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A Regression From The New York Convention: Questions Raised By *Thomas V. Carnival Corporation*

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A Regression from the New York Convention: Questions Raised by *Thomas v. Carnival Corporation*

DANIEL M. SCHWARZ*

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Of course a settlement of a controversy on a fundamentally wrong principle of law is greatly to be deplored, but there must of necessity be many rules governing the relations between members of the same society that are more important in that their establishment creates a known rule of action than that they proceed on one principle or another.

—Chief Justice William Howard Taft¹

I. INTRODUCTION

When passing upon the validity of predetermined contractual dispute resolution provisions, judges may think of a continuum. At one extreme sits absolute contractual freedom to specify the adjudicator, forum, and what law will govern in the event of a dispute. At the other extreme rests a complete inability to avoid a United States court.² Somewhere in the foggy center, yet closer to this second extreme, exists a rule

* J.D. Candidate, May 2011, University of Miami School of Law. The author would like to thank Paul Friedland, Kirsten Odynski, Marc J. Goldstein, and Alan Rau for their stimulating blog posts which prompted the idea for this note. The author would like to thank Professor Jan Paulsson for his guidance, and his family and friends, particularly Melissa Ackert, for their unwavering support.

1. RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 193 (Suzy Platt ed., 1993).

2. See, e.g., Heinrich Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L.J. 36 (1944).

providing for the invalidation of all contractual dispute resolution specifications upon one party's assertion that he or she would prefer to seek a remedy under United States law.³ Such a rule might signal to other states that the United States believes its own laws to be morally, logically, and economically superior, as well as sufficient to remedy much of the world's evils. Indeed, there has been judicial recognition that this type of extraterritorial signal is not desirable—the Supreme Court has warned that the United States “cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”⁴

Nevertheless, *Thomas v. Carnival Corp.*,⁵ decided July 1, 2009, evidences that the Eleventh Circuit Court of Appeals agrees with the appropriateness of such a rule. In *Thomas*, the Eleventh Circuit held an arbitration clause “null and void” which provided for disputes to be resolved under Panamanian law because enforcement of the clause would cause the plaintiff, a seaman, to forfeit his right to seek a remedy under the Seaman's Wage Act.⁶ In doing so, the court relied on dicta from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* and *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, which provide that “[w]ere there no subsequent opportunity for review and were we persuaded that ‘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 . . . we would have little difficulty in condemning the agreement as against public policy.’”⁷ This note contends that the Eleventh Circuit decided *Thomas* wrongly.

Carnival Cruise Lines employed Puliurumpil Mathew Thomas, a citizen and resident of India, as a head waiter on the Carnival *Imagina-*

3. See Posting of Paul Friedland & Kirsten Odynski, to KluwerArbitrationBlog, <http://kluwerarbitrationblog.com/blog/2009/08/26/eleventh-circuit-troubled-by-choice-of-law-not-choice-of-arbitration-in-thomas-v-carnival/#comment-7705> (Aug. 26, 2009).

4. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). See also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (quoting *M/S Bremen*, 407 U.S. at 9) (stating that invalidating “[a]n agreement to arbitrate before a specified [international] tribunal . . . would . . . reflect a ‘parochial concept that all disputes must be resolved under our laws and in our courts.’”). Accord *Thomas Carbonneau, The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 828 (2002) (“It is a serious mistake to assess transborder adjudicatory frameworks through myopic domestic eyes.”).

5. *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1157 (2010).

6. *Id.* at 1124.

7. *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)) (ellipsis in original).

tion.⁸ The *Imagination* flew a Panamanian flag of convenience.⁹ Thomas agreed, by signing his Seafarer's Agreement, to arbitrate under "the laws of the flag of the vessel . . . 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."¹⁰

On November 8, 2004, in the ship's dining room, Thomas slipped, fell, and dropped a coffee pot.¹¹ Thomas sustained injuries to his spine and shoulder and burned his leg.¹² Thomas then sued in Florida state court on the bases of inadequate maintenance and cure under general United States maritime law, negligence under the Jones Act,¹³ and failure to pay wages under the Seaman's Wage Act.¹⁴

Below, Carnival filed a notice of removal to federal court and moved to compel arbitration.¹⁵ The District Court granted both motions, finding that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention") applied "and that the arbitration provision of the Seafarer's Agreement was enforceable."¹⁶ On appeal, after determining at some length which of Thomas's claims fell under which of his two seafarer's agreements (only the later agreement contained an arbitration clause),¹⁷ the Eleventh

8. *Thomas*, 573 F.3d at 1115–16; 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, 315 (2009); Petition for Writ of Certiorari at 3, *Carnival Corp. v. Thomas*, 130 S. Ct. 1157 (2010) (No. 09-646), 2009 WL 4402888, at *3.

9. *Thomas*, 573 F.3d at 1116.

10. Petition for Writ of Certiorari, *supra* note 8, at *4–5. The arbitration clause at issue also provided that conflicts of law rules under the laws of the flag state would not apply. *Id.*

11. *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1116 (11th Cir. 2009).

12. *Id.*

13. 46 U.S.C. § 30104 (2000). "The Jones Act confers on seamen the statutory right to sue their employers in an American court for the negligence of fellow crew members." *Thomas*, 573 F.3d at 1115 n.1.

14. *Thomas*, 573 F.3d at 1115 & n.3. In pertinent part, the Seaman's Wage Act provides "[a]t the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier." 46 U.S.C. § 10313(f) (2000). The Act also makes provision for penalty wages by requiring "[w]hen payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed." 46 U.S.C. § 10313(g) (2000).

15. *Thomas*, 573 F.3d at 1115.

16. *Id.* Specifically, the District Court conducted a four-step inquiry to ensure that jurisdiction under the New York Convention existed: "[T]here existed a written contract to arbitrate; the agreement provided for arbitration in the territory of a signatory to the Convention; the agreement arose out of a legal commercial relationship, and a party to the agreement was not a United State [sic] citizen." Petition for Writ of Certiorari at 6, *Carnival Corp. v. Thomas*, 130 S. Ct. 1157 (2010) (No. 09-646), 2009 WL 4402888, at *6; 9 U.S.C. § 203 (2000). *See also* *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 n.7 (11th Cir. 2005).

17. *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1118–20 (11th Cir. 2009). The court held that

Circuit reversed and remanded to the district court, and in relevant part held that compelling arbitration amounted to an impermissible prospective waiver of the part of Thomas's Seaman's Wage Act claim that was "covered under the New Agreement" because Panamanian law would indisputably apply.¹⁸ On December 1, 2009, Carnival filed a Petition for Writ of Certiorari, framing the issue posed as "[w]hether an agreement to arbitrate that is otherwise enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is *per se* void and unenforceable as to a U.S. statutory claim because it requires application of foreign law."¹⁹ The Supreme Court denied certiorari on January 19, 2010.²⁰

Part II of this note will provide a brief historical overview of "prospective waiver" doctrine by virtue of a choice-of-law clause since its creation in *Mitsubishi*, and will attempt to explain how this doctrine fits into the structure of the terms of the New York Convention. Part III will portray the "prospective waiver" doctrine in a positive light. Part IV will analyze the *Thomas* court's application of this doctrine through its reliance on *Mitsubishi* and *Vimar*, and its reconcilability with prior cases which have allowed seaman's claims to proceed to arbitration. Part V will examine if the *Thomas* court should have considered whether a similar or equivalent remedy existed under Panamanian law, in addition to unintended consequences *Thomas* will likely create. Part VI will scrutinize the *Thomas* court's assertion that Thomas would have no subsequent opportunity for review in a United States court. Part VII will dissect the decision's implicit assumption that all individual federal remedies possess equivalent normative societal value. Part VIII then assumes that normative societal value is an appropriate consideration for courts to consider when deciding whether to invalidate an arbitration clause and seeks to establish a modest hierarchy of the social value of various federal statutory rights. This hierarchy suggests appropriate levels of scrutiny for federal courts to consider based on the content of the substantive right that would otherwise be lost (or was lost if at the enforcement stage). It then seeks to discern the relative normative value

"the Jones Act negligence claim, the unseaworthiness claim, the maintenance and cure claim, and part of the Seaman's Wage Act claim (as it pertains to any obligations incurred before October 10, 2005) d[id] not fall under the Convention" because they only arose in connection with the first seafarer's agreement, which did not contain an arbitration clause. *Id.* at 1120. This note does not take issue with this part of the *Thomas* decision.

18. *Thomas*, 573 F.3d at 1120, 1123–24.

19. Petition for Writ of Certiorari at 9, *Carnival Corp.*, 130 S. Ct. 1157 (No. 09-646), 2009 WL 4402888, at *9.

20. *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1157 (2010).

of the Seaman's Wage Act in order to find its appropriate place within the hierarchy.

This note's core argument is that the Eleventh Circuit in *Thomas* erred in two fundamental ways. First, the court erred by failing to consider arbitration's potential to protect Thomas's rights under the Seaman's Wage Act. The court's public policy concerns would be unfounded if Panamanian law provided a similar remedy to that offered by the Seaman's Wage Act, the arbitrator would decide that application of the Seaman's Wage Act was mandatory, or the arbitrator would consider the claim on any other grounds. Second, the court erred by muddling whether U.S. courts would have an opportunity to review the fairness, as well as substantive compliance with U.S. public policy, of the arbitral proceedings.²¹

II. THE NEW YORK CONVENTION ACT AND THE PROSPECTIVE WAIVER DICTA

The United States is a party to the New York Convention, and Chapter 2 of the Federal Arbitration Act (title 9 of the United States Code) integrates its provisions.²² The Convention and subsequent Supreme Court jurisprudence establish an "emphatic federal policy in favor of arbitral dispute resolution,"²³ and some believe that this "trend favoring the arbitrability of disputes involving public policy issues is justified."²⁴ Article II of the Convention controls the validity of arbitration agreements, and allows U.S. courts to refuse to honor an arbitration agreement if the agreement is "null and void, inoperative or incapable of being performed."²⁵ It also intimates that any agreement to arbitrate must "concern[] a subject matter capable of settlement by arbitration."²⁶

21. See *infra* Parts V–VI.

22. 9 U.S.C. § 201 (2000); Brubaker, *supra* note 8, at 313.

23. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

24. Homayoon Arfazadeh, *In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception*, 13 AM. REV. INT'L ARB. 43, 56 (2002) ("Arbitration can no longer be perceived as a tolerated encroachment upon the state's monopoly over justice, but as the ordinary means of resolving international commercial disputes. As a matter of fact, arbitration seems to afford parties to an international transaction a level of legal protection and security equal to, if not greater than, that offered by state courts."). *But see* Jane VanLare, *From Protectionism to Favoritism: The Federal Policy Toward Arbitration Vis-à-Vis Competing State Policies*, 11 HARV. NEGOT. L. REV. 473 (2006) (viewing increased arbitrability of seaman's claims in a negative light).

25. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(3), June 10, 1958, 21 U.S.T. 2517, 2519; Brubaker, *supra* note 8, at 313.

26. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 25, at 2519.

Only Article V, which actually governs recognition and enforcement of arbitral awards (not the validity of agreements), addresses “public policy.”²⁷

Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc. signaled the end of an era which had immunized statutory remedies from being adjudicated by arbitrators.²⁸ The case involved a distributor agreement between a Japanese automobile manufacturer (Mitsubishi) and a Puerto Rican automobile dealership (Soler).²⁹ The agreement’s arbitration provision provided that disputes would be resolved in Japan under the “rules and regulations of the Japan Commercial Arbitration Association.”³⁰ After alleging, *inter alia*, that Soler failed to pay for a chiliar of cars, Mitsubishi filed a complaint in U.S. District Court and sought to compel arbitration.³¹ Soler counter-claimed and avowed causes of action under the Sherman Act.³² The Supreme Court granted certiorari to “consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction.”³³

Writing “absent such compelling considerations [as ‘fraud or overwhelming economic power’], the Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability,”³⁴ Justice Blackmun held the arbitration agreement encompassing the antitrust counterclaims enforce-

27. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 25, at 2520.

28. See Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 *FORDHAM URB. L. J.* 803, 821 (2009).

29. *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 616–17 (1985).

30. *Id.* at 617.

31. *Id.* at 618–19 & n.2.

32. *Id.* at 619–20. The Sherman Act begins at 15 U.S.C. § 1 (2000).

33. *Mitsubishi*, 473 U.S. at 624.

34. *Id.* at 627. It is noteworthy that the *Mitsubishi* court qualified this fervent pro-arbitration language with the following:

That is not to say that all controversies implicating statutory rights are suitable for arbitration. There is no reason to distort the process of contract interpretation, however, in order to ferret out the inappropriate. Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. . . . We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Id. at 627–28 (citations omitted).

able.³⁵

Mitsubishi created the “prospective waiver” doctrine during its analysis. After establishing that arbitration can reach federal statutory claims, the *Mitsubishi* court turned to the question of whether “Soler’s antitrust claims are nonarbitrable even though it has agreed to arbitrate them.”³⁶ Noting the “need of the international commercial system for predictability in the resolution of disputes” and that its prior case law “establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions,” the *Mitsubishi* court turned to tearing apart the purported sanctity of the antitrust laws.³⁷ With respect to this “fundamental importance,” the court stated:

The importance of the private damages remedy, however, does not compel the conclusion that it may not be sought outside an American court.

. . . .

There is no reason to assume at the outset that international arbitration will not provide an adequate mechanism. . . . The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim.³⁸

The *Mitsubishi* court then laid down footnote nineteen, which reads, in its entirety:

In addition to the clause providing for arbitration before the Japan Commercial Arbitration Association, the Sales Agreement includes a choice-of-law clause which reads: “This Agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein.” The United States raises the possibility that the arbitral panel will read this provision not simply to govern interpretation of the contract terms, but wholly to displace American law even where it otherwise would apply. The International Chamber of Commerce opines that it is “conceivable, although we believe it unlikely, that the arbitrators could consider Soler’s affirmative claim of anticompetitive conduct by CISA and Mitsubishi to fall within the purview of this choice-of-law provision, with the result that it would be decided under Swiss law rather than the U.S. Sherman Act.” At oral argument, however, counsel for Mitsubishi conceded that Ameri-

35. *Id.* at 639.

36. *Id.* at 628.

37. *Id.* at 628, 631.

38. *Id.* at 635–37.

can law applied to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis. The record confirms that before the decision of the Court of Appeals the arbitral panel had taken these claims under submission.

We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in federal court. We merely note that in 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 antitrust violations, we would have little hesitation in condemning the agreement as against public policy.³⁹

Thus, by speculating that, at some point in the future, contractual dispute resolution specifications could bar a party from asserting U.S. statutory causes of action, *Mitsubishi* created the "prospective waiver" doctrine. While to this author it is not overly problematic, this infamous final sentence of footnote nineteen does seem to confuse Articles II and V of the New York Convention by expressly referencing "public policy"⁴⁰ in connection with the validity of an agreement to arbitrate, though the "prospective waiver" doctrine can be read in conjunction with the language of the Convention in multiple ways. Under Article II(1), this dictum can be read to suggest that any contractual waiver of a federally created statutory remedy, where the remedy should otherwise apply, is not a "subject matter capable of settlement by arbitration." Or, under Article II(3), *Mitsubishi* may have been prospectively pronouncing that the Supreme Court would simply consider such a contractual waiver "null and void."⁴¹ Alternatively, the Supreme Court was likely

39. *Id.* at 637 n.19 (citations omitted).

40. See Brubaker, *supra* note 8, at 313 ("[I]n parallel to the observation of leading commentators that arbitral awards arising out of disputes deemed non-arbitrable under Article II(3) are unenforceable under Article V(2)(a), the decision of the Eleventh Circuit [in *Thomas*] appears to conclude that all arbitration agreements that violate public policy under Article V(2)(b) are invalid under Article II."). *But see* Petition for Writ of Certiorari at 17–18, *Carnival Corp. v. Thomas*, 130 S. Ct. 1157 (2010) (No. 09-646), 2009 WL 4402888, at *17–*18. The arbitration clause at issue also provided that conflicts of law rules under the laws of the flag state would not apply. *Id.* (arguing that this confusion between Article II and Article V of the Convention constitutes a grave error and that "Article II's 'null and void' clause encompasses only those situations, such as fraud, mistake, duress, and waiver that can be applied neutrally on an international scale.").

41. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 25, at 2519. This entire discussion raises the question whether the *Mitsubishi* dictum is akin to an advisory opinion and problems of lower courts' reliance on dicta generally. U.S. CONST. art. III, § 2; RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 54, 56 (6th ed. 2009).

aware that “public policy” existed as a defense to the enforcement of an award in the Convention, but just chose to apply it to an agreement to arbitrate.

Setting this confusion aside, and more important from a historical perspective, “many courts confronted with the *Mitsubishi* footnote have found it inapplicable.”⁴² For instance, the Ninth Circuit has opined “we do not believe dictum in a footnote regarding antitrust law outweighs the extended discussion and holding in *Scherk* [*v. Alberto-Culver Co.*] on the validity of clauses specifying the forum and applicable law.”⁴³ The Fifth Circuit has stated that the footnote, “by its own terms, is limited to the antitrust context, as is *Mitsubishi* more generally.”⁴⁴ The Tenth Circuit in *Riley v. Kingsley Underwriting Agencies, Ltd.* similarly refused to “read *Mitsubishi* as restrictively as plaintiff when *Mitsubishi* is viewed against the backdrop of Supreme Court decisions in the area.”⁴⁵ The Sixth and Second Circuits have taken similar approaches.⁴⁶

The Supreme Court decided *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*⁴⁷ a decade later. *Vimar* involved a cargo owner suing a shipper under a bill of lading over damaged oranges.⁴⁸ The “contract evidenced by or contained in [the] Bill of Lading [was to be] governed by Japanese law.”⁴⁹ The Supreme Court quickly dispensed with the cargo owner’s first argument that “a foreign arbitration clause lessens . . . liability by increasing the transaction costs of obtaining relief,” citing a “difference . . . between explicit statutory guarantees and the procedure for enforcing them,” the fact that “there would be no principled basis for distinguishing national from foreign arbitration clauses,” that the Carriage of Goods by Sea Act (“COGSA”) is based on an international convention, and other benefits of international comity in an era of vastly increased international business transactions.⁵⁰ Turning to the choice-of-law question, the *Vimar* court enforced the arbitration clause because:

[I]t [was] not established what law the arbitrators will apply to peti-

42. *Grynberg v. BP P.L.C.*, 596 F. Supp. 2d 74, 78 (D.D.C. 2009); Brubaker, *supra* note 8, at 317.

43. *Richards v. Lloyd’s of London*, 135 F.3d 1289, 1295 (9th Cir. 1998), *noted in Grynberg*, 596 F. Supp. 2d at 78 n.2.

44. *Haynsworth v. The Corp.*, 121 F.3d 956, 968 (5th Cir. 1997), *noted in Grynberg*, 596 F. Supp. 2d at 78 n.2.

45. *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 957 (10th Cir. 1992), *noted in Grynberg*, 596 F. Supp. 2d at 78 n.2.

46. *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1231 (6th Cir. 1995); *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353, 1360 (2d Cir. 1993).

47. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

48. *Id.* at 530–31.

49. *Id.* at 531.

50. *Id.* at 534–38.

tioner's claims or that petitioner will receive diminished protection as a result. The arbitrators may conclude that COGSA applies of its own force or that Japanese law does not apply so that, under another clause of the bill of lading, COGSA controls.⁵¹

Notwithstanding intervening cases like *Riley*, the *Vimar* court then repeated *Mitsubishi's* footnote nineteen, altering it slightly by adding "[w]ere there no subsequent opportunity for review" and replacing "for antitrust violations" with an ellipsis,⁵² arguably limiting the efficacy of the argument that footnote nineteen could be easily brushed off as limited to antitrust violations.

Hence, with regards to the place of the "prospective waiver" doctrine in the Convention, *Vimar* does not provide much supplemental clarity, although the addition of "no subsequent opportunity for review" might suggest that the Supreme Court did realize it was attempting to operate within Article V, or at least reflects an understanding that this doctrine does not fit nicely within either Article II or Article V.

III. ON SUPPORT FOR THE PROSPECTIVE WAIVER DOCTRINE

The "prospective waiver" doctrine is far from indefensible. Where Congress has directed that particular persons should have a right to seek a remedy in the federal courts, and such a remedy has survived the gamut of the legislative process, the deprivation of this right is not to be taken lightly. Democratically elected bodies have discerned the existence of a void, and determined that the endowment of a legal entitlement on a distinct class is required to plug the hole. So it makes sense that two parties, especially where the endowed party is systemically barred from freely negotiating alternative dispute resolution mechanisms and the law to be applied therein, should be inhibited in their ability to simply contract around this entitlement. More pointedly, shouldn't a party with significant advantages in sophistication and general bargaining power be explicitly prevented by law from effectively depriving the weaker party from vindicating his or her right to sue in court by virtue of forcing the weaker party to arbitrate under a law which does not contain the right?

In accordance with this philosophy, *Thomas* makes perfect sense. Since 1790, Congress has recognized that seamen, owing to their vulner-

51. *Id.* at 540.

52. *Id.* See also Posting of Marc J. Goldstein to Marc J. Goldstein Arbitration Commentaries, <http://arblog.lexmarc.us/2009/07/us-public-policy-as-basis-to-nullify-arbitration-agreement-beyond-the-bounds-of-mitsubishi> (July 7, 2009) (noting that *Thomas* inherited the ellipsis from *Vimar*, and that the ellipsis creates the impression that the prospective waiver doctrine applies to all "federally-created statutory remedies" rather than remedies of "fundamental public policy.").

ability to ship owners, require unique legal protections.⁵³ Three decades later, the Supreme Court opined that seamen “are easily overreached,” are treated similar to “young heirs,” “are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them,” and as such, “the most rigid scrutiny is instituted into the terms of every contract, in which they engage.”⁵⁴ Thus, Congress fashioned the Seaman’s Wage Act as an additional protection for this susceptible group, with the goal that it would deter ship owners from unreasonably withholding wages—and where wages *were* unreasonably withheld, seamen could go to court and do something about it.⁵⁵ To allow an employer such as Carnival to deprive a seaman of his wage claim by compelling mandatory arbitration thus undermines the legislative mandate, which determined a significant public need. In turn, the societal void which prompted Congress to create the remedy in the first place would remain empty. Invalidating an arbitration clause, then, in which “the choice-of-forum and choice-of-law clauses operate[] in tandem as a prospective waiver of a party’s right to pursue statutory remedies”⁵⁶ on public policy grounds preserves a right which the structures bequeathed with the public trust thought to be very important. This is the primary ground on which the “prospective waiver” doctrine can be defended.

But, this proverbial “void” need not remain empty if arbitration is compelled in all cases. Put differently, it is possible for arbitration to preserve the original purpose for the legislative endowment on the facially weaker class. Fairness and compliance with substantive public policy can be achieved in at least two ways: First, if the arbitral proceeding itself will preserve the legal entitlement, the public need determined by the legislature can still be fulfilled. Second, and not unrelated, if courts in the state where the right exists have an opportunity to review whether the arbitrators gave consideration to the right, the previous “hole” determined by the legislature can remain filled also.

IV. THOMAS’S APPLICATION OF PRECEDENT

Neither *Mitsubishi* nor *Vimar* demand the result reached by the Eleventh Circuit in *Thomas*. First, opining about “prospective waivers” was not necessary to decide either dispute. Consequently, *Thomas*’s reli-

53. U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 357 (1971); Ryan C. Davis, Note, *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).

54. Harden v. Gordon, 11 F. Cas. 480, 485 (C.C. Me. 1823) (No. 6,047). See also Davis, *supra* note 53, at 366.

55. 46 U.S.C. § 10313 (2000).

56. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

ance on these dicta is strained because the Supreme Court in both *Mitsubishi* and *Vimar* allowed the disputes before it to proceed to arbitration. Thus, the *Thomas* court's decision rested solely on what the Supreme Court said it would do if faced with different facts. Since there can be no certainty that the Supreme Court would have acted in accordance with its prior dicta (even if it is assumed that the arbitration agreement before the Supreme Court unquestionably and unequivocally removed all possibility that U.S. law would apply), the Eleventh Circuit's decision is not supported by law. Indeed, the *Thomas* court itself recognized that "[t]he Supreme Court itself has not been confronted with an arbitration clause that would act as a prospective waiver,"⁵⁷ and instead preferred to find lower court decisions that struck down arbitration agreements persuasive.

"The implications of *Mitsubishi* are an enduring mystery"⁵⁸ Even so, the *Thomas* court's intensive reliance on *Mitsubishi* can be viewed as exceedingly suspect, primarily because, on the whole, it cannot be definitively determined that the Supreme Court in *Mitsubishi* was truly concerned with the choice-of-law problem. Three points demonstrate this. First, the parties in *Mitsubishi* "agreed that the arbitral body [was] to decide a defined set of claims," and the Court stated that "the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim."⁵⁹ It is chiefly for this reason that the dicta relied on by *Thomas* was relegated to a footnote: Despite the Swiss choice-of-law clause in *Mitsubishi*, which did not seem to necessarily apply to the exclusion of all other law, the parties agreed to arbitrate under the rules of the Japan Commercial Arbitration Association and submitted the antitrust claims to that association with the understanding that U.S. law would apply.⁶⁰ Thus, put differently, the choice-of-law problem in *Mitsubishi* can properly be viewed as a "done deal" that the Court chose not to spend excessive time on. It was not extraordinarily important in itself, as *Thomas* stated it was, that "U.S. statutory rights . . . were . . . not being ignored or violated but specifically protected."⁶¹

Second, the *Mitsubishi* court noted in footnote nineteen that the International Chamber of Commerce believed it to be "conceivable," although "unlikely," that Swiss law would apply to Soler's claim, yet

57. *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1123 n.16 (11th Cir. 2009).

58. Adam J. Sulkowski, *Through the Looking Glass: What a Comparison with the New Polish Legal Framework of Arbitration Reveals about the U.S. Legal Framework of Arbitration*, 7 WASH. U. GLOBAL STUD. L. REV. 87, 100 (2008).

59. *Mitsubishi*, 473 U.S. at 636–37.

60. *Id.* at 617, 637 n.19.

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

that Mitsubishi conceded that American law would apply to the antitrust claim.⁶² This alone does not clearly and necessarily evince a belief that nonapplication of U.S. law would be contrary to public policy in all arbitrations of statutory claims. Rather, these sentences combine to simply show that, for the time being, the Supreme Court was placated, and provided a basis for not addressing the choice-of-law issue head-on.

And third, *Mitsubishi* expressly reserved passing upon whether a choice-of-law clause in an arbitration provision that prevented a party from pursuing U.S. statutory remedies were categorically forbidden, stating “[w]e therefore have no occasion to speculate on this matter at this stage in the proceedings”⁶³ Even if footnote nineteen can be read to indicate an extremely serious concern in this regard, the concern would be applicable outside the context of a claim under the antitrust laws, at least in the decade between *Mitsubishi* and *Vimar*.

The same cannot be so easily said of *Vimar*, as the Supreme Court in that case addressed this issue head-on, noting the prospect that the Japanese arbitrators would not apply COGSA “raise[d] a concern of substance.”⁶⁴ But as already noted, the Court held that “the choice-of-law question . . . must be decided in the first instance by the arbitrator,” since at the time of the decision “it [was] not established what law the arbitrators will apply”⁶⁵ Again, then, while the Court quoted *Mitsubishi*’s “prospective waiver” phrase, *Vimar* need not stand for the bold proposition that no U.S. statutory right can be waived by virtue of a foreign choice-of-law clause, in particular because COGSA, the statute at issue in *Vimar*, expressly provided that liability for loss or damaged goods could not be contractually limited.⁶⁶ To the contrary, the Seaman’s Wage Act contains no provision invoked by *Thomas* as a justification for awarding it special treatment, though it does provide that “[t]he courts are available to the seaman for the enforcement of this section.”⁶⁷ If this provision were cited by the *Thomas* court, the brittleness of its analytical structure would be lessened.⁶⁸

Another problem with the *Thomas* court’s reliance on *Vimar* is that in *Vimar* itself, its assertion that U.S. law might apply is somewhat conclusory, particularly because the bill of lading at issue in *Vimar* stated

62. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 n.19 (1985).

63. *Id.*

64. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

65. *Id.* at 540–41 (citation omitted).

66. *See* 46 U.S.C.A. § 30704 (2006).

67. 46 U.S.C. § 10313(i) (2000).

68. However, a conflict would be created with *Lobo v. Celebrity Cruises, Inc.*, 488 F.3d 891 (11th Cir. 2007). *See infra* text accompanying notes 74–79.

explicitly that Japanese law would apply.⁶⁹ This aside (and largely irrelevant to this note because *Vimar* remains law that the Eleventh Circuit could not disregard), more problematic is simply the fact that *Vimar* “leaves in doubt the validity of choice-of-law clauses.”⁷⁰ What is clear is that *Vimar* undoubtedly “marked a change in the jurisprudence of the United States with respect to foreign arbitration clauses,”⁷¹ by effectively switching the presumption associated with them from “presumptively invalid” to “presumptively valid.”⁷² Aside from this level of deference which the *Thomas* court ignored, *Vimar*’s failure to take a more audacious stance on the issue of subject-matter arbitrability, while it would be dicta, should have prevented the *Thomas* court from striking down the arbitration clause on the basis of a decision which held the resolution of this issue to be “premature.”⁷³

Moreover, while *Thomas* can be reconciled procedurally with prior Eleventh Circuit precedent, it conflicts with the policies underlying previous holdings in the Circuit. In *Lobo v. Celebrity Cruises Inc.*,⁷⁴ the Eleventh Circuit held that the New York Convention as implemented by Congress superseded the right of a seaman to resolve wage disputes in federal court under the Seaman’s Wage Act.⁷⁵ Prior to *Lobo*, in *Bautista v. Star Cruises*, the Eleventh Circuit determined via statutory textual analysis that “the plain language of the Convention Act precludes application of the exemption for seamen’s employment agreements”⁷⁶ While neither *Lobo* nor *Bautista* are facially inconsistent with *Thomas*, they do combine to demonstrate that federal protection for seamen from being compelled to arbitrate is much more limited than once thought.⁷⁷

69. *Vimar*, 515 U.S. at 531.

70. *Id.* at 549 (Stevens, J., dissenting).

71. Aaron A. Radicke, Comments, *Strange Ways: COGSA, The Action In Rem, and Sky Reefer’s Progeny*, 32 TUL. MAR. L.J. 203, 203 (2007).

72. *Id.*

73. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995).

74. *Lobo v. Celebrity Cruises, Inc.*, 488 F.3d 891 (11th Cir. 2007).

75. *Id.* at 895–96 (“[T]o nullify the arbitration provision here would be to hinder the purpose of the Convention and subvert congressional intent.”).

76. *Bautista v. Star Cruises*, 396 F.3d 1289, 1303 (11th Cir. 2005) (citation omitted). The exemption referred to exists in the Federal Arbitration Act and provides “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1 (2000). *See also* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 117 (2001) (holding the § 1 exemption confined to transportation workers).

77. *See generally* 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 (2007). *Accord* Matthew Nickson, Comment, *Closing U.S. Courts to Foreign Seamen: The Judicial Excision of the FAA Seamen’s Arbitration Exemption from the New York Convention Act*, 41 TEX. INT’L L.J. 103 (2006) (arguing *Bautista* and a Fifth Circuit case which reached the same result should be overturned).

The *Thomas* court explicitly noted, though, that:

Our opinion has no bearing on the holding of *Lobo*. . . . [I]n *Lobo*, the arbitration provision stated the arbitral forum would be either Miami, FL or the seafarer's country of citizenship and did not specify that only foreign law would apply. . . . [Here], the narrow holding is that the Convention *does govern* but, applying its affirmative defenses provision, we find that *the particular arbitration clause in question* is null and void as a matter of public policy.⁷⁸

The inconsistency between *Bautista* and *Lobo* on the one hand and *Thomas* on the other lurks not in the Convention's legal effect on the seaman's exemption, but in the wider debate as to whether greater protections, in part against unfair bargaining power, should be available to vulnerable classes of persons, such as seamen.⁷⁹

Perhaps even more striking with respect to the interplay between *Thomas* and prior Eleventh Circuit precedent is reconciling *Thomas* with *Lipcon v. Underwriters at Lloyd's, London*.⁸⁰ In *Lipcon*, the Eleventh Circuit held U.S. investors to their bargain, stating, "[w]e will not invalidate choice clauses, however, simply because the remedies available in the contractually chosen forum are less favorable than those available in the courts of the United States."⁸¹

In practice, perhaps the interplay of *Thomas* and *Lobo* will thus result in the arbitration of Seaman's Wage Act claims where the arbitrators will apply U.S. law or there is a possibility that they will; but, if foreign law will apply, arbitration will never be permitted. Clearly though, regardless of precisely how the cases play out, the holding in *Thomas* will be quite a distance from "narrow."

V. ASSESSING THE SUBSTANCE OF THE FOREIGN LAW

Following *Thomas*, the Southern District of Florida accepted a stipulation by Carnival "that Panamanian law does not provide seamen with a reasonable equivalent to the rights provided by the Seaman's Wage

78. *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1124 n.17 (11th Cir. 2009).

79. See, e.g., Posting of Marc J. Goldstein to KluwerArbitrationBlog, <http://kluwerarbitrationblog.com/blog/2009/08/26/eleventh-circuit-troubled-by-choice-of-law-not-choice-of-arbitration-in-thomas-v-carnival/#comment-7705> (Aug. 31, 2009, 17:52 EST) ("[C]ommon law notions of unconscionability in some employment contracts motivated the *Thomas* decision."); *Bautista*, 396 F.3d at 1302 (rejecting plaintiff's argument that "state-law principles of unconscionability render the resulting agreements unconscionable" because they "were put in a difficult take it or leave it situation when presented with the terms of employment.") (internal quotation marks omitted).

80. *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285 (11th Cir. 1998).

81. *Id.* at 1297. See also *Petition for Writ of Certiorari* at 16, *Carnival Corp. v. Thomas*, 130 S. Ct. 1157 (2010) (No. 09-646), 2009 WL 4402888, at *16 (arguing *Lipcon* and *Thomas* are irreconcilably inconsistent).

Act.”⁸² Based on this stipulation, it is reasonable to assume that Panamanian law does not make provision for “two days wages for each day penalty is delayed” like the Seaman’s Wage Act,⁸³ a provision which has been described as “capable of producing results that are ‘both absurd and palpably unjust.’”⁸⁴ Interestingly, Carnival argued in the past that relevant Panamanian law “specifically allow[s] another form of compensation in lieu of hourly overtime wages.”⁸⁵ Regardless of the merits of a comparison between Panamanian and U.S. seaman’s remedies, a major criticism of *Thomas* is that the court failed to consider whether a comparable remedy would be available to Thomas under Panamanian law.⁸⁶

If an analogous remedy were available to Thomas, the entire concern of arbitration specifications “operat[ing] in tandem as a prospective waiver of a party’s right to pursue statutory remedies”⁸⁷ would appear to be vitiated. In other words, if Panamanian law made provision for seamen who were not paid in a timely manner by ship owners, Thomas would not need the protection of the Seaman’s Wage Act. If the Court at least commented on the comparability of Panamanian law, at least a semblance of international comity could have been preserved (which in no small part drove the results in *Mitsubishi*, *Vimar*, *Lobo*, and *Bautista*).

Thus, determining whether Panama offered a similar remedy for seamen should have been a crucial step in the *Thomas* court’s inquiry, yet the court implicitly assumed that Panamanian law would not be adequate without addressing this issue. And, the court did not simply forget to consider whether Panama provided similar remedies. The court cited *Fireman’s Fund Insurance Co. v. Cho Yang Shipping Co.*,⁸⁸ noting that the Ninth Circuit in that case “compell[ed] arbitration after finding

82. *Kovacs v. Carnival Corp.*, No. 09-22630-CV, 2009 WL 4980277, at *1 (S.D. Fla. Dec. 21, 2009) (citation omitted).

83. 46 U.S.C. § 10313 (2000).

84. *Chung v. Overseas Navigation Co.*, 774 F.2d 1043, 1048 (11th Cir. 1985) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 586 (1982) (Stevens, J., dissenting)).

85. *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 667 (S.D. Fla. 2006). *But see* *Henry v. S/S Bermuda Star*, 863 F.2d 1225, 1231 (5th Cir. 1989) (finding Panama law requires seamen to be “paid overtime with a surcharge of not less than 25% of the wages accrued”); *United States v. Seaboard Sur. Co.*, 239 F.2d 667, 669 (4th Cir. 1957) (Panamanian law requires “earned wages are to be paid to crewmen in ports of discharge”).

86. *See* Posting of Marc J. Goldstein to Marc J. Goldstein Arbitration Commentaries, <http://arbblog.lexmarc.us/2009/07/us-public-policy-as-basis-to-nullify-arbitration-agreement-beyond-the-bounds-of-mitsubishi> (July 7, 2009) (“But the court of appeals did not consider whether Panama law might be capable of affording remedies comparable to those offered by the Seamen’s [sic] Wage Act.”); Brubaker, *supra* note 8, at 314 (“One concern is that the court did not analyze Panamanian law to determine whether a comparable remedy to the Seaman’s Wage Act existed before invalidating the arbitration agreement.”).

87. *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1121 (11th Cir. 2009).

88. *Fireman’s Fund Ins. Co. v. Cho Yang Shipping Co.*, 131 F.3d 1336, 1340 (9th Cir. 1997).

'uncontroverted evidence that Korean law will at least be as favorable to plaintiff as COGSA.'⁸⁹ Of course, federal courts are not required to judicially notice foreign law—so this conspicuous omission in the court's analysis could signal inadvertent failure by Carnival's attorneys to brief the court on Panamanian seaman's remedies. Or, perhaps the court merely felt entitled to conduct its analysis differently, brushing off *Fireman's Fund* as nonbinding. Nevertheless, the court's refusal to examine comparable Panamanian remedies after this citation of *Fireman's Fund* is at least curious, if not wholly unacceptable. Even the two cases cited by the court prior to *Fireman's Fund* as instances of arbitration clauses acting as prospective waivers of statutory rights, *Central National-Gottesman v. M/V "Gertrude Oldendorff"*⁹⁰ and *Nippon Fire & Marine Insurance Co. v. M/V Spring Wave*,⁹¹ did so on the basis that foreign law, or at least the manner in which foreign courts would enforce particular provisions of the respective agreements, would limit liability in violation of COGSA. The *Thomas* decision, however, goes a step further. Rather than stating that application of relevant Panamanian law would limit Carnival's liability under the Seaman's Wage Act, the court determined that the mere fact that Thomas would not be able to pursue a remedy under the Seaman's Wage Act was sufficient to hold the arbitration clause "null and void."⁹² This mode of analysis flies in the face of *Vimar*, which the *Thomas* court so wholeheartedly felt supported its position, as *Vimar* stated "[t]he relevant question . . . is whether the substantive law to be applied will reduce the carrier's obligation to the cargo owner below what COGSA guarantees."⁹³

Foreign arbitration clauses are a division of forum selection clauses.⁹⁴ In forum selection clause cases, courts in other circuits have explicitly required analysis of the foreign law that will be applied before such a clause will be invalidated. In *Roby v. Corp. of Lloyd's*,⁹⁵ in which a series of choice-of-law, choice-of-forum, and arbitration clauses were

89. *Thomas*, 573 F.3d at 1123 n.16 (brackets omitted).

90. *Cent. Nat'l-Gottesman v. M/V "Gertrude Oldendorff"*, 204 F. Supp. 2d 675, 679 (S.D.N.Y. 2002).

91. *Nippon Fire & Marine Ins. Co. v. M/V Spring Wave*, 92 F. Supp. 2d 574, 575 (E.D. La. 2000).

92. *Thomas*, 573 F.3d at 1123–24.

93. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

94. *Id.* at 534 (1995) ("[F]oreign arbitration clauses are but a subset of foreign forum selection clauses . . ."); *Cent. Nat'l-Gottesman, Inc. v. M/V "Gertrude Oldendorff"*, 204 F. Supp. 2d 675, 679 (S.D.N.Y. 2002).

95. *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993). *See also* *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1231 (6th Cir. 1995) (after comparing relevant English law and American law, rejecting the argument that forum selection clause should be invalidated on the basis that remedies are not equivalent, since "the fact that parties will have to structure their case differently . . . is not a sufficient reason to defeat a forum selection clause.").

at issue, the Second Circuit stated with respect to its public policy analysis “if the Roby Names were able to show that available remedies in England are insufficient to deter British issuers from exploiting American investors . . . we would not hesitate to condemn the . . . clauses as against public policy.”⁹⁶ While contracting around U.S. securities laws implicates a separate set of concerns, and is not permitted at all in a wholly domestic context, a direct comparison reveals that the *Thomas* court’s failure to pass upon the adequacy of Panamanian law prior to declaring the arbitration clause “null and void” cannot be reconciled with at least one other circuit’s mode of analysis, despite the fact that in international securities cases, analyzing the comparability of the foreign law is a more explicit requirement. Ultimately, while *Roby* has been the subject of much criticism,⁹⁷ it remains good law. Most, if not all, decisions disagreeing with *Roby* have been withdrawn or reversed.⁹⁸

Roby offers guidance in another significant respect, discussed in greater detail *infra* Part VII. The *Roby* court also stated:

It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff simply would have to allege violations of *his country’s* tort law or *his country’s* statutory law or *his country’s* property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We refuse to allow a party’s solemn promise to be defeated by artful pleading. In the absence of other considerations, the agreement to submit to arbitration or the jurisdiction of the English courts must be enforced even if that agreement tacitly includes the forfeiture of some claims that could have been brought in a different forum.⁹⁹

This speaks to the very concern that results from the upheaval created by *Thomas*. If no analysis of the comparability of applicable foreign law is required, it appears that agreements to arbitrate may now be struck down upon a party’s assertion that he or she seeks to pursue a remedy under a federal statute instead of abiding by agreed-to terms.¹⁰⁰

96. *Roby*, 996 F.2d at 1365; Brubaker, *supra* note 8, at 314 (noting the inconsistency between *Thomas* and *Roby*).

97. See, e.g., Darrell Hall, *No Way Out: An Argument Against Permitting Parties to Opt Out of U.S. Securities Law in International Transactions*, 97 COLUM. L. REV. 57, 74–78 (1997).

98. See, e.g., *Richards v. Lloyd’s of London*, 107 F.3d 1422, 1428 (9th Cir. 1997), *withdrawn*, *Richards v. Lloyd’s of London*, 135 F.3d 1289 (9th Cir. 1998); *Leslie v. Lloyd’s of London*, No. H-90-1907, 1995 WL 661090, at *22 (S.D. Tex. Aug. 20, 1995), *rev’d*, *Haynsworth v. The Corp.*, 121 F.3d 956 (5th Cir. 1997).

99. *Roby*, 996 F.2d at 1360–61 (citation omitted).

100. Posting of Paul Friedland & Kirsten Odynski, to KluwerArbitrationBlog, <http://kluwerarbitrationblog.com/blog/2009/08/26/eleventh-circuit-troubled-by-choice-of-law-not-choice-of-arbitration-in-thomas-v-carnival/#comment-7705> (Aug. 26, 2009) (“Citing *Thomas*, parties may

Indeed, *Thomas* is a premier example of how “[t]he potential for judicial abuse of the public policy exception significantly undermines the foundations of international arbitration.”¹⁰¹ Certainly, *Thomas* has revived the evil reviled by the Supreme Court long ago in *Scherk v. Alberto-Culver Co.*: “[C]ourts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements.”¹⁰²

Roby, not cited by *Thomas*, also cited *Carnival Cruise Lines v. Shute*¹⁰³ for the proposition that forum selection clauses may be “unreasonable” where “the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy”¹⁰⁴ While *Roby* considered this separate from its determination of whether the clauses at issue violated U.S. public policy, the existence of this ground for unreasonableness further evidences the problematic nature of the *Thomas* court’s failure to assess Panamanian seamen’s remedies. This ground indicates the propriety of a comparison between the foreign law and the U.S. statutory remedy in the determination of whether an agreement to arbitrate under foreign law violates U.S. public policy. Where such a comparison is absent, as in *Thomas*, the public policy violation becomes the mere inability to bring a U.S. claim—which gives all U.S. statutory remedies equivalent social value.

Rampant consequences are becoming apparent as lower courts begin to interpret *Thomas* and as attorneys begin to cite *Thomas* for the proposition that a foreign choice-of-law clause should be struck down if it might cause an inability to seek a remedy under any federal statute. Particularly, lower courts are citing *Thomas* yet irreconcilably also looking at whether the foreign law to be applied provides comparable remedies to those provided by the relevant U.S. federal statute.

seek to avoid otherwise valid arbitration agreements simply by declaring their intention to bring a claim based on a U.S. statute.”).

101. Hans Smit, *Comments on Public Policy in International Arbitration*, 13 AM. REV. INT’L ARB. 65, 66 (2002) (“As long as judicial efforts to protect losers in arbitration from enforcement of awards rendered against them by recourse to local notions of public policy that could not pass muster under international standards persist, the basic scheme of the New York Convention is dealt a heavy blow.”).

102. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

103. *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

104. *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353, 1363 (2d Cir. 1993).

In *Kovacs v. Carnival Corp.*,¹⁰⁵ the Southern District of Florida, reaching the same conclusion as *Thomas*, nevertheless based its decision on defendant's concession "that Panamanian law does not provide seamen with a reasonable equivalent to the rights provided by the Seaman's Wage Act."¹⁰⁶ Far more significant, though, is the *Kovacs* court's rejection of defendant's subsequent argument that "*Thomas* does not preclude the application of Panamanian law in the arbitration of other U.S. statutory rights, such as the Jones Act."¹⁰⁷ The court then also concluded that Panamanian law did not provide a reasonable equivalent to the rights provided by the Jones Act. While at least the *Kovacs* court compared the right at issue with the appropriate foreign law, *Kovacs* confirms that *Thomas*' extension of the "prospective waiver" doctrine may go far beyond the Seaman's Wage Act to all U.S. statutory rights. And in *Sorica v. Princess Cruise Lines, Ltd.*, the district court, relying on *Thomas*, would not compel arbitration until Princess stipulated that U.S. law would apply to the arbitral proceedings in Bermuda so that the plaintiff would not forego her statutory rights under the Jones Act.¹⁰⁸

Along these lines, perhaps the *Thomas* holding will be confined to cases in which the statutory remedy to be foregone has some relation to admiralty, but *Thomas* provides no principled basis for so limiting itself.¹⁰⁹

VI. A SUBSEQUENT OPPORTUNITY FOR REVIEW?

Critical to the *Thomas* court's holding was its assertion that *Thomas* would have no "subsequent opportunity for review."¹¹⁰ The

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106. *Kovacs v. Carnival Corp.*, No. 09-22630-CV, 2009 WL 4980277, at *1 (S.D. Fla. Dec. 21, 2009).

107. *Id.*

108. *Sorica v. Princess Cruise Lines, Ltd.*, No. 09-CV-20917-CIV-Huck (S.D. Fla. Aug. 4, 2009).

109. See Brubaker, *supra* note 8, at 316 ("[T]he Eleventh Circuit's terse recitation of the facts does not readily provide a basis for distinguishing the case. That this case arose in the employment context and called for arbitration in a foreign country seems irrelevant because the Eleventh Circuit's decision does not provide any basis to conclude that these factors are significant.").

110. *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1123-24 (11th Cir. 2009). The court opined:

Moreover, there is no assurance of an 'opportunity for review' of *Thomas*'s Seaman's Wage Act claim. Although we are at an interlocutory stage, the possibility of any later opportunity presupposes that arbitration will produce *some* award which the plaintiff can seek to enforce. But, in accordance with our holdings above, in this case *Thomas* would only be arbitrating a single issue—the Seaman's Wage Act claim, one derived solely from a U.S. statutory scheme. If, applying Panamanian law, *Thomas* receives no award in the arbitral forum—a distinct possibility given the U.S. based nature of his claim—he will have nothing to enforce in U.S. courts, which will be deprived of any later opportunity to review.

Id.

court presupposed that in order for review of any arbitral award to occur, there must *be* an arbitral award to review.¹¹¹ This is incorrect for several reasons.

Professor Alan Rau has indicated one way review could occur. Thomas could simply ignore the arbitral award rendered (or lack thereof) and bring his Seaman's Wage Act "claim in a U.S. court."¹¹² Then, Carnival would likely present the arbitral award, or decision not to render an award, "as a defense to the suit, and ask that it be 'recognized' under the [New York] Convention."¹¹³ Thomas would thus be provided with a forum to argue that recognition is unwarranted as contrary to public policy under Article V of the New York Convention.¹¹⁴ Another commentator has described this possibility slightly differently: Thomas "could, after the arbitration, commence a separate action to assert a Seaman's Wage Act claim in federal court, and the court would have the ability to deny *res judicata* effect to the award and to vacate in part its earlier order sending the claim to arbitration."¹¹⁵ Even the Supreme Court in *Mitsubishi* recognized that if particular statutory provisions are not taken into account during arbitration, there could be, at least potentially, a subsequent suit in a United States court. In footnote nineteen itself, the *Mitsubishi* court wrote "[n]or need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in federal court."¹¹⁶ Therefore, the *Thomas* court erred by simply failing to consider how proceedings could be initiated in federal court following arbitration, instead opting for a conclusory assertion that Thomas would lose and be left with zero options.¹¹⁷

It is not entirely clear whether the *Thomas* court would have reached a different result had it realized that a subsequent opportunity for review would be available in this manner. Of course, if recognition of this possibility would have mitigated the court's concerns to the point where it could tolerate enforcement of the arbitration clause, its failure

111. *Id.*

112. Posting of Alan Rau to KluwerArbitrationBlog, <http://kluwerarbitrationblog.com/blog/2009/08/26/eleventh-circuit-troubled-by-choice-of-law-not-choice-of-arbitration-in-thomas-v-carnival/#comment-7705> (Sept. 2, 2009, 21:03 EST). See also Brubaker, *supra* note 8, at 316 (making the same point and also noting that "Carnival Corporation could waive the adverse arbitral award and defend the statutory claim on the merits," and "Thomas cannot complain" if this option is taken).

113. Brubaker, *supra* note 8, at 316.

114. Brubaker, *supra* note 8, at 316.

115. Posting of Marc J. Goldstein to Marc J. Goldstein Arbitration Commentaries, <http://arblog.lexmarc.us/2009/07/us-public-policy-as-basis-to-nullify-arbitration-agreement-beyond-the-bounds-of-mitsubishi> (July 7, 2009).

116. *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

117. *Thomas v. Carnival Corp.* 573 F.3d 1113, 1123–24 (11th Cir. 2009).

to recognize that review might occur via an independent Seaman's Wage Act claim following arbitration becomes more problematic. But, the court's mode of analysis indicates it had deemed the clause a "prospective waiver" prior to its incorrect determination that there would be no "subsequent opportunity for review."¹¹⁸ This is evidenced by its legislative finding that "[t]he [Supreme] Court, then, has held that arbitration clauses should be upheld if it is evident that either U.S. law definitely will be applied or if, there is a possibility that it might apply *and* there will be later review."¹¹⁹ As stated, the court first found that Panamanian law would apply to the arbitral proceedings to the categorical exclusion of U.S. law, resulting in an "inability to bring a Seaman's Wage Act claim [which] certainly qualifies as a 'prospective waiver' of rights"¹²⁰ Hence, finding that U.S. law would not apply, it appears that the court could have refrained from passing on the availability of a subsequent opportunity for review. The secondary importance of the court's finding of a lack of such subsequent opportunity for review is supported by the court's use of the term "moreover" preceding its brief assessment of the point.

Interestingly, on the other hand, had the court applied the *Vimar* dicta directly, its incorrect finding that there would be no subsequent opportunity for review would be of much greater significance.¹²¹ According to the *Vimar* dicta, invalidation requires that the arbitration requirements serve as a "prospective waiver of . . . statutory remedies" *and* there be no "subsequent opportunity for review."¹²² By looking at the precise facts of *Vimar* and *Mitsubishi*, then, the *Thomas* court created its own strained hierarchy between these two factors, rather than considering them as separate elements as directed by the *Vimar* dicta. And by relegating the possibility of a subsequent opportunity for review to secondary importance, the *Thomas* court's incorrect assertion that there would be no such opportunity is less troublesome legally, at least within its fabricated structure. It is of course troubling regardless to those who expect judges to pick up on such an easily noticeable possibility for later review. But if the *Thomas* court had looked at whether the agreement served as a prospective waiver and the possibility of a later opportunity for review as separate, equal elements, as it should have,

118. *Id.* at 1124.

119. *Id.* at 1123.

120. *Id.*

121. See *Vimar Seguros y Reaseguros S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) ("Were there no subsequent opportunity for review and were we persuaded that the '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 . . . , we would have little hesitation in condemning the agreement as against public policy.") (ellipsis in original).

122. *Id.*

this incorrect determination would be even more legally awkward because it would bear more directly on the result. The idea underlying the “opportunity for review” phrase of the *Vimar* dicta is that even if arbitration specifications result in a party foregoing potential statutory remedies, subsequent opportunity for review could fix this, and arbitration should proceed. The *Thomas* court’s failure to at least adhere to the text of the *Vimar* dicta neglects this.

VII. DO ALL FEDERAL STATUTORY REMEDIES HAVE EQUIVALENT SOCIAL VALUE?

As argued by one observer, the *Thomas* court’s reliance on *Mitsubishi* implicates a fundamental problem: “U.S. law per *Mitsubishi* is in harmony with transnational principles that only an offense against fundamental (and some would say international) public policy will result in invalidation of an arbitration agreement or denial of recognition of an award under the Convention.”¹²³ Few would dispute the classification of U.S. antitrust law as a “fundamental” public policy. Thus, the Supreme Court’s concern in *Mitsubishi* with whether U.S. law would apply in a Japanese arbitral tribunal was justified because of the importance of antitrust law to desired U.S. economic normative structure. The Seaman’s Wage Act, on the other hand, “cannot be so easily defended”¹²⁴ inasmuch as it simply does not affect a societal segment of comparable size.

By citing to *Mitsubishi*’s “prospective waiver” dicta as the primary basis underlying its result, then, the *Thomas* decision treats all federal statutory remedies equivalently in terms of their social, economic, and normative value to society. In reality, though, while difficult if not impossible to quantify, federal remedies possess differing amounts of each of these types of value. Very serious and difficult questions arise with respect to whether “social value” is a proper consideration in the context of subject-matter arbitrability, and if it is, with respect to who should make these value-determinations. At least one commentator has argued that “[c]ourts cannot readily rank the importance of federal statutes to the public interest or guess the respective protection that Congress intended for each statute.”¹²⁵ This is correct insofar as any ranking of various federal statutory remedies in terms of societal importance would be easily subject to criticism—who is to say, other than perhaps

123. Posting of Marc J. Goldstein to KluwerArbitrationBlog, <http://kluwerarbitrationblog.com/blog/2009/08/26/eleventh-circuit-troubled-by-choice-of-law-not-choice-of-arbitration-in-thomas-v-carnival/#comment-7705> (Aug. 31, 2009, 17:52 EST).

124. Brubaker, *supra* note 8, at 314.

125. Brubaker, *supra* note 8, at 314.

Congress itself, that one class of interests benefits collective American welfare more than another? There is democratic merit in preventing appointed federal judges, who may on occasion act in accordance with personal motivations and biases (notwithstanding whether tenure theoretically prevents such arbitrary decision-making) from making this determination.

VIII. HIERARCHY OF U.S. MANDATORY LAW IN TERMS OF NORMATIVE VALUE

Still, nowhere is the establishment of such a hierarchy prohibited. If limited to the context of determining whether to enforce an arbitration clause or an arbitral award on the basis of public policy, a hierarchy of the social value of federal statutory remedies could serve a useful purpose in this now-confused area of the law. Thus, this Part seeks to recommend a potential hierarchy that federal courts could use to consider relative normative value to United States society when determining whether to invalidate an agreement to arbitrate on public policy grounds (or enforce an award after the fact). Of course, even if empowered to do so, a federal court would not have occasion in a particular case to establish this hierarchy on its own, as it would entail discussion of numerous statutes and varying public policies. Congress itself could probably create such a normative hierarchy. But, in an era of unprecedented attempts at rule harmonization at an international level, Congress might be unwisely distancing itself from other states. This is why, assuming that any "ranking of public policies" is possible at an international level it should be in the form of a recommendation by an organization such as the International Council for Commercial Arbitration. Nevertheless, for purposes of this Part, the proposed hierarchy will consider what the United States might consider a principled hierarchy.

This exercise, however, requires clear distinctions between domestic and international transactions. While the relative normative value of each of these statutory remedies does not differ to the American public based on whether a given transaction is domestic or international, in the international setting, the need for certainty and the necessity of international comity are more likely to render concerns of domestic normative value less relevant.¹²⁶

Finally, and regrettably, because this note focuses on the *Thomas* decision, each of the areas of law below is discussed in a relatively cur-

126. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515-16 (1974) (noting that an international "contract involves considerations and policies significantly different than those found" in a contract in which it is undisputed that only U.S. law will apply).

sory manner. Surely the normative value of each and its relationship to arbitration could warrant an entire article.

A. *Civil Rights*

Federal courts should be most reluctant to allow a party to lose federal statutory rights via operation of a choice-of-law clause in an arbitration agreement in the case of certain civil rights.¹²⁷ Even though the trend favoring arbitrability has encompassed claims under many civil rights statutes, discrimination based on race, sex, national origin, religion, or creed is directly repugnant to the notion of equal protection under the law that the United States prides itself on. Heightened scrutiny is therefore justified before compelling arbitration of these claims simply due to the national interest in seeing them resolved before an Article III court.¹²⁸ This is not to say that arbitrators are more likely to lack competence than judges in deciding civil rights claims. But insofar as “broad social-ordering” has caused courts in the past to categorically exempt particular subject areas from arbitration,¹²⁹ the imperative role played by civil rights statutes in the American public’s overwhelming desire for protected grounds to remain protected militates in favor of a heightened level of scrutiny in the case of civil rights statutes.

The seminal case evincing this explosive level of normative value is *Alexander v. Gardner-Denver Co.*¹³⁰ While *Alexander* did not possess an international component, the Supreme Court reaffirmed its prior holding that “an employee’s rights under Title VII are not susceptible of prospective waiver,” and while it did not hold that Title VII claims cannot be arbitrated, it preserved employee rights to sue in court following arbitration.¹³¹ The semantic phrasing of the quoted sentence indicates

127. See, e.g., Douglas E. Abrams, *Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment*, 26 CONN. L. REV. 521, 584 (1994) (“[Some] civil rights claims . . . require thoughtful development of existing legal doctrine once the facts are determined; here the federal judiciary’s ultimate oversight remains particularly critical.”); *id.* (arguing for “a right to a post-arbitral trial de novo on claims under any of the four statutes touched by the Acts” based on “the role of civil rights legislation as public mandates designed to produce equality before the law.”).

128. Of course, it is arguable that the unique significance of the norms embodied by U.S. civil rights statutes is universally recognized. If this is so, the probability that an arbitrator will consider substantive civil rights claims is high, either because a U.S. civil rights act is considered mandatory or because an international treaty will be applied to reach the same result.

129. Posting of Marc J. Goldstein to Marc J. Goldstein Arbitration Commentaries, <http://arblog.lexmarc.us/2009/07/us-public-policy-as-basis-to-nullify-arbitration-agreement-beyond-the-bounds-of-mitsubishi> (July 7, 2009).

130. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52–54 (1974) (holding that “a contractual right to submit a claim to arbitration is not displaced simply because Congress has also provided a statutory right against discrimination” thereby allowing an employee to arbitrate *and* sue in court).

131. *Id.* at 51–52 (citing *Wilko v. Swan*, 346 U.S. 427 (1953)).

the importance of nondiscrimination (in employment) to U.S. values as a whole. By contrast, substituting “the Seaman’s Wage Act” for “Title VII” in the quoted sentence seems more suspect, yet this is effectively what *Thomas* did. Critical to the placement of civil rights claims as justifying the highest level of scrutiny is the fact that *Alexander* has never been explicitly overruled. Notably, though the Supreme Court’s recent 5-4 decision in *14 Penn Plaza LLC v. Pyett*, involving the Age Discrimination in Employment Act, distinguished *Alexander* on the basis that there, the employee had not *agreed* to arbitrate his statutory claims, only his contractual claims.¹³² *Pyett* thus eliminated what appeared to be the last bastion of a subject matter which arguably stood exempt from arbitration, and seriously limited *Alexander*. Nonetheless, simply as a result of the goal of creating a society founded upon equality, agreements to arbitrate civil rights claims should be subject to the highest level of scrutiny before arbitration is compelled.

B. Antitrust

Even under contemporary U.S. economic values, The Sherman Act and the Clayton Act still present crucial regulatory tools. Put simply, they reflect the well-regarded repugnance to situations where intra-industry competition, theoretically beneficial for the individual consumer, is stifled by monopoly. *Mitsubishi* is the paramount case dealing with the permissibility of the arbitration of antitrust claims. Certainly, *Mitsubishi* permitted arbitration of an antitrust dispute, not least because “American law applied to the antitrust claims and . . . the claims had been submitted to the arbitration panel in Japan on that basis.”¹³³ Yet, the Supreme Court in *Mitsubishi* recognized “the fundamental importance to American democratic capitalism of the regime of the antitrust laws.”¹³⁴ *Mitsubishi* further expressed respect for the importance of the antitrust laws “to the preservation of economic freedom and our free-enterprise system,”¹³⁵ and noted that “the Sherman and Clayton Acts reflect Congress’ appraisal of the value of economic freedom.”¹³⁶ *American Safety Equipment Corp. v. J.P. Maguire & Co.*, though greatly limited by *Mitsubishi* itself, identified the incalculable normative Congressional judgment underlying the antitrust laws by concluding that “the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the

132. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1468–69 (2009). See also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

133. *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

134. *Id.* at 634.

135. *Id.* at 651 (quoting *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972)).

136. *Id.* at 652.

. . . . antitrust claims raised here . . . inappropriate for arbitration.”¹³⁷

What this language reveals (even if *American Safety* is arguably obsolete), besides simply that the antitrust laws exist to vindicate a legislative determination of an essential public interest, is a justification for a significantly heightened level of public policy scrutiny in the case of an agreement to arbitrate which might exempt an alleged antitrust violator from the payment of punitive damages.

Again, the difficulty in establishing a “hierarchy of normative value” is made clear by the fragility of the argument that antitrust claims are more amenable to arbitration than civil rights claims (such as under Title VII), and less amenable to arbitration than securities claims. All the same, the persistent bias against monopoly does render the antitrust laws of particular importance in overall U.S. public policy. Noticeably, the provision of the Seaman’s Wage Act at issue in *Thomas* seeks to incentivize ship owners to pay their sailors quickly—a rather less lofty goal than setting a limit on organizational structures and policies of all U.S. companies.

C. Securities and RICO

The United States has a strong public policy in favor of “protect[ing] . . . investors against fraud and nondisclosure.”¹³⁸ But in spite of this governmental desire to provide an investor haven, when concrete disputes have arisen the policy has often given way to international comity where the remedies available in arbitration might be comparable.¹³⁹ Arbitration, in both the domestic and international contexts, has demonstrated a unique, mutually beneficial ability to deal with these claims.¹⁴⁰ It is this judicial willingness to send these claims to arbitration which justifies securities arbitration’s placement of third on the list. Admittedly, there is a potential problem with using instances in which courts compelled arbitration as evidence of less importance to be attributed to a

137. *Am. Safety Equip. Co. v. J.P. Maguire & Co.*, 391 F.2d 821, 827–28 (2d Cir. 1968). But see Nicholas R. Weiskopf, *Arbitral Injustice—Rethinking the Manifest Disregard Standard for Judicial Review of Awards*, 46 U. LOUISVILLE L. REV. 283, 285 n.9 (2007) (citing decisions which hold even domestic antitrust claims arbitrable).

138. *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1231–32 (6th Cir. 1995) (discussing *Bonny v. Society of Lloyd’s*, 3 F.3d 156, 162 (7th Cir. 1993)).

139. See, e.g., *Bonny*, 3 F.3d at 156 (“Given the international nature of the transactions involved here, and the availability of remedies under British law that do not offend the policies behind the securities laws, the parties’ forum selection and choice of law provisions contained in the agreements should be given effect.”); *Allen v. Lloyd’s of London*, 94 F.3d 923 (4th Cir. 1996); *Richards v. Lloyd’s of London*, 135 F.3d 1289 (9th Cir. 1998).

140. See generally Brandon M. Thompson, Note, *Answering a Call that was Never Made: The Unwarranted Congressional Assault on Shearson/American Express, Inc. v. McMahon*, 64 U. MIAMI L. REV. 339, 357–61 (2009) (describing fairness guarantees in consumer-securities arbitration).

given subject-matter, but at the same time, judicial willingness might serve as an indication of the relative importance that Congress wished to place on particular statutes in the context of determining arbitrability.

In *Shearson/American Express, Inc. v. McMahon*, Justice O'Connor rejected the plaintiffs' argument that arbitration "effects an impermissible waiver of the substantive protections of the [Securities] Exchange Act," and also held the plaintiff's claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") arbitrable.¹⁴¹ The Supreme Court reaffirmed the RICO holding in *PacifiCare Health Systems, Inc. v. Book*, which compelled physicians' RICO claims against managed-health-care organizations to be arbitrated in spite of the possibility that the parties' agreement might have limited the punitive damage liability of the health-care organizations ordinarily available under RICO.¹⁴² These cases, while compelling arbitration, do not render the public policies enunciated in the Securities Exchange Act and RICO unimportant; they merely reflect a recognition, as did *Mitsubishi*, that arbitrators are capable of adjudicating in a way that will take into account the public policies reflected by the statutes' enactment.

But, on the other hand, it can reasonably be surmised that much of the American public feels quite strongly against racketeers investing in enterprises engaged in interstate or foreign commerce,¹⁴³ as well as against securities "fraud on the market" and insider trading.¹⁴⁴ And to the extent there is simply a public interest in having Article III courts resolve disputes which implicate the fundamental foundations of American society¹⁴⁵ regardless of arbitrators' actual capabilities, some scrutiny of both procedural and substantive guarantees of fairness is necessary before compelling arbitration on a whim in these cases. Not quite so, however, with respect to the less publicly significant Seaman's Wage Act.

D. Consumer Protection

Due in part to the cosmic increase in the number of Internet transactions over the last two decades,¹⁴⁶ a slightly lower level of judicial

141. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229 (1987).

142. *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406–07 (2003).

143. 18 U.S.C. § 1962 (2000).

144. 15 U.S.C. § 78j(b) (2000).

145. See Kronstein, *supra* note 2, at 68 ("To effect protection of individuals against the unlawful exercise of 'judicial power,' the scope of the due process clause must not be limited to acts of formal 'judicial' bodies. It must include acts of organizations which attempt to usurp judicial power. . . . [T]he public and the government should be assured that organized arbitration does not violate principles of law, social justice and national interest.").

146. Catherine A. Rogers, *The Arrival of the Have-Nots in International Arbitration*, 8 NEV. L.

scrutiny is justified where a consumer may be forced to lose the right to recover under a federal statute in favor of arbitration. This is so because with this increase, “international arbitration, particularly online dispute resolution, is often touted as the only viable means for consumers to pursue claims.”¹⁴⁷ Indeed, consumer advocacy groups themselves have “urged the use of arbitration for these cross-border disputes.”¹⁴⁸

Domestically speaking, the two Supreme Court cases which touch on the benefits of consumer arbitration, and hence the need for less scrutiny are *Carnival Cruise Lines v. Shute*¹⁴⁹ and *Allied-Bruce Terminix Cos. v. Dobson*.¹⁵⁰ While *Shute*’s assertion that “passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares”¹⁵¹ seems dubious, these cases indicate the expansive reading that the Court has given to the Federal Arbitration Act. In this regard, if the Court is viewed as an espouser of congressional intent, protecting consumers from arbitration is not a high congressional priority. Accordingly, some, but less, scrutiny is needed in the case of such agreements to arbitrate disputes between consumers and the firms from which they purchase goods and services. On the other hand, many commentators have lashed out at the U.S. approach to mandatory consumer arbitration or at least urged Congress to reexamine the desirability of this endemic phenomenon.¹⁵²

Further justifying this relatively lower level of scrutiny is the proposition that the concept of mandatory consumer law is not conducive to the antiregulatory environment of the United States.¹⁵³ In addition, Professor Keith Hylton undertook a mathematical analysis and determined that from an economic perspective, consumer arbitration agreements should generally be enforced because:

J. 341, 361 (2007) (“[W]ith the lowering of trade barriers and the advent of the Internet, consumers are increasingly purchasing across national borders.”).

147. *Id.*

148. *Id.* See also Karen Stewart & Joseph Matthews, *Online Arbitration of Cross-Border, Business to Consumer Disputes*, 56 U. MIAMI L. REV. 1111, 1136 (2002) (noting “the difficulty inherent in applying domestic laws to electronic commerce . . .”).

149. *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

150. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). *Accord Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

151. *Shute*, 499 U.S. at 594.

152. See, e.g., Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002); William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 56 VAND. J. TRANSNAT’L L. 1241, 1311 (2003) (“[F]or consumer transactions and employment contracts . . . heightened court scrutiny provides a healthy measure of paternalistic protection for the weaker party.”).

153. See Patrick J. Borchers, *Categorical Exceptions to Party Autonomy in Private International Law*, 82 TUL. L. REV. 1645 (2008).

[Parties] will enter into a waiver agreement when and only when the option to litigate reduces wealth, which is true when the deterrence benefits provided by the threat of litigation are less than expected litigation costs. Similarly, parties have an incentive to enter into an arbitration agreement when and only when the margin between deterrence benefits and dispute resolution costs is larger under the arbitration regime. In view of the benefits to the contracting parties, and the widely-dispersed gains from relieving courts of the burdens imposed by wealth-reducing litigation, there should be a presumption in favor of enforcing waiver and arbitration agreements that are entered into in a knowing and voluntary manner.¹⁵⁴

E. *Non-Civil Rights Employment*

Agreements to arbitrate claims in the employment context that do not involve civil rights statutes need only be subject to minimal scrutiny by courts before arbitration is compelled. This is partially demonstrated by the Sixth Circuit's recent decision in *Mazera v. Varsity Ford Mgmt. Servs.*¹⁵⁵ While *Mazera* actually involved claims under civil rights statutes, the court's language indicates judicial and congressional endorsement of rejection of the usual criticisms of mandatory employment arbitration. The court opined, "[a]lthough Mazera's affidavit raises several factual issues—his lack of bargaining power, the absence of an attorney, language problems, and his degree of understanding of the contract—none of these statements is material with respect to the validity of the arbitration agreement."¹⁵⁶ Moreover, it is undisputed that wage claims under the Fair Labor Standards Act ("FLSA") are arbitrable.¹⁵⁷ The lesser normative value to be attributed to the FLSA relative to statutes such as Title VII is arguably further indicated by Congress' omission in the FLSA of the protection that waivers of rights need be "knowing and voluntary."¹⁵⁸ The Seaman's Wage Act possesses a normative similarity to the FLSA, and is best thought of as falling into this last category.

In the international cross-border employment context, one scholar has argued that "litigation in national courts" may not adequately consider the conflicting policies of the employee's state and the employer's state, and hence that "arbitration may provide a more viable mechanism for safeguarding national interests represented in employment laws, and

154. Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 263 (2000).

155. *Mazera v. Varsity Ford Mgmt. Servs.*, 565 F.3d 997 (6th Cir. 2009).

156. *Id.* at 1002 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)).

157. *See, e.g., Skirchak v. Gen. Dynamics Corp.*, 508 F.3d 49 (1st Cir. 2007).

158. *Id.* at 57.

for finding a meaningful accommodation of conflicting national laws.”¹⁵⁹ This provides a further justification for less scrutiny, and is directly relevant to *Thomas*—if arbitration in the Philippines were allowed, the Filipino policy of encouraging the hiring of its nationals abroad¹⁶⁰ and the U.S. policy of ensuring prompt payment to seaman could be appropriately reconciled.

IX. CONCLUSION

A quarter-century ago, the Supreme Court in *Mitsubishi* recognized that:

If [international arbitral tribunals] are to take a central place in the international legal order, national courts will need to shake off the old judicial hostility to arbitration, and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.¹⁶¹

By holding *Thomas*'s agreement to arbitrate under Panamanian law a prospective waiver of his right to a remedy under the Seaman's Wage Act in United States courts, the Eleventh Circuit has revived this feared "old judicial hostility." It is in this vein that Chief Justice Taft's quote is relevant. Certainty touts enormous benefits which can frequently overcome even the strongest arguments supporting access to judicially-supplied remedies for the "little guy." While the result in *Thomas* is admirable insofar as it addresses the vulnerability concerns intrinsic to seamen as a class, avoiding uncertainty by enforcing arbitration agreements in commercial contracts must win out.

159. Rogers, *supra* note 146, at 361.

160. Nickson, *supra* note 77, at 105.

161. *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 638 (1985) (citation and internal quotation marks omitted).