauses operated in tandem . . . we could have little hesitation in condemning the agreement as against public policy."¹³⁸

The Eleventh Circuit distinguished *Mitsubishi* from the Court's 1995 decision in *Vimar Seguros y Reaseguros v. M/V Sky Reefer*.¹³⁹ *Vimar* involved dispute between an American fruit distributor and a Japanese shipping company.¹⁴⁰ After receiving a shipment of damaged fruit, the American distributor attempted to sue the Japanese shipper.¹⁴¹ The shipping company sought a stay of litigation and an order to compel arbitration in Japan under an arbitration agreement in accordance with the enforcement provisions of the FAA.¹⁴² The distributor argued that enforcing arbitration would violate public policy because the arbitrator would *likely* not apply American law.¹⁴³ The Court held that because the arbitration agreement was silent on the issue, and it was therefore unclear what law would be applied to the distributor's claims, the arbitration agreement did not violate public policy.¹⁴⁴ The *Vimar* Court concluded by holding that "arbitration clauses should be upheld if it is evident that either U.S. law definitely will be applied or if there is a

134. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

135. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); *Thomas*, 573 F.3d at 1120–22.

136. *Mitsubishi*, 473 U.S. at 614.

137. *Id.* at 628, 637.

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

138. *Thomas v. Carnival Corp.* 573 F.3d 1113, 1121 (11th Cir. 2009) (quoting *Mitsubishi*, 473 U.S. at 637).

139. *Vimar*, 515 U.S. at 530; *Thomas*, 573 F.3d at 1121.

140. *Thomas*, 573 F.3d at 1121.

141. *Id.*

142. *Id.*

143. *Id.* at 1122.

144. *Id.*

possibility that it might apply *and* there will be a later review.”¹⁴⁵

In *Thomas*, the Eleventh Circuit found that, under the *Vimar* test, Carnival’s arbitration and choice-of-law provisions violate federal public policy and are therefore void under Article V of the Convention.¹⁴⁶ The court first found that Thomas’ employment agreement explicitly required arbitration to be conducted in the Philippines under Panamanian law.¹⁴⁷ Because Panamanian law does not recognize the Seaman’s Wage Act as a valid cause of action, and the arbitrators are “bound to effectuate the intent of the parties irrespective of any public policy considerations,” the arbitration agreement operates “to completely bar Thomas from relying on any U.S. statutorily-created cause of actions.”¹⁴⁸ It went on to find that there was no adequate assurance of post-arbitration review.¹⁴⁹ Because Thomas only had one issue to be decided during arbitration, it was likely that Thomas would never have the opportunity to have a court review the arbitrator’s decision during enforcement, as it was unlikely he would be granted an award to enforce.¹⁵⁰

The *Thomas* decision, although appearing to take steps to assure seafarer’s rights, is far from a perfect decision. There are a number of questions the Eleventh Circuit leaves unanswered that have the potential to complicate matters for seafarers attempting to assert their statutory rights in the future. For instance, it is unknown how the Eleventh Circuit would rule on the question of the validity of choice-of-law provisions when, in addition to statutory claims, general maritime claims that have a reasonable equivalent in the substantive law of the choice-of-law country are alleged.¹⁵¹ Another question left unanswered by the court is what it meant in *Thomas* when it based the applicability of a choice-of-law provision on whether U.S. law will definitely apply or whether it might

145. *Id.* at 1123.

146. *Id.* at 1123–24.

147. *Id.* at 1123. The agreement provides:

The Agreement shall be governed by, and all disputes arising under or in connection with this Agreement or Seafarer’s service on the vessel *shall be resolved in accordance with, the laws of the flag of the vessel on which Seafarer is assigned at the time the cause of action accrues, without regard to principles of conflicts of laws thereunder.* The parties agree to this governing law, notwithstanding any claims for negligence, unseaworthiness, maintenance, cure, failure to provide prompt, proper and adequate medical care, wages, personal injury, or property damage which might be available under the laws of any other jurisdiction.

148. *Id.*

149. *Id.*

150. *Id.* at 1124 n.17 (The court, in a footnote, disregarded Thomas’ final contention that the Seaman’s Wage Act was not subject to the Convention because the date of the Seaman’s Wage Act recodification occurred after the Convention was already in effect.).

151. *Rivas v. Carnival Corp.*, 2010 WL 1837807, at *2 (S.D. Fla. 2010).

apply and is subject to review.¹⁵² It is unclear at what point it must become obvious that U.S. law will apply, or whether the party compelling arbitration can simply stipulate to the applicability of U.S. law despite inconsistency in the contractual language.¹⁵³ Florida's Southern District Court has certified these questions, but at the time of this article's writing no date of review has been scheduled.¹⁵⁴

Despite these unanswered questions, the *Thomas* decision appears to have brought the Eleventh Circuit towards a revitalized period of protection of seafarer's rights. Since its decision, a number of cases decided by the U.S. District Court for the Southern District of Florida have held that, while arbitration and forum provisions within employment contracts are enforceable, the choice-of-law provision is severable.¹⁵⁵ Thus, the lower courts have used *Thomas* as a means of striking a balance between the two often-conflicting federal policies. Courts will compel arbitration to foreign venues in accordance with the arbitration agreement and the enforcement provisions of the Convention, but will not hesitate to sever the choice-of-law provisions and demand U.S. law be applied when statutory claims are to be arbitrated. As we will see in this note's final section, however, the realities of the cruise industry's labor practices render the headways made by the Eleventh Circuit in *Thomas* almost completely meaningless to the majority of the exploited employees working for the cruise industry.

V. CONCLUSION: AN INEFFECTUAL DECISION

The *Thomas* decision appears, on its face, to have reinvigorated the Eleventh Circuit's commitment to the application of federally created rights to foreign seafarers. The decision, however, fails to take into account the hardships and realities that go hand-in-hand with a life at sea, and how those realities affect a seafarers' ability to submit to arbitration in the first place. The cruise industry's labor model relies upon a continuous stream of cheap, foreign labor that is too poor or too desperate to quit or complain. The cruise industry sponsors recruiting agents in third-world countries who routinely charge prospective employees up to five months pay to secure a job, and then demands these employees perform grueling and intensive work, for months on end without a day off, at sweatshop wages.¹⁵⁶ The fear of losing their job and being black-

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

153. *Rivas*, 2010 WL 1837807, at *2.

154. *Id.* at *3.

155. See, e.g., *Dockeray v. Carnival Corp.*, 724 F. Supp. 2d 1216 (S.D. Fla. 2010); *Matthews v. Princess Cruise Lines, Ltd.*, 728 F. Supp. 2d 1326 (S.D. Fla. 2010); *Krstic v. Princess Cruise Lines, Ltd.*, No. 09-23846-CIV, 2010 WL 1542003 (S.D. Fla. Mar. 25, 2010).

156. War on Want, *supra* note 12, at 11-17.

listed as a troublemaker often inhibits these workers from complaining or demanding overtime pay or time-off, and when the relationship between the employee and employer finally does break down, and a labor dispute arises, the only way for the employee to vindicate his or her claims is to submit to arbitration in a country that is often far from home, and in a language that is not their own.

The *Thomas* decision's flaw, and the principle reasons for its ineffectiveness, is that it purports to eliminate prospective waivers from employee contracts, but ignores the fact that an arbitration agreement's choice-of-venue provision can be used as a prospective waiver of statutory rights just as effectively as a choice-of-law provision. Compelling arbitration to a foreign country, which essentially requires the employee to either relocate to that country or hire an attorney to represent him, often creates an insurmountable wall to the enforcement of the very same federal rights the *Thomas* court attempted to protect. What these contract provisions, with their mandatory arbitration clauses do, in practical terms, is to force workers with valid claims against their employers to abandon these claims and return to work. The cruise industry knows its workers, and knows the desperate conditions many of them are in when they sign up for a life at sea. The industry knows that it is unlikely if not impossible for a foreign worker to front the expense of travelling to a foreign forum to have this claim heard and to pay an attorney to represent him there.¹⁵⁷

Even assuming that the costs of arbitration are not prohibitive and that a wronged employee has the means and ability to seek to arbitrate a claim rising under the Jones Act or the Seaman's Wage Act, one has to wonder whether the strides made in *Thomas* are actually available. Post-*Thomas* district court decisions suggest that the cruise industry appears to still require its employees to sign a contract with arbitration clauses that contain foreign choice-of-law provisions.¹⁵⁸ Such foreign legal systems often have no equivalent protection for the rights of seamen as are secured by federal statutes. The workers who do the most onerous jobs at sea for the least pay, those who might be most likely to have claims against their employers arising under federal protective statutes, come primarily from poor third-world countries.¹⁵⁹ They are likely poorly educated. One can easily imagine that at least some of these workers, perhaps the majority of such claimants, will submit to arbitration

157. See *Matthews*, 728 F. Supp. 2d at 1326 (expressly rejecting the "prohibitive costs" defense to a motion to compel arbitration).

158. See e.g., *Dockeray v. Carnival Corp.*, 724 F. Supp. 2d 1216 (S.D. Fla. 2010); *Matthews v. Princess Cruise Lines, Ltd.*, 728 F. Supp. 2d 1326 (S.D. Fla. 2010); *Krstic v. Princess Cruise Lines, Ltd.*, No. 09-23846-CIV, 2010 WL 1542003 (S.D. Fla. Mar. 25, 2010).

159. War on Want, *supra* note 12, at 11.

proceedings governed by foreign law without even realizing that, in so doing, that their statutory rights are effectively being destroyed.

The men and women who work in the cruise industry, and provide the luxury that vacationers have come to expect, are in a situation without a practical solution. Although groups like the International Trade Federation have been lobbying for seafarers' rights for years, the apparently simple solution of a guaranteed minimum wage and improved working conditions may, paradoxically, not be entirely beneficial for these workers in the long run.¹⁶⁰ One of the major factors that draw people into a cruising vacation, as opposed to a more traditional vacation, is the relative luxury one can get for their dollar.¹⁶¹ If the cruise industry were to drastically change and workers received wages that matched their productivity, it is possible that many people who enjoy cruising and keep the industry growing would be priced out of their next vacation.

The above scenario is far from a certainty, and some may say that it is better to let the cruise industry die than to allow the exploitation of its workers to continue. This view, however, is myopic and does not take into account the considerable good generated by the cruise industry worldwide. The industry provides a boon not only to the economy of North America, but also furnishes millions of dollars in revenue to debarkation points like the Caribbean, Bahamas, Greek Isles, Turkey, Bermuda, and Mexico, as well as to flagged countries like Liberia and Panama.¹⁶² Additionally, the cruise industry provides men and women from some of the poorest and least industrialized places in the world the opportunity to earn a wage and send money back to their home country, even if that wage is extremely low by normal industrialized standards. To allow cruise reforms to destroy these benefits completely would most likely hurt more people in the long run than they would help.

Because of the realities of the cruise industry, it may be both impractical and unjust to reform the system in a dramatic way in the short-term in order to truly improve the lives of its foreign workers. Instead, it appears that the only practical means of improving their situation is through small, incremental reforms. A discussion concerning how to successfully reform the industry without destroying it is beyond the scope of this note, or the expertise of its author, but further exploration and discussion of this issue in the public forum is both needed and welcome. One proposal may be for both Congress and the courts to reaffirm and revitalize the existing, but rarely exercised, federal policy of open-

160. *Id.* at 27.

161. Fla. Caribbean Cruise Ass'n, *supra* note 9.

162. *Id.*; War on Want, *supra* note 12, at 26.

ing up the courts to foreign seafarers and for them to continue to push back against the policy of allowing corporations with such a high degree of unequal bargaining power to force a class of unsophisticated workers into arbitration agreements that contain foreign venue and choice-of-law provisions in the first place.

Although statistics are unavailable, common sense would dictate that of the thousands of foreign cruise employees who might have valid statutory claims against their employers, the majority of such workers willing and financially able to bring a claim against their employer will likely blindly submit to arbitration. Only a very small minority of workers could properly be expected to recognize that the choice-of-law provision they signed when starting their employment would be used to abrogate their rights, and an even smaller minority probably possesses the sophistication, dedication, or money to challenge that provision in federal court. For that small group—the men and women like Puliurumpil Mathew Thomas—the Eleventh Circuit's decision in *Thomas* is meaningful. However, for the rest of the industry's workers it changes nothing.