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## The Eleventh Circuit's Interpretation of *Mitsubishi's* Footnote 19 and the Validity Of Arbitration Clauses in Union-negotiated Collective Bargaining Agreements

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# The Eleventh Circuit's Interpretation of *Mitsubishi's* Footnote 19 and the Validity of Arbitration Clauses in Union-Negotiated Collective Bargaining Agreements

CAITLIN E. BURKE\*

I. INTRODUCTION .....	893
II. BACKGROUND .....	895
A. <i>The Federal Arbitration Act Conflicts with the Eleventh Circuit's Holding in Bautista v. Star Cruises</i> .....	896
B. <i>The Jones Act</i> .....	897
C. <i>The Eleventh Circuit Reinterprets Footnote 19</i> .....	898
D. <i>The Eleventh Circuit Deviated from Prior Circuit Precedent</i> .....	899
E. <i>Other Courts' Reliance on Thomas</i> .....	901
III. THE SUPREME COURT'S PERSPECTIVE ON PROSPECTIVE WAIVER .....	902
A. <i>Alexander v. Gardner-Denver Co.</i> .....	903
B. <i>Scherk v. Alberto-Culver Co. and Wilko v. Swan</i> .....	904
C. <i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> .....	905
D. <i>Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer</i> .....	908
E. <i>Wright v. Universal Mar. Serv. Corp.</i> .....	910
F. <i>Circuit City Stores, Inc. v. Adams</i> .....	912
G. <i>14 Penn Plaza LLC v. Pyett</i> .....	913
IV. <i>LINDO v. NCL (BAHAMAS), LTD.</i> .....	917
V. THE JONES ACT, THE FAA, AND THE FUTURE .....	920
A. <i>History Surrounding the Jones Act and its Applicability to Foreign Seamen</i> .....	920
B. <i>"American" Cruise Lines</i> .....	923
C. <i>The Eleventh Circuit Ignores the Nature of the Claims</i> .....	925
D. <i>Abusive Business Practices by the Maritime Industry is Not Ancient History</i> .....	926
E. <i>The Direction of the Supreme Court and Congress on Union-Negotiated Waiver</i> .....	926
F. <i>Fictions of the Federal Arbitration Act</i> .....	928
G. <i>Advocation of Future Direction</i> .....	930
VI. CONCLUSION .....	932

## I. INTRODUCTION

The Eleventh Circuit Court of Appeals deviated from the Circuit's prior precedent in announcing its decision in *Lindo v. NCL*.<sup>1</sup> The holding innuendo overruled *Thomas v. Carnival Cruise Lines*, decided by Judge Barkett on the Eleventh Circuit in 2009.<sup>2</sup> Rather than explicitly overrule *Thomas*, the Court of Appeals acrobatically differentiated *Lindo* by rein-

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\* In memory of my Father, Michael P. Burke.

1. *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1277–80 (11th Cir. 2011).

2. *Id.*

terpreting the United States Supreme Court decision in *Mitsubishi*'s Footnote 19.<sup>3</sup>

This novel interpretation allowed the Eleventh Circuit to compel arbitration of a foreign seaman's claim while holding that such procedural manipulation did not prospectively waive the seaman's United States statutory rights.<sup>4</sup> Even though *Lindo*'s holding conflicts with the Supreme Court's analysis in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*,<sup>5</sup> the Eleventh Circuit extended *Lindo* in *Henriquez v. NCL* to include seamen's common law maintenance and cure claims.<sup>6</sup> Thus, within one month, the Eleventh Circuit overruled its holding in *Thomas* and substantially altered seamen's rights and remedies in conflict with the Jones Act<sup>7</sup> and recent Supreme Court decisions regulating the enforcement of arbitration provisions.<sup>8</sup>

This Casenote analyzes the holding announced in *Lindo v. NCL*. It begins with an overview of *Lindo* and discusses the Eleventh Circuit's precedent in arbitration under the Federal Arbitration Act ("FAA"). The Casenote then discusses the Supreme Court's arbitration precedent and the ability to waive U.S. statutory rights in contractual agreements. This Part includes various opinions, expressed in *dicta*, which provide guidance to the Court's current stance on union-negotiated collective bargaining agreements.

After analyzing the Supreme Court's related precedent, the Casenote presents the facts of *Lindo* and the Eleventh Circuit's rationale in the opinion. This rationale includes a comparison of Eleventh Circuit cases leading up to *Lindo*. The Casenote concludes with an analysis of the Jones Act, including its legislative history and purpose, and the Supreme Court's interpretation and application. The Jones Act analysis will lead into a discussion of the Supreme Court's interpretation of the FAA and how lower courts have responded. In addition to the precedent on the books, this Casenote will look at the proposed legislative amendments to the FAA. The Casenote concludes with the proposed amendments, their purpose, and will lead into a public policy discussion of

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3. *Id.*

4. *Id.*

5. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-37 n.19 (1985).

6. *Henriquez v. NCL (Bahamas), Ltd.*, 440 F. App'x 714, 715 (11th Cir. 2011).

7. *See Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 311-12 (1970) (stating that the language of the Jones Act by its terms "is not limited to American seaman nor to vessels bearing the American flag").

8. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974) (holding "In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement").

union-negotiated arbitration clauses contained in collective bargaining agreements.

## II. BACKGROUND

Harold Leonel Pineda Lindo ("Lindo") is a citizen and resident of Nicaragua.<sup>9</sup> Norwegian Cruise Line ("NCL") employed Lindo as a seaman aboard the M/S Norwegian Dawn.<sup>10</sup> The employment contract signed by Lindo stipulated to submission of all claims arising from employment to arbitration.<sup>11</sup> The forum selection clause fixed arbitration in Lindo's home country,<sup>12</sup> Nicaragua, and the choice of law provision dictated that Bahamian law would apply.<sup>13</sup> During his employment, Lindo sustained back injuries while carrying heavy trash bags, which subsequently required corrective surgery.<sup>14</sup>

In 2009, Lindo filed suit in Florida state court asserting violations of the Jones Act, pursuant to 46 U.S.C. § 30104.<sup>15</sup> In addition to his Jones Act negligence claims, Lindo claimed: failure to provide maintenance and cure, failure to provide adequate medical treatment, unseaworthiness, and disability benefits under the collective bargaining agreement ("CBA").<sup>16</sup>

NCL removed the case under 9 U.S.C. § 205<sup>17</sup> to the United States District Court for the Southern District of Florida and moved to compel arbitration pursuant to the CBA.<sup>18</sup> Lindo amended his complaint, limiting his cause of action to a single claim of Jones Act negligence.<sup>19</sup> Lindo opposed NCL's motion and sought remand to state court.<sup>20</sup>

Raising the Eleventh Circuit's decision in *Thomas*, Lindo argued that the arbitration provision, contained in the CBA, was void as a prospective waiver of his Jones Act claim.<sup>21</sup> In the alternative, Lindo contested the validity of the arbitration clause under Florida state law, arguing that the provision failed because it neglected to inform Lindo of the costs associated with arbitration.<sup>22</sup> The district court denied Lindo's

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

10. *Id.*

11. *Id.* at 1260–61.

12. *Id.* at 1261.

13. *Id.*

14. *Id.* at 1260.

15. *Lindo*, 652 F.3d at 1261.

16. *Id.*

17. 9 U.S.C.A. § 205.

18. *Lindo*, 652 F.3d at 1262.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

motion for remand, granted NCL's motion to compel arbitration, and dismissed Lindo's amended complaint.<sup>23</sup>

Lindo appealed.<sup>24</sup> The Eleventh Circuit Court of Appeals held that the contract's arbitration provision was not void as a matter of public policy, did not prospectively waive Lindo's U.S. statutory rights, and thus, compelled arbitration to Nicaragua under the application of Bahamian law.<sup>25</sup>

A. *The Federal Arbitration Act Conflicts with the Eleventh Circuit's Holding in Bautista v. Star Cruises*

The Eleventh Circuit's holding in *Lindo*, compelling arbitration of seamen's claims, is unambiguously in conflict with the language and purpose of the Federal Arbitration Act.<sup>26</sup> The FAA expressly prohibits seamen claims from being submitted to arbitration for resolution.<sup>27</sup> Chapter 1, Section 1 of the FAA dictates that the Act is inapplicable to "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>28</sup> Despite the code's clear language, the Eleventh Circuit held that Chapter 1 of the FAA does not apply to arbitration agreements involving foreign parties, but rather, only the defenses in Chapter 2 of the FAA are available to parties in international contracts.<sup>29</sup> The Circuit's interpretation of the FAA not only conflicts with the legislative history of the Federal Arbitration Act,<sup>30</sup> it disagrees with this country's long-standing practice of

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23. *Id.*

24. *Lindo*, 652 F.3d at 1262.

25. *Id.* at 1287.

26. 9 U.S.C.A. § 1 (West) (The exemption provision of the Federal Arbitration Act specifies: "but 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.").

27. *Id.*

28. *Id.*

29. *Bautista v. Star Cruises*, 396 F.3d 1289, 1296 (11th Cir. 2005) (holding "The statutory framework of title 9 and the language and context of the Convention Act preclude the application of the FAA seamen's exemption, either directly as an integral part of the Convention Act or residually as a non-conflicting provision of the FAA.").

30. H.R. REP. NO. 91-1181, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3601, at 3603.

THE FEDERAL ARBITRATION ACT, WHICH HAS BEEN CODIFIED IN TITLE 9 OF THE U.S.C. EMBODIES BASIC NATIONAL POLICY CONCERNING ARBITRATION. THE SECRETARY OF STATE'S ADVISORY COMMITTEE ON PRIVATE INTERNATIONAL LAW, WHICH INCLUDES REPRESENTATIVES OF THE AMERICAN BAR ASSOCIATION, . . . SUGGESTED THAT THE DEPARTMENT DISCUSS WITH A SMALL GROUP OF REPRESENTATIVES . . . THE MOST EFFECTIVE APPROACH TO THE IMPLEMENTING LEGISLATION. THE CONSENSUS OF THE GROUP, WITH WHICH THE DEPARTMENT OF JUSTICE CONCURS, WAS THAT RATHER THAN AMENDING A SERIES OF SECTIONS OF THE FEDERAL ARBITRATION ACT IT WOULD BE PREFERABLE TO ENACT A NEW

protecting seamen as wards of admiralty.<sup>31</sup>

### B. *The Jones Act*

The Jones Act was enacted to protect seamen as a class of persons subjected to harsh working conditions and reality of marine life.<sup>32</sup> Concerns over evasive business practices spawned the First Congress to enact legislation<sup>33</sup> designed to serve a regulatory function and ensure ship owners effectuated appropriate measures to protect their crew.<sup>34</sup> Because Congress was troubled by the historical oppression of seamen, it sought to afford the same protection to seaman as it had to railroad employees.<sup>35</sup>

The purpose of the Act was not only to provide a shield, but also to afford a sword to the abused class. The sword allowed seamen, domestic and foreign, to bring their claims in negligence in United States Federal Courts.<sup>36</sup> The Act lessened the burden of proving causation and provided compensation to injured seamen.<sup>37</sup> Providing an adequate judicial forum, lessening the negligence standard, and creating an accessible platform to vindicate seamen rights was the focus and purpose of the

CHAPTER DEALING EXCLUSIVELY WITH RECOGNITION AND ENFORCEMENT OF AWARDS FALLING UNDER THE CONVENTION. THIS APPROACH WOULD LEAVE UNCHANGED THE LARGELY SETTLED INTERPRETATION OF THE FEDERAL ARBITRATION ACT BUT NOT UNDER THE CONVENTION.

31. See *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 282 (1932) (stating "Seamen have always been regarded as wards of the admiralty, and their rights, wrongs, and injuries a special subject of the admiralty jurisdiction.").

32. *Resp't Br., Hellenic Lines Limited*, 398 U.S. 396, 1970 WL 136482, at \*15 (2004) (arguing the Jones Act, "In its plain language and operation, it is broad in scope, giving protection to all seamen injured in their employment in which the United States has a legitimate interest.").

33. *Harrington v. Atl. Sounding Co., Inc.*, 602 F.3d 113, 131 (2d Cir. 2010) (Calabresi, J. dissenting), *cert. denied*, 131 S. Ct. 1054 (2011) (stating "The [Jones] Act followed a long tradition of solicitude for the rights and interests of seamen by both legislatures and courts that dates back to the First Congress.").

34. *Id.* at 4 (stating "This nation must not permit foreign-flag ships to take advantage of our benefits equally with the American merchant marine, and, simultaneously, evade the accompanying obligations.").

35. Rory Bahadur, *Constitutional History, Federal Arbitration and Seamen's Rights Sinking in A Sea of Sweatshop Labor*, 39 J. MAR. L. & COM. 157, 171 (2008) (arguing Jones Act claims are not removable to federal court as they were enacted under the Federal Employees Liability Act, which bars removal in cases of personal injury to railway employees).

36. *Hellenic Lines Ltd.*, 398 U.S. at 310 (holding "The flag, the nationality of the seaman, the fact that his employment contract was Greek, and that he might be compensated there are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contacts that this alien owner has with this country.").

37. *Harrington*, 602 F.3d at 138 (stating "This Circuit continues to recognize the distinctive nature of FELA and the Jones Act by applying relaxed standards of negligence and causation to claims brought under those statutes.").

Jones Act.<sup>38</sup>

Motivated by concern over ships flying flags of convenience and circumventing U.S. labor laws, Congress enacted the Jones Act to protect seamen porting in U.S. territories.<sup>39</sup> However, the Eleventh Circuit's holding in *Lindo* strips the Jones Act of its legislative purpose. By compelling arbitration of seamen claims to foreign tribunals, under foreign law, the Eleventh Circuit endorses the exact type of evasive business practices Congress sought to prevent. The aftermath of *Lindo* effectively allows ship owners to register ships in foreign countries and stipulate to a favorable choice of law and continue oppression of seamen. The decision steals the seamen's sword, the sword Congress granted centuries ago.

### C. *The Eleventh Circuit Reinterprets Footnote 19*

In *Thomas v. Carnival Cruise Lines*, the Eleventh Circuit interpreted the Supreme Court's dicta in *Mitsubishi's* Footnote 19 to guide its holding.<sup>40</sup> Footnote 19 expressed the Court's hesitation in compelling arbitration when a contract's choice of law and forum selection clause act in tandem to prospectively waive U.S. statutory rights.<sup>41</sup> In *Thomas*, Judge Barkett determined that the Supreme Court's concern of prospective waiver as expressed in Footnote 19 of *Mitsubishi* was indicative to her outcome.<sup>42</sup>

The Circuit held that granting the cruise line's motion to compel arbitration to the Philippines, under Panamanian law, would act as a prospective waiver of *Thomas's* U.S. statutory rights (Seaman's Wage Act claim).<sup>43</sup> In refusing to compel arbitration, the Eleventh Circuit highlighted that the stipulated choice of law (Panamanian) prevented *Thomas* from vindicating his U.S. statutory right.<sup>44</sup> Furthermore, submission of his claims to a foreign tribunal, under foreign law, may result in no award, which would be effectively unreviewable (violating the FAA).<sup>45</sup> Because the Supreme Court's language dictates hesitation in compelling arbitration that would waive a litigant's U.S. statutory rights,

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38. *Id.* at 136.

39. *Hellenic Lines Ltd.*, 398 U.S. at 315 (defending its holding by arguing that Congress was weary of "the practice of American owners of finding a 'convenient' flag 'to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries'").

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

41. *Mitsubishi Motors Corp.*, 473 U.S. 614, n.19.

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

43. *Id.* at 1124.

44. *Id.* at 1123.

45. *Id.*

the Eleventh Circuit erred by deviating from *Thomas* and reinterpreting *Mitsubishi's* Footnote 19 when it announced its decision in *Lindo*.

D. *The Eleventh Circuit Deviated from Prior Circuit Precedent*

In *Atlantic Sounding Co., Inc. v. Townsend*, Chief Judge Edmondson announced that under the Eleventh Circuit's precedent, a panel may only depart from an earlier panel's decision when an intervening Supreme Court decision compels departure and is "clearly on point."<sup>46</sup> The interlocutory appeal arose after the district court refused to strike the seaman's request for punitive damages.<sup>47</sup>

On 5 July 2005, Defendant, a seaman and crew member of the Motor Tug *Thomas*, allegedly slipped and landed shoulder first on the steel deck of the vessel, injuring his shoulder and clavicle. According to [the seaman], [the tug owners] advised him that they would not provide him with maintenance and cure, which covers medical care, a living allowance, and wages for seamen who become ill or are injured while serving aboard a vessel. [The tug owners] then filed this suit for declaratory relief on the question of their obligations in this matter.<sup>48</sup>

In *Hines v. J.A. LaPorte, Inc.*, an Eleventh Circuit panel announced that seamen are able to recover punitive damages when an employer arbitrarily and willfully refuses to pay maintenance and cure.<sup>49</sup> In *Atlantic Sounding*, the seaman's employer argued that the Supreme Court's decision in *Miles v. Apex Marine Corp.*, which announced that punitive damages are unavailable under the general maritime law in a wrongful death action, abrogated *Hines*.<sup>50</sup> On interlocutory appeal, the Circuit examined whether the court could depart from its holding in *Hines*, based on the Supreme Court's intervening decision in *Miles*.<sup>51</sup> Chief Judge Edmondson reiterated the importance of adhering to settled law of the Circuit: "[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing."<sup>52</sup>

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46. *Atlantic Sounding Co., Inc. v. Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007) *aff'd and remanded*, 129 S. Ct. 2561 (U.S. 2009).

47. *Id.* at 1283–84.

48. *Id.*

49. *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187, 1189 (11th Cir. 1987) (stating "this Court held that punitive damages are recoverable under general maritime law upon a showing of a shipowner's willful and wanton misconduct in a death action").

50. *Atl. Sounding Co., Inc.*, 496 F.3d at 1283.

51. *Id.* at 1284.

52. *Id.* (citing *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir.2007) (concluding that the Supreme Court's determination that the time requirement in Fed. R. Crim. P. 33 was not jurisdictional did not "relieve[ ] us from the obligation to follow our prior panel decisions holding that the requirements of Appellate Rule 5 are jurisdictional")).



In *Miles*, the Supreme Court strictly announced that damages for loss of society were unavailable under general maritime law in seaman death causes of action.<sup>53</sup> The holding, however, did not extend to maintenance and cure or personal injury claims.<sup>54</sup> Holding *Miles* to a limited reading, the Eleventh Circuit refused to deny the seaman's request for punitive damages in *Atlantic Sounding*.<sup>55</sup> The Eleventh Circuit refused to overrule its prior decision in *Hines* based on the Supreme Court's rationale in *Miles*.<sup>56</sup>

Lindo's deviation from the Circuit's holding in *Thomas* violates the principle announced in *Atlantic Sounding*. In order to avoid overruling a prior panel decision, Judge Hull sidestepped *Thomas*'s holding. Instead, of overruling *Thomas* the judge proclaimed that *Thomas* was incorrect in its application of the prospective waiver doctrine (*Mitsubishi*'s Footnote 19).<sup>57</sup>

In defending his holding, the district judge stated that the FAA's Article V public policy defense could only be raised at the enforcement of an award, not when challenging an arbitration agreement.<sup>58</sup> Article V of the FAA's public policy defense dictates that enforcement of an arbitral award may be refused when enforcement "would be contrary to the public policy of that country."<sup>59</sup> In *Thomas*, the Circuit interpreted this language to conclude that a seaman could challenge the choice of law contained in an arbitration agreement when the choice of law and forum selection clause act in tandem to waive the seaman's U.S. statutory rights.<sup>60</sup> Because Footnote 19 explicitly stated that an arbitration agreement would not be upheld if it prospectively waived a litigant's rights, Judge Barkett held that the public policy defense was available to a litigant challenging an agreement, not just an award.

The decision in *Lindo* therefore not only violates the rationale in *Mitsubishi* and *Thomas*, it conflicts with the Circuit's prohibition announced in *Atlantic Sounding*, which refuses to allow the Circuit to deviate from prior precedent absent an on-point Supreme Court decision.<sup>61</sup>

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53. *Id.* at 1285.

54. *Id.*

55. *Id.* at 1288. The Supreme Court affirmed the Eleventh Circuit's holding in *Atlantic Sounding*, ruling that punitive damages are available for willful and wanton disregard of seaman's maintenance and cure claims.

56. *Id.*

57. *Lindo*, 652 F.3d at 1284 (holding that the public policy defense may only be invoked at the arbitral award-enforcement stage, not the initial arbitration-enforcement stage).

58. *Id.*

59. New York Convention, art. V(2)(b), June 10, 1958, T.I.A.S. No. 6997, 21 U.S.T. 2517.

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

61. *Atl. Sounding Co., Inc.*, 496 F.3d at 1286.

### E. *Other Courts' Reliance on Thomas*

The Southern District of New York relied on *Thomas's* holding and rationale when it announced its holding in *Dumitru v. Princess Cruise Lines*.<sup>62</sup> Discussing *Mitsubishi*, the district court noted that the Supreme Court “upheld the arbitration provision [in *Mitsubishi*] because . . . U.S. law would be applied in arbitration”<sup>63</sup> and “the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.”<sup>64</sup> The district court heeded to the logic and plain meaning of Footnote 19: “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 . . . we would have little hesitation in condemning the agreement as against public policy.”<sup>65</sup>

The court then turned to the Supreme Court’s rationale in *Vimar*, which compelled arbitration to Japan when the choice of law was ambiguous but the Court would have the “opportunity to review the outcome of arbitration at a later stage.”<sup>66</sup> In conducting its own analysis, the Southern District of New York considered the Eleventh Circuit’s interpretation of *Mitsubishi's* Footnote 19.

Synthesizing these two cases, the Eleventh Circuit in *Thomas v. Carnival Corp.* declared 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.” Applying this approach, the *Thomas* court invalidated an agreement to arbitrate a Seaman’s Wage Act claim in the Philippines under Panamanian law, finding that the choice-of-law and choice-of-venue provisions “operated in tandem to completely bar *Thomas* from relying on any U.S. statutorily-created causes of action,” and that the court had “no opportunity for review” because of the “distinct possibility” that the plaintiff would receive no award under Panamanian law.<sup>67</sup>

In *Asignacion v. Schiffahrts*, the Eastern District of Louisiana opted to follow the Eleventh Circuit’s holding in *Thomas* after a thorough discussion of the legislative purpose and history of the Jones Act.<sup>68</sup> The case was a question of first impression for the Fifth Circuit.<sup>69</sup> Having never determined the enforceability of forum selection clause and choice

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62. *Dumitru v. Princess Cruise Lines, Ltd.*, 732 F. Supp. 2d 328, 341 (S.D.N.Y. 2010).

63. *Id.*

64. *Mitsubishi Motors Corp.*, 473 U.S. at 637.

65. *Dumitru*, 732 F. Supp. 2d at 341.

66. *Id.*

67. *Id.*

68. *Asignacion v. Schiffahrts*, Slip. Op., No. CIV.A. 11-627, 2011 WL 2118740, at \*6-7 (E.D. La. May 25, 2011) *appeal dismissed*, 11-30546, 2012 WL 13773 (5th Cir. Jan. 4, 2012).

69. *Id.* at \*4.

of law clause in an international arbitration agreement, the district court examined Supreme Court precedent and relevant circuits' interpretations.<sup>70</sup> Upon full analysis, the district court held that public policy commanded the court to sever the choice of law provision in the seaman contract.<sup>71</sup> Despite conflicts with the Circuit's precedent, the court elected to differentiate the case from *Haynsworth v. The Corp.* and follow the Eleventh Circuit's rationale in *Thomas*.<sup>72</sup>

In *Haynsworth*, the Fifth Circuit "held that a forum selection clause requiring suit in England and a choice of law clause providing for the application of English law in the investors' agreement did not violate public policy."<sup>73</sup> In distinguishing the two cases, the district court stated that although the "reasoning in *Haynsworth* would appear to apply to the instant case, the Court finds that the instant case is distinguishable given that Philippine law, unlike English law, will not afford Plaintiff adequate protection."<sup>74</sup> The court concluded, "Unlike American securities laws, which typically govern disputes between sophisticated parties, the Fifth Circuit has recognized that the Jones Act serves a unique purpose in protecting seamen as wards of admiralty."<sup>75</sup> Because of the unique nature of the individual rights established for seamen, Judge Zainey held that a plaintiff's Jones Act claims could not be compelled to arbitration under foreign law as it would constitute a prospective waiver of the seaman's U.S. statutory rights.<sup>76</sup>

### III. THE SUPREME COURT'S PERSPECTIVE ON PROSPECTIVE WAIVER

Arbitration clauses are increasingly more commonplace in today's global economy. Over the past decade, courts have faced numerous challenges in interpreting the validity of arbitration provisions. Throughout this experimental period, judges have been hesitant to uphold arbitration agreements when the litigant contesting the provision demonstrates that the contract or the arbitration clause itself is unconscionable. Courts often find employment agreements to be especially susceptible to invalid arbitration agreements. Unequal bargaining power steers the sign-on worker to consent to submission of his claims to an unfamiliar or completely unknown tribunal, which has been found to violate the requirement that a litigant's waiver be "knowing and intelligent."

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70. *Id.* at \*4-7.

71. *Id.* at \*7.

72. *Id.* at \*8.

73. *Id.* (citing *Haynsworth v. The Corp.*, 121 F.3d 956, 968-69 (5th Cir. 1997)).

74. *Assignacion*, *supra* note 68, at \*8.

75. *Id.*

76. *Id.* at \*7.

Despite treaty ratification in 1970,<sup>77</sup> only recently have courts started to observe the Federal Arbitration Act's pro-arbitration stance. This novel homage to comity and international relations places a strain on courts trying to blend U.S. statutory rights with respect to international affairs. Contractual agreements to arbitrate claims are typically upheld when the agreement simply alters the forum to vindicate a litigant's rights. However, hesitation is rightfully counseled when an arbitration agreement alters those rights. The Supreme Court has provided some guidance in determining the validity of arbitration agreements.

A. *Alexander v. Gardner-Denver Co.*

In 1974, the Supreme Court announced its decision in *Alexander v. Gardner-Denver Co.*, which held that a litigant was not foreclosed from bringing his Title VII claim in federal court after already being submitted for resolution in a prior arbitration.<sup>78</sup> Justice Powell, delivering the opinion for the unanimous court, stated "Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement."<sup>79</sup> Justice Powell went on to write:

Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.<sup>80</sup>

The decision announced in *Alexander* demonstrates the Court's reluctance to compel arbitration of U.S. statutory claims, especially those that afford individual rights. When Congress acts to protect individual rights, and resolution of those rights in an arbitral forum would skirt the legislative purpose and objective, the Court heeds to Congress's direction.<sup>81</sup> Thus, courts are reluctant to uphold contractual arbitration agreements when agreeing to submit the claims to arbitration conflicts with Congress's regulatory scheme.<sup>82</sup> The Supreme Court reiterated this concern in Footnote 19 of *Mitsubishi v. Soler Chrysler-Plymouth*, dis-

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77. MICHAEL A. ROSENHOUSE, *Confirmation of Foreign Arbitral Award Under Convention on Recognition and Enforcement of Foreign Arbitral Awards*, 194 A.L.R. FED 291, at \*1 (2004).

78. *Alexander*, 415 U.S. at 59–60.

79. *Id.* at 49.

80. *Id.* at 51–52.

81. See generally *id.*

82. *Mitsubishi Motors Corp.*, 473 U.S. 614, n.19 (1985).

cussed *infra*.<sup>83</sup>

B. *Scherk v. Alberto-Culver Co. and Wilko v. Swan*

The same year as *Alexander*, the Court decided *Scherk v. Alberto-Culver Co.*<sup>84</sup> In *Scherk*, the Court honored the United States' participation in the FAA and compelled arbitration of an American company's Securities Exchange Act claims to resolution in Paris.<sup>85</sup> Differentiating its holding from *Wilko v. Swan*,<sup>86</sup> the Court reasoned that the forum selection clause in *Scherk* was valid because it was the product of an international dispute, not a domestic conflict.<sup>87</sup> Because the FAA supersedes U.S. statutory law in international commercial transactions, the statutory provision vesting exclusive jurisdiction in a particular forum was null in an international contract.<sup>88</sup>

In *Wilko*, the Court refused to compel arbitration because the relevant section of the Securities Act prevented the litigants from "waiving compliance with any provision of this subchapter."<sup>89</sup> The Court held that by contractually agreeing to submit their claims to arbitration, the parties engaged in an unauthorized waiver of compliance, and thus invalidated the arbitration agreement.<sup>90</sup> Conversely, in *Scherk*, the contract encountered conflicting substantive law and choice of law rules because the conflict arose out of an international dispute.<sup>91</sup>

In *Scherk*, Alberto-Culver Company was an American company and Scherk was a German citizen residing in Switzerland.<sup>92</sup> The contract was negotiated in both Europe and the United States, and ultimately effectuated in Austria.<sup>93</sup> The contract stipulated to resolution of any dispute in an arbitral tribunal in Paris, France, with application of Illinois law.<sup>94</sup> The difference between the Securities Exchange Act claims being brought between domestic litigants and international litigants was sufficient enough for the Court to uphold the international agreement for

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83. *Id.*

84. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

85. *Id.* at 519-20.

86. *Wilko v. Swan*, 346 U.S. 427 (1953).

87. *Scherk*, 417 U.S. at 515-17.

88. *Id.* at 515-20.

89. *Wilko*, 346 U.S. at 434-35 (stating "The words of § 14, note 6, *supra*, void and 'stipulation' waiving compliance with any 'provision' of the Securities Act. This arrangement to arbitrate is a 'stipulation,' and we think the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act."), *overruled by, Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989).

90. *Id.* at 438.

91. *Scherk*, 417 U.S. at 515-17.

92. *Id.*

93. *Id.*

94. *Id.* at 508.

arbitration, while striking the domestic agreement as invalid.<sup>95</sup> The Court's deference to the FAA, despite the apparent conflict between Congressional purposes and objectives of the Securities Exchange Act showed a departure from *Alexander v. Gardner-Denver Co.*

In announcing its holding, the Court emphasized that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."<sup>96</sup> Stressing the commercial nature of the transaction, *Scherk* demonstrates the Court's transition into honoring the FAA with respect to international business relations.<sup>97</sup>

In his opinion, Justice Stewart counseled reluctance to "a parochial refusal by the courts of one country to enforce an international arbitration agreement" that would "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."<sup>98</sup> For these reasons, the Court upheld the parties' contractual agreement to arbitrate their claims in Paris under Illinois law for any dispute arising out of their commercial transaction in accord with the provisions of the FAA.<sup>99</sup>

### C. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.

In 1985, the Court again determined the validity of an arbitration clause in an international commercial transaction.<sup>100</sup> Following *Scherk*, the Court held that the antitrust dispute in *Mitsubishi v. Soler-Chrysler Plymouth* was subject to arbitration as stipulated in the parties' agreement.<sup>101</sup> The dispute entangled several parties: Mitsubishi Motors Corporation, Chrysler International (wholly owned by Chrysler Corporation), and Mitsubishi Heavy Industries on the petitioner-cross-respondent side, and Soler Chrysler-Plymouth ("Soler") on the respondent-cross-petitioner side.<sup>102</sup>

In October 1979, Soler, a Puerto Rico corporation, entered into a Distributor Agreement with Chrysler International, a Swiss corporation.<sup>103</sup> On the same date, Chrysler International, Soler, and Mitsubishi entered into a Sales Agreement, which made reference to the Distributor

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95. *Id.* at 515–20.

96. *Scherk*, 417 U.S. at 516.

97. *See Id.*

98. *Id.* at 516–17.

99. *Id.* at 519–20.

100. *Mitsubishi Motors Corp.*, 473 U.S. 614.

101. *Id.* at 665–66.

102. *Id.* at 616–17.

103. *Id.* at 617.

Agreement.<sup>104</sup> In the Sales Agreement, the parties stipulated to "Arbitration of Certain Matters."<sup>105</sup> After executing the agreements, Soler began to experience difficulty meeting its projected sales requirements and requested that Mitsubishi delay or cancel shipment of several orders.<sup>106</sup> Mitsubishi and Chrysler International refused permission for any diversion from the terms stipulated in the contract.<sup>107</sup> Unable to come to a resolution, Mitsubishi eventually withheld shipment of 966 vehicles and brought an action against Soler in the United States District Court for the District of Puerto Rico, under the Federal Arbitration Act and the Convention. Mitsubishi moved to compel arbitration.<sup>108</sup>

The Supreme Court granted certiorari to determine whether the U.S. District Court should enforce an agreement to resolve antitrust claims by arbitration when the agreement arose from an international transaction.<sup>109</sup> In analyzing whether the parties agreed to submit their claims to arbitration, the Court announced that "agreeing to arbitrate a statutory claim . . . does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>110</sup> Furthermore, the Court "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."<sup>111</sup>

The Supreme Court agreed with the lower court that the proper analysis was two-fold: (1) whether the parties agreed to submit their claims to arbitration; and (2) whether legal constraints external to the parties' agreement foreclosed the possibility of arbitration.<sup>112</sup> In determining whether Soler's antitrust claims were arbitrable, the Court relied on *Scherk*, and concluded "that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" requires the Court to enforce the arbitration agreement.<sup>113</sup>

The Court went on to emphatically express the need to enforce freely negotiated forum selection clauses in international commercial disputes, stating that the federal policy toward honoring the FAA

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104. *Id.*

105. *Id.*

106. *Mitsubishi Motors Corp.*, 473 U.S. at 617.

107. *Id.* at 618.

108. *Id.* at 618-19.

109. *Id.* at 624.

110. *Id.* at 628.

111. *Id.*

112. *Mitsubishi Motors Corp.*, 473 U.S. at 628.

113. *Id.* at 629.

“applies with special force in the field of international commerce.”<sup>114</sup> “And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”<sup>115</sup>

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*.<sup>116</sup>

The issue before the Court in *Mitsubishi* specifically addressed the validity of a forum selection clause assigning arbitration to Japan. The Court did not decide whether the dispute would be submitted to arbitration if the contract had stipulated to a foreign choice of law. In fact, the Court articulated apprehension to arbitration agreements, which fixed arbitration in a foreign forum under the application of foreign law.<sup>117</sup> In a controversial footnote, the Court stated: “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.”<sup>118</sup>

Preceding the Court’s informative declaration, the Court discussed the case’s record. In doing so, the Court took into account the Sales Agreement’s choice of law provision: “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.”<sup>119</sup> As *amicus curiae*, the United States raised 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.”<sup>120</sup> The International Chamber of Commerce opined that while the arbitrators could conceivably determine that Soler’s anticompetitive conduct fell within the purview of the choice of law provision, it was highly unlikely.<sup>121</sup> Because Mitsubishi conceded at oral argument that the U.S. Sherman Act, rather than Swiss law, would govern the anticompetitive claims, the Supreme Court stated that it had no reason to speculate, at this stage in the proceeding, the validity of the

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114. *Id.* at 631.

115. *Id.* at 637.

116. *Id.* at 636–37 (emphasis added).

117. *Id.* at n.19.

118. *Mitsubishi Motors Corp.*, 473 U.S. at n.19 (emphasis added).

119. *Id.*

120. *Id.*

121. *Id.*



arbitration agreement.<sup>122</sup>

In a confusing sentence, breeding controversy in circuits across the nation, Justice Blackmun stated "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 the award."<sup>123</sup> Because this sentence directly follows the review of the record, concluding that American law would apply to Soler's antitrust claim, a strict textual reading would lend credence to several courts' interpretation.

Several circuits have interpreted this to mean that had the Court found Swiss law would apply, then the arbitration agreement would be void as a prospective waiver of the litigant's rights or the court would have considered the litigant's choice of law argument.<sup>124</sup> Furthermore, it can be argued, that Justice Blackmun was simply preserving and reminding the federal courts of their ability, and duty,<sup>125</sup> to evaluate an award obtained in a foreign tribunal, after the foreign tribunal interpreted U.S. statutory laws, such as the Sherman Act claim at issue in *Mitsubishi*.

Footnote 19 concludes by stating that in the event a contract's choice of law and forum selection clause operate in tandem to waive a litigant's right to pursue statutory remedies, then the *agreement* would be void as against public policy.<sup>126</sup> Justice Blackmun's choice of the word *agreement*, instead of award, strengthens the belief that favorable choice of law and forum selection clauses are to be condemned when challenging the agreement, not the enforcement of the award.

#### D. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer

In 1995, the Supreme Court decided *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, which held that the foreign arbitration agreement contained in the contract did not lessen liability under the Carriage of Goods by Sea Act ("COGSA").<sup>127</sup> Petitioners argued that the foreign arbitration agreement violated section § 3(8) of COGSA because the inconvenience and cost of proceeding in Tokyo would "lessen liability" in the sense that COGSA prohibits.<sup>128</sup> In granting an interlocutory

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122. *Id.*

123. *Id.*

124. See *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 160-61 (7th Cir. 1993) ("By including the anti-waiver provisions in the securities laws, Congress made clear that the public policy of these laws should not be thwarted . . . (stating that prospective waivers of statutory antitrust remedies would likely be voidable as contrary to public policy)"); see also *Asignacion*, *supra* note 68, at \*8; see also *Dumitru*, 732 F. Supp. 2d at 341.

125. *Scherk*, 417 U.S. at n.5.

126. *Mitsubishi Motors Corp.*, 473 U.S. at n.19 (emphasis added).

127. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 530 (1995).

128. *Id.* at 532.

appeal, the Court certified the question of whether § 3(8) nullifies an arbitration clause.<sup>129</sup>

While holding that the forum selection clause assigning arbitration to Japan was valid, the Supreme Court expressed hesitation and ceded to the concerns in petitioner's choice of law argument.<sup>130</sup> Even though the Court evaded ruling on the issue, it stated that the ambiguity over whether the foreign tribunal would apply COGSA raised a concern of substance.<sup>131</sup> In his opinion, Justice Kennedy argued that the enactment of § 3(8) was designed to prohibit contracts from relieving "the carrier of the obligations or diminish the legal duties specified by the Act."<sup>132</sup> This, he concluded, advocates hesitation to courts upholding choice of law provisions if the choice of law lessens the carrier's obligations or diminishes its legal duties under the Act.<sup>133</sup>

In evading the question, Justice Kennedy wrote:

Whatever the merits of petitioner's comparative reading of COGSA and its Japanese counterpart, its claim is premature. At this interlocutory stage it is not established what law the arbitrators will apply to petitioner's claims or that petitioner will receive diminished protection as a result.<sup>134</sup>

In combing out the Supreme Court's arbitration precedent, Justice Kennedy articulated that the district court retained jurisdiction to review the foreign arbitral award to ensure the legitimate interest of the U.S. laws had been addressed.<sup>135</sup> However, citing *Mitsubishi*, Justice Kennedy suggested that the Court should sever the choice of law provision, should the Court be persuaded that there would be no subsequent opportunity for review.<sup>136</sup>

Despite the contract's express language that the contract "shall be governed by . . . Japanese law,"<sup>137</sup> the Supreme Court affirmed the First Circuit's determination that the arbitrator (not the court) reserves judgment as to the choice of law to be applied.<sup>138</sup> Furthermore, mere speculation that the arbitrators might apply Japanese law, is not sufficient itself to nullify an arbitration agreement.<sup>139</sup> However, Justice Kennedy's opinion leads to the belief that had the Court known that Japanese law

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129. *Id.*

130. *Id.* at 540–41.

131. *Id.*

132. *Id.* at 539.

133. *Vimar Seguros y Reaseguros, S.A.*, 515 U.S. at 539.

134. *Id.* at 540.

135. *Id.*

136. *Id.*

137. *Id.* at 531.

138. *Id.* at 541.

139. *Vimar Seguros y Reaseguros, S.A.*, 515 U.S. at 541.

would apply, then it would have considered petitioner's choice of law arguments. Furthermore, the Court seems to stipulate that if Japanese law lessens or diminished the carrier's liability under the Act (the purpose for which it was enacted—to avoid ships registering under flags of convenience and escaping liability), the Court would sever the provision, and compel arbitration under U.S. law.

Justice Stevens' dissent supports the majority's inferences; he argued that the holding in *Vimar* "discards settled law and adopts a novel construction of § 3(8)."<sup>140</sup> In support of his position, he denoted:

In the 19th century it was common practice for shipowners to issue bills of lading that included stipulations exempting themselves from liability for losses occasioned by the negligence of their employees. Because a bill of lading was (and is) a contract of adhesion, which a shipper must accept or else find another means to transport his goods, shippers were in no position to bargain around these no-liability clauses.<sup>141</sup>

The dissent postulates that choice of law provisions in bills of lading are void as a matter of law.<sup>142</sup> Because ship owners have historically evaded ethical business practices, he argued that COGSA's "lessening liability" clause sought to prohibit ship owners from stipulating to favorable choices of law. Unfortunately the Supreme Court was not finished hearing maritime claims and three years later the Court again determined the validity of an arbitration agreement in a maritime contract.

#### E. *Wright v. Universal Mar. Serv. Corp.*

In 1998, the Supreme Court issued its opinion *Wright v. Universal Mar. Serv. Corp.*<sup>143</sup> In an opinion by Justice Scalia, the Court invalidated an agreement to arbitrate a longshoreman's Americans with Disabilities Act ("ADA") claim.<sup>144</sup> The longshoreman was a citizen of the U.S. and a member of International Longshoreman's Association ("ILA").<sup>145</sup> Wright was injured while working for a shipping company and sought compensation under the Longshore and Harbor Workers' Compensation Act, and ultimately settled his claim for \$250,000.<sup>146</sup> Three years later, Wright returned to the ILA seeking employment.<sup>147</sup>

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140. *Id.* at 543 (Stevens, J. dissenting).

141. *Id.* at 543-44.

142. *Id.*

143. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998).

144. *Id.* at 82.

145. *Id.* at 72.

146. *Id.* at 74.

147. *Id.*

However, when the stevedore companies realized that Wright had settled a permanent disability claim, they informed the ILA they would no longer accept Wright for employment.<sup>148</sup>

The ILA directed Wright to obtain an attorney and file a claim under the ADA.<sup>149</sup> After a convoluted litigation background, Wright filed a suit in the United States District Court for the District of South Carolina against the South Carolina Stevedores Association and 6 individual stevedore companies, alleging claims under the ADA.<sup>150</sup>

The stevedore companies answered and asserted several affirmative defenses, including failure to exhaust remedies under the CBA.<sup>151</sup> After discovery, the stevedores moved for summary judgment, and the Magistrate Judge recommended the case be dismissed "without prejudice because Wright had failed to pursue the grievance procedure provided by the CBA."<sup>152</sup> The District Court adopted the Magistrate's recommendation and the United States Court of Appeals for the Fourth Circuit affirmed.<sup>153</sup>

The Court analyzed *Alexander v. Gardner-Denver* and *Gilmer v. Interstate/Johnson Lane Corp.*<sup>154</sup> to determine the case at hand.<sup>155</sup>

There is obviously some tension between these two lines of cases. Whereas *Gardner-Denver* stated that "an employee's rights under Title VII are not susceptible of prospective waiver," *Gilmer* held that the right to a federal judicial forum for an ADEA claim could be waived.<sup>156</sup>

Despite having the opportunity to determine the validity of union-negotiated waiver of U.S. statutory rights in collective bargaining agreements, the Court evaded ruling on the issue, again. Stating that it found "it unnecessary to resolve the question of the validity of a union-negotiated waiver, since it is apparent to us, on the facts and arguments presented [in *Wright*], that no such waiver has occurred."<sup>157</sup>

The Court skirted the issue by concluding that Wright's cause of action arose not out of contract, but out of the ADA.<sup>158</sup> Justice Scalia wrote: "Not only is petitioner's statutory claim not subject to a presumption of arbitrability; we think any CBA requirement to arbitrate [a statu-

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148. *Id.*

149. *Wright*, 525 U.S. at 74.

150. *Id.* at 75.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

155. *Wright*, 525 U.S. at 75-77.

156. *Id.* at 76-77.

157. *Id.* at 77.

158. *Id.* at 79.

tory claim] must be particularly clear.”<sup>159</sup> Even though the Court declared its refusal to rule on the issue, Justice Scalia again brought up the question left unresolved in *Gardner-Denver*:

Whether or not *Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*, *Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA.<sup>160</sup>

There is obvious tension between the Supreme Court's arbitration precedents regarding union-negotiated collective bargaining agreements. The Supreme Court has never determined whether union-negotiated waiver of litigants' U.S. statutory rights is strictly prohibited (as suggested in *Gardner-Denver*).<sup>161</sup> However, the Court has held that waiver of vindicating the right in a federal forum is valid, so long as waiver is express (as suggested in *Wright* and *Gilmer*). Although the Court has never held that a union may not negotiate vindication of a U.S. statutory right under foreign law, the Court has counseled reluctance to the validity of such waiver in various opinions over the years.<sup>162</sup>

#### F. Circuit City Stores, Inc. v. Adams

In 2001, the Supreme Court again considered the validity of an arbitration agreement in an employment contract in *Circuit City Stores, Inc. v. Adams*.<sup>163</sup> The question before the Court was whether Section 1 of the FAA exempted all employment disputes from being submitted to arbitration.<sup>164</sup> In enacting the FAA, Congress included an exceptions provision in Chapter 1, Section 1 to exempt certain persons from application under the Title (*see Bautista*, discussed *supra*).<sup>165</sup> Congress included the exemption provision for persons whom were believed to need special protection from abusive employment practices: “but 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.”<sup>166</sup>

Circuit City Stores hired Adams as a sales counselor in October 1995.<sup>167</sup> His employment contract stipulated to arbitration for any claims

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159. *Id.*

160. *Id.* at 80.

161. *Alexander*, 415 U.S. at 51.

162. *See Mitsubishi Motors Corp.*, 473 U.S. at n.19; *see also Vimar Seguros y Reaseguros, S.A.*, 515 U.S. at 543 (Stevens, J. dissenting).

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

164. *Id.* at 109.

165. 9 U.S.C.A. § 1 (1947).

166. *Id.*

167. *Circuit City Stores, Inc.*, 532 U.S. at 110.

arising out of or related to his employment.<sup>168</sup> The Supreme Court was asked to determine whether Adams fell into the “any other class of workers” exception in Section 1 of the FAA.<sup>169</sup> Delivering the opinion for the Court, Justice Kennedy wrote:

Construing the residual phrase to exclude all employment contracts fails to give independent effect to the statute’s enumeration of the specific categories of workers which precedes it; there would be no need for Congress to use the phrases “seamen” and “railroad employees” if those same classes of workers were subsumed within the meaning of the “engaged in . . . commerce” residual clause.<sup>170</sup>

The Court concluded that the Ninth Circuit’s interpretation of Section 1, which would have included Adams as a protected class was unsubstantiated.<sup>171</sup> After a detailed analysis, the Court held that Congress intended to protect only transportation workers.<sup>172</sup> Relying on Congress’s use of “seamen” and “railroad employees,” the Court speculated that if Congress intended to protect all employees involved in commerce, it would have explicitly expressed such intent.<sup>173</sup>

#### G. 14 Penn Plaza LLC v. Pyett

More recently, the Supreme Court issued its contentious opinion regarding the ability of unions to negotiate arbitration clauses into collective bargaining agreements of employees.<sup>174</sup> In a 5-4 opinion, Justice Thomas delivered the opinion for the Court in *14 Penn Plaza LLC v. Pyett*.<sup>175</sup> The case arose out of the Second Circuit, with the Supreme Court reversing both the District Court and Court of Appeals’ opinions.<sup>176</sup>

Respondents were members of the Service Employees International Union (“SEIU”), consisting of building carpenters, porters, and doorpersons in New York City.<sup>177</sup> The SEIU and the Realty Advisory Board of Labor Relations, Inc. (“RAB”) negotiated industry wide CBA’s for employees and the real-estate industry.<sup>178</sup> Encompassed in the CBA was a provision agreeing to submit all employment discrimination claims to arbitration, including claims brought under the Age Discrimination in

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168. *Id.* at 109–10.

169. *Id.*

170. *Id.* at 114.

171. *Id.* at 110–11.

172. *Id.* at 119.

173. *Circuit City Stores, Inc.*, 532 U.S. at 119.

174. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

175. *Id.* at 250.

176. *Id.* at 251.

177. *Id.*

178. *Id.*

Employment Act ("ADEA").<sup>179</sup>

While arbitration was pending, respondents withdrew their ADEA claims, and filed their claims in the Southern District of New York.<sup>180</sup> Petitioners moved to compel arbitration, and the district court denied the motion because "under Second Circuit precedent, 'even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable.'"<sup>181</sup>

Petitioners appealed to the Second Circuit Court of Appeals.<sup>182</sup> The Court of Appeals determined that it could not "compel arbitration of the dispute because *Gardner-Denver*, which 'remains good law,' held 'that a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress.'"<sup>183</sup> The Supreme Court granted certiorari to consider whether a provision in a CBA, which clearly and unmistakably requires union members to arbitrate ADEA claims was enforceable as a matter of law.<sup>184</sup>

Central to the Court's analysis was whether Congress intended "the substantive protection afforded by the ADEA to include protection against waiver of the right to a judicial forum."<sup>185</sup> The Supreme Court determined that there was no evidence in the text or legislative history that "'Congress, in enacting the ADEA, intended to preclude arbitration of claims under the Act.'"<sup>186</sup> The majority, led by Justice Thomas, declared that *Gardner-Denver* was not controlling precedent to *14 Penn Plaza*: "First, the Court in *Gardner-Denver* erroneously assumed that an agreement to submit statutory discrimination claims to arbitration was tantamount to a waiver of those rights."<sup>187</sup>

In holding that statutory discrimination claims could be submitted to arbitration, Justice Thomas gave credence to the lower court's conclusion that federal antidiscrimination rights "may not be prospectively waived."<sup>188</sup> Clarifying the difference, Justice Thomas stated that the lower court "confused an agreement to arbitrate those statutory claims with a prospective waiver of the substantive right."<sup>189</sup> Quoting *Mitsubishi*, the Court reiterated "'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only

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179. *Id.* at 252.

180. *14 Penn Plaza LLC*, 556 U.S. at 253.

181. *Id.* at 254.

182. *Id.*

183. *Id.*

184. *Id.* at 251.

185. *Id.* at 258.

186. *14 Penn Plaza LLC*, 556 U.S. at 258.

187. *Id.* at 265.

188. *Id.*

189. *Id.*

submits to their resolution in an arbitral, rather than judicial, forum.’”<sup>190</sup>

Referencing *Circuit City Stores*, the majority proffered that “this ‘Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law.’”<sup>191</sup> The Court differentiated *Gardner-Denver* by arguing, “the decision [in *Gardner-Denver*] to arbitrate statutory discrimination claims was tantamount to a substantive waiver of those rights . . . .”<sup>192</sup> Justice Thomas alluded that *Gardner-Denver* was a “direct descendant” of the Court’s decision in *Wilko*, which was characterized as “‘pervaded by . . . the old judicial hostility to arbitration.’”<sup>193</sup> However, the Court never explicitly held that a favorable choice of law, which would waive or depreciate a litigant’s U.S. statutory rights are void *per se*; rather, the Court held that it was willing to compel arbitration of these rights to a foreign forum.

The Court briefly addressed respondents’ argument that the CBA operated as a substantive waiver of litigants’ ADEA rights, but concluded that the question was not properly before the Court.<sup>194</sup> Although, Justice Thomas echoed the language of *Mitsubishi*’s Footnote 19, avowing, “a substantive waiver of federally protected civil rights will not be upheld,” the Court refused to rule that union-negotiated waiver of such rights are inexcusably void.<sup>195</sup>

In a four-person dissent, Justice Souter criticized the majority’s holding.<sup>196</sup> Disagreeing with the Court’s deduction, Justice Souter argued that the holding announced in *14 Penn Plaza* was in conflict with the Court’s prior precedent.<sup>197</sup> Analogizing the rights conferred by Title VII, at issue in *Gardner-Denver*, to the individual rights conferred by the ADEA in *14 Penn Plaza*, Justice Souter argued that *Gardner-Denver* was controlling precedent.<sup>198</sup>

Although Title VII, like the ADEA, “does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements,” we unanimously held that “the rights conferred” by Title VII . . . cannot be waived as “part of the collective bargaining process.”<sup>199</sup>

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190. *Id.* at 266.

191. *Id.*

192. *14 Penn Plaza LLC*, 556 U.S. at 266.

193. *Id.*

194. *Id.* at 273–74.

195. *Id.* at 273.

196. *Id.* at 274.

197. *Id.*

198. *14 Penn Plaza LLC*, 556 U.S. at 278.

199. *Id.* at 278.



Thus, Justice Souter concluded, "as the Court previously realized, *Gardner-Denver* imposed a 'seemingly absolute prohibition of union waiver of employees' federal forum rights.'"<sup>200</sup> Justice Souter contended that "only a contractual right under the CBA to be free from discrimination, not the 'independent statutory rights accorded by Congress'" is subject to waiver.<sup>201</sup>

In a convincing breakdown, the dissent characterized arbitrable claims from nonarbitrable claims. Discrimination claims arising from a breach of a collective bargaining agreement can reasonably be negotiated to submission in arbitration. Logically, two parties conferring rights in a contract also have the power to dictate how breach of those rights will be resolved. However, claims arising from a federal statute have less flexibility in their resolution. When Congress has enacted a statute, designed to provide minimum substantive guarantees to individual workers, unions are arguably prohibited from negotiating these rights out of the vested federal forum.<sup>202</sup> Certainly, unions cannot deprive a litigant of those rights altogether by stipulating to a favorable choice of law, as in *Lindo*.

The dissent takes issue with the majority's pass-the-buck mentality. The majority claimed that "judicial policy concerns," regarding individual antidiscrimination rights is insufficient in itself to prevent unions from negotiating arbitration provisions into CBA's absent clear prohibition by Congress.<sup>203</sup> Justice Souter, joined by three other Justices dissenting, persuasively argued that Congress understood *Gardner-Denver* the way the Court has "repeatedly explained it and [Congress] has operated on the assumption that a CBA cannot waive employees' rights to a judicial forum to enforce antidiscrimination statutes."<sup>204</sup>

Alerting the Court's attention to House Report No. 104-40 (II), discussing the Civil Rights Act of 1991, Justice Souter demonstrates not only was Congress afforded 30 years to correct the Supreme Court's decision in *Gardner-Denver*, Congress has emphatically embraced the Court's decision.<sup>205</sup>

The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitra-

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200. *Id.* at 279.

201. *Id.*

202. See *Alexander*, 415 U.S. at 51; see also *Mitsubishi Motors Corp.*, 473 U.S. at n.19.

203. *14 Penn Plaza LLC*, 556 U.S. at 270.

204. *Id.* at 285.

205. *Id.* at 256; H.R. REP. NO. 102-40 (II), at 35, (1991), reprinted in 1991 U.S.C.C.A.N. 694, 735.

tion, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.* 415 U.S. 36 (1974).<sup>206</sup>

The Supreme Court's mentality toward arbitration has developed from a resistant temperament to a generalized acceptance. A historical glance of the Court's cases demonstrates the United States' growing comity toward international affairs and decision to honor the Country's involvement in the FAA. However, the Court has become over-inclusive in its approach. Recently, the federal courts' decisions have substantially altered individual rights; rights afforded by Congress to protect certain classes of persons. Furthermore, the judgments have produced confusion for federal courts across the country. This confusion has led to a particularly unusual and incoherent course by the Eleventh Circuit in interpreting the validity of arbitration clauses in seamen contracts.

#### IV. *LINDO v. NCL (BAHAMAS), LTD.*

As discussed *infra*, *Lindo*'s employment contract ("Contract") with Norwegian Cruise Line ("NCL") was governed by a collective bargaining agreement, negotiated between the Norwegian Seafarers' Union and NCL.<sup>207</sup> Paragraph 12 of the agreement specified that all Jones Act claims were to be resolved by arbitration in accordance with the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention" or "Convention").<sup>208</sup>

The Contract stipulated to arbitration in the seaman's country of citizenship, or in the alternative, Nassau, Bahamas.<sup>209</sup> The choice of law provision postulated to the law of the flag under which the vessel was flown. In this instance, the arbitrators were to apply Bahamian law.<sup>210</sup> *Lindo* argued that the choice of law and forum selection clause operated in tandem to waive his U.S. statutory Jones Act claims.<sup>211</sup> Thus, *Lindo* challenged the application of Bahamian law, relying on the Circuit's precedent in *Thomas*.

In a 92-page opinion, the Eleventh Circuit meandered through the Circuit's and Supreme Court's arbitration precedent to determine that *Lindo*'s Jones Act claims were not prospectively waived. To reach this

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206. *Id.* at n.6.

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

208. *Id.* at 1260–61.

209. *Id.* at 1261.

210. *Id.*

211. *Id.* at 1262.

conclusion, the Court had to evade the law laid down in *Thomas*.<sup>212</sup> However, rather than overrule *Thomas*, the Court communicated that *Thomas* merely misinterpreted *Mitsubishi's* Footnote 19 and the prospective waiver doctrine.<sup>213</sup> Specifically, the Court held that the prospective waiver doctrine was to be invoked when a litigant sought to challenge an award, not the agreement.<sup>214</sup> Judge Hull shocked the Circuit when he announced that an employment CBA, containing a choice of law provision and forum selection clause, could be compelled to arbitration, even though the employee's individual rights, afforded by Congress, were substantially altered.

Under Judge Hull's interpretation, a litigant may only challenge an arbitration agreement (under the defenses available under Article II) if: (1) it is void under an internationally recognized defense such as duress, mistake, fraud, or waiver; or (2) it contravenes fundamental policies of the forum state.<sup>215</sup> Conversely, the Circuit held that Article V of the FAA, which *Lindo* tried to invoke, could only be applied at the enforcement of an award, not to challenge the agreement.<sup>216</sup> Despite the holding's conflict with the Supreme Court's suggestive dicta in *Gardner-Denver*, *Mitsubishi*, and *14 Penn Plaza*, the Eleventh Circuit deviated from its guided path and stripped seamen of their rights and access to U.S. federal courts.

The Circuit first confronted an arbitration provision and its interplay with the FAA in a seaman's contract in *Bautista v. Star Cruises*.<sup>217</sup> The 2005 Eleventh Circuit decision analyzed an arbitration provision contained in a CBA negotiated between the Philippine Overseas Employment Administration ("POEA") and Star Cruises.<sup>218</sup> *Bautista* challenged the agreement under Florida law, charging that the agreement was unconscionable, with which the court disagreed.<sup>219</sup> Additionally, the seaman argued, the exemption provision in Section 1 of the FAA prohibited POEA from negotiating an arbitration provision into the CBA.<sup>220</sup> In a confusing analysis delivered by the Eleventh Circuit, *Bautista* professed that the seamen exemption in Chapter 1 of the FAA did not apply to arbitration agreements involving foreign parties under Chapter 2.<sup>221</sup>

The Court held that Chapter 1 of the FAA was only applicable to

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212. *Id.* at 1277–80.

213. *Lindo*, 652 F.3d at 1277–80.

214. *Id.*

215. *Id.* at n.18.

216. *Id.* at 1277–80.

217. *Bautista*, 396 F.3d at 1289.

218. *Id.*

219. *Id.* at 1301.

220. *Id.* at 1296.

221. *Id.*

domestic collective bargaining agreements involving domestic parties.<sup>222</sup> Arguing that Chapter 2 of the FAA (adopted to recognize the U.S.'s participation in the Convention and apply to international disputes) was not incorporated under Title 9 to include Chapter 1.<sup>223</sup> *Bautista* essentially held that Chapter 1 and Chapter 2 of the FAA are exclusive of each other, and as such, the foreign seaman's CBA fell under Chapter 2. Therefore, the exceptions provision in Chapter 1, exempting seamen from arbitration under Title 9, does not apply.

Despite the Circuit's holding in *Bautista*, the Eleventh Circuit deviated from *Bautista* in *Thomas*. In a novel opinion by Judge Barkett, the savvy judge held that the Supreme Court's footnote in *Mitsubishi* was indicative of the FAA's application in *Thomas*.<sup>224</sup> The opinion held that the forum selection clause and choice of law provision prospectively waived Thomas's U.S. statutory rights and was therefore void as against public policy.<sup>225</sup> Under the direction of Footnote 19, the Circuit refused to compel arbitration of the seaman's claim to a foreign nation under foreign law because it waived the litigant's Seaman's Wage Act claim.<sup>226</sup>

Four years later, the Circuit revisited *Thomas*, and *Lindo*'s holding shocked the Circuit when it announced that Judge Barkett had misinterpreted Article V and Footnote 19. Judge Hull determined that Article V's public policy defense was only applicable when challenging an award obtained in a foreign tribunal.<sup>227</sup> Thus, the court refused to sever the choice of law provision and the seaman was required to litigate his claims in a foreign tribunal under foreign law. He could then come back and challenge the award as against public policy. The court's reinterpretation substantially altered the accessibility of foreign seamen to domestic courts and deviated from the Supreme Court's historic precedent in *Lauritzen v. Larsen*<sup>228</sup> and *Hellenic Lines Ltd. v. Rhoditis*.<sup>229</sup> The holding ignores the well-established principles laid down by the Supreme Court and allows domestic corporations to evade domestic laws and abuse foreign crewmembers without recompense, equivalent to modern-day slavery.

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222. *Id.* at 1291-00.

223. *Bautista*, 396 F.3d at 1291-00.

224. *Thomas*, 573 F.3d at 1120-21.

225. *Id.*

226. *Id.* at 1124.

227. *Lindo*, 652 F.3d at 1266-68.

228. *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

229. *Hellenic Lines Ltd.*, 398 U.S. 306.

## V. THE JONES ACT, THE FAA, AND THE FUTURE

### A. *History Surrounding the Jones Act and its Applicability to Foreign Seamen*

The Supreme Court was asked to determine the applicability of the Jones Act in *Lauritzen v. Larsen* in 1953.<sup>230</sup> A Danish employer employed Larsen, a Danish seaman, to work upon the *Randa*, a ship of Danish flag and registry.<sup>231</sup> Larsen signed a contract written in Danish, which stipulated that the rights of crewmembers would be governed by Danish law.<sup>232</sup> The contract was negotiated between the ship owner and the Danish Seamen's Union.<sup>233</sup>

Larsen was injured on the vessel and brought a lawsuit in the Southern District of New York, alleging Jones Act negligence claims.<sup>234</sup> Larsen did not deny that Danish law was applicable in his case; rather, he argued that he should be able to choose between American and Danish law to apply to his negligence claims.<sup>235</sup> Justice Jackson analyzed the Jones Act legislative history to aid his determination of whether to extend the protections of the Jones Act to foreign crewmembers on foreign vessels.<sup>236</sup>

The Jones Act, enacted in the 1920s, which was "set forth in Title 46 of the United States Code, 46 U.S.C.A., comprise a patchwork of separate enactments, some tracing far back in our history and many designed for particular emergencies."<sup>237</sup> Justice Jackson wrote, some provisions of the Title were specifically addressed to foreign shipping, and others were confined to American shipping.<sup>238</sup> However, many of the provisions failed to specify.<sup>239</sup> Because Congress failed to clarify some of the provisions' application, Justice Jackson concluded that their application was to be judicially determined from context and circumstance.<sup>240</sup>

The Court recognized that because the cause of action for tort had substantial ties with both Denmark and the United States, the Court would look at several factors "generally conceded to influence choice of

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230. *Lauritzen*, 345 U.S. 571.

231. *Id.* at 573.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 576.

236. *Id.* at 577.

237. *Lauritzen*, 345 U.S. at 577.

238. *Id.*

239. *Id.*

240. *Id.*

law to govern a tort claim, particularly a maritime tort claim.”<sup>241</sup> The seven weighing factors were: (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; and (7) the law of the forum.<sup>242</sup>

Ultimately the Court held that the seven above-stated factors weighed heavily in favor of the application of Danish law.<sup>243</sup> However, in delivering its opinion, the Court held, *inter alia*, that all seamen, including foreign seamen, are afforded protection under the Jones Act.<sup>244</sup>

In 1970, the Court revisited the applicability of the Jones Act to foreign seaman in *Hellenic Lines Ltd. v. Rhoditis*.<sup>245</sup> In refusing to overrule *Lauritzen*, Justice Douglas wrote:

We see no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act “employer.” The flag, the nationality of the seaman, the fact that his employment contract was Greek, and that he might be compensated there are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contacts that this alien owner has with this country.<sup>246</sup>

Justice Douglas argued that *Lauritzen* was decided based on the specific facts of the case.<sup>247</sup> Furthermore, he referenced the Court’s “allusion to the practice of American owners of finding a ‘convenient’ flag ‘to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries.’”<sup>248</sup> However, despite Justice Douglas’ credence to the concerns of the trade, he held that because the Greek crew member was adequately protected under Greek law, he could be subject to Greek law as stipulated in the contract.<sup>249</sup>

In a brief on behalf of the National Maritime Union of America (“NMUA”), as *amicus curiae* in *Hellenic Lines Ltd.*, the NMUA argued that the façade of a foreign flag makes it “cheaper to operate beyond the

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241. *Id.* at 583.

242. *Id.* at 583–91.

243. *Lauritzen*, 345 U.S. at 592–93.

244. *See generally id.*

245. *Hellenic Lines Ltd.*, 398 U.S. 306.

246. *Id.* at 310.

247. *Id.* at 315.

248. *Id.*

249. *Id.* at 318.

pale of American laws, and, thus, it makes for easier competition against American-flag vessels in the quest for the American dollar," yet free of American obligation.<sup>250</sup> The NMUA urged that because the ship owner in *Hellenic Lines Ltd.* had its main office in the United States, from which all management and business operations took place therefrom, the corporation should be required to abide by the laws of the Country.<sup>251</sup> Furthermore, the *amicus curiae* argued that the vessel obtained substantial revenue from its operation in the U.S.<sup>252</sup>

In directing the Court's attention to the legislative history behind the Jones Act, NMUA highlighted:

It is a shocking fact that, as of 1969, vessels flying the American flag carried only six per cent of our total imports and exports. The Jones Act, as well as the prior Seamen's Act which it amended were intended by Congress to reduce the competitive advantage of foreign-flag operators seeking American business. As it is Constitutionally empowered, Congress has recognized that detriment to the American economy by weighted foreign competition is an effect going far beyond the "internal affairs" of a foreign vessel. Congress has refused to permit the American maritime industry to be so handicapped in the face of growing foreign competition. *The result was a direct benefit to foreign seamen as well as to the American economy.*<sup>253</sup>

Citing Judge Friendly in *Monteiro v. Sociedad Maritima San Nicolas, S. A.*, the MNUA argued the legislative history supported the idea that the Jones Act was thought "to apply to foreign vessels touching at American ports," because application of such would "tend to 'equalize the cost of operation' of American and foreign flag vessels and thereby discourage American shipowners from placing their vessels under foreign flags."<sup>254</sup> Preventing American registration of foreign flags of convenience "could be better attained by *giving foreign seamen unobstructed and mandatory access to the federal courts* rather than by leaving it to the discretion of each district judge to remit the seaman to a foreign consul, who could hardly be counted upon to apply the special remedies . . . ."<sup>255</sup>

The Honorable Judge Learned Hand even had the opportunity to

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250. Br. on Behalf of National Maritime Union of America, as *amicus curiae*, *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306, 1970 WL 136482.

251. *Id.*

252. *Id.*

253. *Id.* (emphasis added).

254. *Id.* (citing *Monteiro v. Sociedad Maritima San Nicolas, S. A.*, 280 F.2d 568, 573 (2d Cir. 1960); see particularly H.R. REP. NO. 645, at 8 (1912); H.R. REP. NO. 852, at 19 (1914); and the remarks of Senator Fletcher, 50 Cong. Rec. 5748-49 (1915)).

255. *Monteiro*, 280 F.2d at 574 (emphasis added).

voice an opinion on the applicability of the Jones Act to foreign seamen, stating:

The Jones Act was the culmination of a series of efforts, largely those of the Seamen's Union, to secure more adequate relief for American seamen, injured in their employment. It is extremely unlikely that Congress should have meant to exclude aliens who, in every sense that mattered, were members of that class merely because they had not been naturalized. Naturalization is a troublesome process for a seaman; he is sure to be absent from the country for long periods which are indeed apt to be longer than those during which he is here. . . . To hold that these are excepted from [the Act's] protection because they have not become naturalized, would, it seems to us, pretty clearly defeat the overriding purpose of Congress.<sup>256</sup>

Judge L. Hand wrote the opinion in *Gambera v. Bergoty* in 1942. However, even after 20 years, the Southern District of New York reinvigorated his attitude in *Voyiatzis v. Nat'l Shipping & Trading Corp.*<sup>257</sup> The Court stated:

It is our belief that in any case where substantial contacts [with the U.S.] exist and the Jones Act therefore applicable, it will be applied *notwithstanding a provision for exclusive foreign jurisdiction*. To enforce such agreements would run counter to the clearly expressed policy applicable to shipowners who are subject to the Jones Act. That policy is set out in the Federal Employers' Liability Act (incorporated into the Jones Act by reference) as follows: 'Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void.' 45 U.S.C.A. § 55.<sup>258</sup>

Courts have historically applauded the reach of the Jones Act to include protection over foreign seamen. This protection was exceptionally praised when judges actively sought to protect seamen from defiant trade practices. Unfortunately, the practice of American ship owners registering ships to foreign flags of convenience is not a foreign trick of the trade and is continually practiced today.<sup>259</sup>

### B. "American" Cruise Lines

There are various reasons cruise companies have traditionally

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256. *Gambera v. Bergoty*, 132 F.2d 414, 416 (2d Cir. 1942).

257. *Voyiatzis v. Nat'l Shipping & Trading Corp.*, 199 F. Supp. 920 (S.D.N.Y. 1961).

258. *Id.* at 925.

259. Justin Samuel Wales, *Beyond the Sail: The Eleventh Circuit's Thomas Decision and Its Ineffectual Impact on the Life, Work, and Legal Realities of the Cruise Industry's Foreign Employees*, 65 U. MIAMI L. REV. 1215, 1221 (2011) (The majority of cruise ships, around sixty percent, are registered in Panama, The Bahamas, or Liberia.).



sought incorporation and registration in foreign lands.<sup>260</sup> Among them are: lackadaisical labor laws, evasion of federal environmental and safety standards, avoidance of U.S. taxation liabilities, etc.<sup>261</sup> The ability to register under flags of convenience allows major cruise line companies to evade the laws and regulations of the U.S., even though the majority of cruise line passengers depart from North America every year.<sup>262</sup>

The Supreme Court's pro-arbitration stance and its adherence to the FAA adulterated the country's precedent of the Jones Act. The country's outlook on arbitration, while important to international affairs, has deprived individuals of important rights. Over the years, Congress has enacted numerous laws to protect the rights of individuals. Some of the Acts were at the heart of debate in *Gardner-Denver*, *Wright*, and *14 Penn Plaza*.<sup>263</sup> Congress enacts legislation to protect certain classes. Members of classes and unions, which are historically deprived of adequate representation and in need of protection from abusive employment practices. Of these, Congress enacted the ADA, ADEA, Title VII, Title IX, Jones Act, etc. The aim of Congress in enacting this legislation is to afford abused class members with individualized rights. Rights prescribed by statute and codified into law.

The claims afforded in Congressional acts, especially those aimed at employment, are designed to keep industries accountable. In this instance, it was the shipping and maritime industry. The early Congress of the 1920s found seamen to be included as a class in need of protection.<sup>264</sup> Recognizing that ship owners were registering their ships to foreign flags and incorporating their companies under foreign countries, Congress realized that ship owners were selecting favorable choice of laws to evade U.S. statutory requirements.<sup>265</sup>

The ability to stipulate to a favorable choice of law and forum allows industries to tailor their employment contracts to lessen or diminish individual rights. The Court's pro-arbitration stance has effectively

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260. *Id.*

261. *Id.*

262. Fla. Caribbean Cruise Ass'n., *Cruise Industry Overview* (2011), available at [http://www.f-cca.com/downloads/2011-overview-book\\_Cruise%20Industry%20Overview%20and%20Statistics.pdf](http://www.f-cca.com/downloads/2011-overview-book_Cruise%20Industry%20Overview%20and%20Statistics.pdf) (finding that "In 2010 a record of 15 million passengers are forecasted to have cruised, with 11.1 million originating in North America.").

263. See *Alexander*, 415 U.S. at 1015 (determining whether Title VII claims under the Civil Rights Act of 1964 could be compelled to arbitration; see also *Wright*, 525 U.S. at 72 (determining whether claims under the Americans with Disabilities Act ("ADA") could be compelled to arbitration); *14 Penn Plaza LLC*, 556 U.S. at 251 (determining whether claims brought under the Age Discrimination in Employment Act ("ADEA") could be compelled to arbitration).

264. *Lauritzen*, 345 U.S. at 579.

265. *Resp't Br.*, *supra* note 32, at \*15.

endorsed this practice, making it easier for companies to abuse employees and negotiate arbitration provisions with unfavorable law.

*Lindo*'s holding depicts this practice. Norwegian Cruise Line, a Bermuda corporation, with its principal place of business in Miami, Florida, stipulated to the application of Bahamian law. The application of Bahamian law would infer that Lindo could not bring his Jones Act negligence claims, but instead is required to litigate his negligence claims under a comparable Bahamian law.<sup>266</sup> The Eleventh Circuit held that because Lindo could litigate his negligence claims in a Nicaraguan tribunal, under Bahamian negligence laws, the court was not prospectively waiving the litigant's rights by compelling arbitration.<sup>267</sup>

The court went on to hold that the "void as against public policy" defense is only applicable when a litigant seeks to challenge an award.<sup>268</sup> However, *Thomas* explicitly held that waiver of statutory rights by union negotiated contractual agreement could be declared void when defendant sought to compel arbitration.<sup>269</sup> Because stipulating to a favorable choice of law could effectively result in no award, Judge Barkett cautioned the court against compelling arbitration to a foreign forum under the application of foreign law. When arbitration of claims could result in no award—"a distinct possibility given the U.S. based nature of his claim"—the litigant will have nothing to review in federal courts.<sup>270</sup> This being the case, Judge Barkett held that the forum selection clause and choice of law acted in tandem to waive Thomas's U.S. statutory rights.

### C. *The Eleventh Circuit Ignores the Nature of the Claims*

At issue in *Mitsubishi* was the Sherman Act,<sup>271</sup> which was enacted to support competition in the marketplace. The Sherman Act prohibited certain business activities that would interfere with fair trade and creation of monopolies.<sup>272</sup> Unlike *Lindo*, *Mitsubishi* did not deal with individual rights arising out of tort. The securities claims at issue in *Mitsubishi* did not deal with personal injuries affecting a person's life and well-being. The result of compelling arbitration in *Mitsubishi* might have resulted in delay of review by a United States court or possible delay in receiving a monetary award. However, the delay in a case like *Lindo* could advance harm to a victim. Unlike securities fraud and anti-

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266. *Lindo*, 652 F.3d at 1283.

267. *Id.* at 1277–80.

268. *Id.* at 1280–82.

269. *Thomas*, 573 F.3d at 1120–24.

270. *Id.* at 1124.

271. 15 U.S.C.A. § 1 *et seq.* (2004).

272. Richard Squire, *Antitrust and the Supremacy Clause*, 59 STAN. L. REV. 77, 77 (2006).

competition claims, tort claims could result in delay of medical aid to a victim.

General maritime law affords seamen a right to prompt and adequate medical treatment in a claim for maintenance and cure.<sup>273</sup> Compelling arbitration of maintenance and cure claims could mean delay for the seaman seeking medical treatment. Delay in medical treatment is known to aggravate preexisting conditions. When Congress has gone through the laborious task of drafting and passing legislation to protect certain members, its justification for passing new legislation is substantiated on facts showing disparate treatment of the favored class. Congress is not at whim, and certainly would not have the time to enact legislation absent lobbying and movement efforts on behalf of the represented class.

*D. Abusive Business Practices by the Maritime Industry is  
Not Ancient History*

Recently a grassroots organization, International Cruise Victims, Inc., passed legislation to protect cruise ship passengers injured at sea. The Cruise Vessel Security and Safety Act, which passed in 2010, was enacted by Congress after testimony by rape victims and family members distressed by loved ones who had disappeared at sea.<sup>274</sup> The small organization rallied itself through Congress, fighting off corporate cruise lines, and passed the Act under Title 46 (the same Title housing the Jones Act). The organization allied itself with other nonprofit organizations and sought Congressional protection for United States passengers at sea.

It is through the effort and compassion of small organizations that Congress begins to act and generate laws. It can hardly be inferred that once Congress has acted to grant protections to certain class members, that companies can contractually negotiate with unions around those afforded rights. By stipulating to a foreign law, employers are able to lessen or deprive the class member of the protections afforded by Congress.

*E. The Direction of the Supreme Court and Congress on  
Union-Negotiated Waiver*

The Supreme Court has refused to rule on whether union-negotiated contracts, which stipulate to the application of foreign law are indefensibly void. The Court has however counseled hesitation in

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273. See generally *Calmar S. S. Corp. v. Taylor*, 303 U.S. 525 (1938).

274. Cruise Vessel Security and Safety Act, 46 U.S.C.A. § 3507 (2010).

compelling arbitration under foreign law when it would waive the litigant's U.S. statutory rights, known as prospective waiver.<sup>275</sup>

Justice Souter's dissent in *14 Penn Plaza* best articulates the Supreme Court's opinion on union-negotiated collective bargaining agreements and the prospective waiver doctrine.<sup>276</sup> Arguing that the Court got it right in *Gardner-Denver*, Justice Souter described the Congressional adherence to the principle that statutory rights afforded by Congress could not be waived as part of the collective bargaining agreement.<sup>277</sup> Specifically, if Congress intended to disturb the principle that union-negotiated waivers are void, then it would have expressed its deviation from *Gardner-Denver* in its enacted legislation that followed.<sup>278</sup> However, instead of deviating from the Court's principle, Justice Souter argues that Congress emphatically embraced the Court's holding that union-negotiated waivers are void.<sup>279</sup>

Even when the Court had the opportunity to rule on the issue, the Court has always determined that the validity of union-negotiated waiver is not properly before the Court. However, Congress apparently has been watching the Supreme Court and lower courts' interpretation of the FAA and its interplay with employment contracts. There is some support that Congress is unhappy with the courts' determination that unions are allowed to freely negotiate unfavorable arbitration agreements.<sup>280</sup> In a proposed amendment to the FAA, the Arbitration Fairness Act of 2011 would amend Title 9 to remove its applicability to employment disputes, consumer disputes, and civil rights disputes.<sup>281</sup>

Within the proposed amendments, Congress stated the following findings:

- (1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.
- (2) A series of decisions by the Supreme Court of the United States have changed the meaning of the Act so that it now extends to consumer disputes and employment disputes.
- (3) Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights.

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275. *Mitsubishi Motors Corp.*, 473 U.S. 614, n.19.

276. *14 Penn Plaza LLC*, 556 U.S. at 274-86.

277. *Id.* at 279.

278. *Id.* at 285.

279. *Id.*

280. S. 987, 112th Cong. § 2 (2011).

281. *Id.*

(4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions.

(5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.<sup>282</sup>

The proposed amendments suggest that Congress recognizes the severe disadvantage the provisions of the FAA have placed on employees and consumers. The disparity in bargaining power between unions and industries has made employees susceptible to unfair contractual agreements. The notion that employees have the ability, knowledge, and resources to effectively negotiate employment contracts is a legal fiction. Quite contrarily, Congress has often determined that employers and employees are placed on unequal bargaining platforms and has enacted legislation to protect the individual class members.

#### F. *Fictions of the Federal Arbitration Act*

There are several fictions of the FAA. The first being that Congress, in ratifying Chapter 2, did not intend to incorporate Chapter 1 into its ratification. The Eleventh Circuit held in *Bautista* that Chapter 1's exemption provision was inapplicable to Chapter 2 when it compelled arbitration of a Filipino crew member.<sup>283</sup> The Circuit determined that the seamen exemption provision in Chapter 1 was inapplicable because it only applied to domestic disputes and was not ratified as part of the Treaty.<sup>284</sup> Because *Bautista* involved foreign parties, the Circuit refused to apply the exemption provision.

However, Chapter 2 was incorporated into Title 9 of the United States Code. It is reasonable to infer that Congress intended for the provision in Chapter 1 to apply equally to Chapter 2. Additionally, Section 1 of Chapter 1 states: "'Maritime transactions' and 'commerce' defined; *exceptions to operation of title*."<sup>285</sup> If Congress intended for Section 1 of Chapter 1 to be inapplicable to Chapter 2, then it would have amended Chapter 1 to reflect its intent. Meaning, Congress would have changed the word "Title" in Section 1 to read "Chapter." Because Congress did not amend the language of Section 1, it is reasonable to infer that the exception provision contained in Chapter 1 intended to apply to all sections of the Title, including Chapter 2.

This conclusion is supported by Congress's findings in the pro-

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282. *Id.*

283. *Bautista*, 396 F.3d at 1296.

284. *Id.*

285. 9 U.S.C.A. § 1 (1947) (emphasis added).

posed amendments of the Arbitration Fairness Act.<sup>286</sup> Furthermore, the House Report discussing the Treaty's ratification produces evidence that Congress intended Chapter 1 to apply to all chapters of Title 9:

THE PURPOSE OF SECTION 208 [CHAPTER 2] IS TO MAKE THE PROVISIONS OF THE FEDERAL ARBITRATION ACT APPLICABLE TO ACTIONS BROUGHT UNDER THE CONVENTION TO THE EXTENT THAT SUCH PROVISIONS ARE NOT IN CONFLICT WITH THE IMPLEMENTING LEGISLATION OR THE CONVENTION AS RATIFIED BY THE UNITED STATES.<sup>287</sup>

"The convention as ratified by the United States" would include Chapter 1, and the seamen, railroad employees, and transportation workers exemption. Therefore, the class of persons exempt in Chapter 1 would be exempt from the entire Title.

Despite the inherent unequal bargaining power, courts have been overly supportive of the United States participation in the Convention. Even at the sacrifice of consumers and employees, courts have compelled arbitration. Despite the Supreme Court's guidance in dicta throughout the years, *Lindo* portrays the outcome of the United States' participation in the Convention. However, this comity to international affairs intended to apply only to commercial disputes.

Congress assumed that courts analyzing arbitration agreements would take into consideration the litigants' bargaining power. Under *Mitsubishi*, even when the litigant was a sophisticated party, the Court heavily scrutinized arbitration agreements that waive U.S. statutory rights.<sup>288</sup> At one point the Court even seemed to opine that union-negotiated waiver of a U.S. statutory right is presumptively void.<sup>289</sup> However, the Court's precedent following *Gardner-Denver* held that unions were at liberty to waive the right to vindicate U.S. claims in a federal-judicial forum, provided the waiver is stated expressly in the contract.<sup>290</sup> However, even when the litigant's rights were waived to an alternative forum, the Court hesitated to compel arbitration if the agreement substantively altered the law applied.

Arriving at *14 Penn Plaza*, the Court's stance on union-negotiated waiver seems to have confused even the Court. With a 5-person majority and 4-person dissent, it appears that the Court will compel arbitration so long as it does not prospectively waive the litigant's rights. However, what amounts to "prospective waiver" is inherently unclear by the

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286. S. 987, 112th Cong. § 2 (2011).

287. H. REP. NO. 91-1181, at 3 (1970), 1970 U.S.C.C.A.N. 3601, at 3604.

288. See *Mitsubishi Motors Corp.*, 473 U.S. 614.

289. *14 Penn Plaza LLC*, 556 U.S. at 279.

290. *Wright*, 525 U.S. at 79.

Court's precedent as indicated by the 5-person majority and 4-person dissent. Although, under the Court's current rationale, *Lindo's* arbitration agreement, stipulating to resolution in Nicaragua, under Bahamian law, would appear to constitute a substantive waiver because it failed to place resolution of his statutory rights in an alternative forum. Instead, it deprived him of his rights altogether.

### G. *Advocation of Future Direction*

While forum selection clauses should not be presumptively void, choice of law clauses, which remove liability under certain Congressional acts, should be declared void. Forum selection clauses stipulating to an alternative forum simply places vindication of rights in a foreign forum. While there are some procedural hurdles to vindication, the rights afforded by Congress will still be available to the litigant. Choice of law clauses on the other hand, may substantively alter the law and deprive litigants of individualized rights proscribed to them as a member of a protected class. Such substantive waiver should be void as against public policy.

Severing and voiding choice of law provisions is especially important to employees and consumers. Employees and consumers stand at the peril of corporate companies. When the sustainability of the economic market is in jeopardy, the bargaining power of employees is substantially depreciated. The employee, desperately seeking employment, is willing to sign almost anything presented. This can hardly amount to knowing, willing, and intelligent waiver on behalf of the employee.

In addition to the fiction that Chapter 1 does not apply to Chapter 2, the FAA is fictionalized in that litigants will have an opportunity to challenge an award. As stated in *Thomas*, there is a distinct possibility that the litigant will return home with no award.<sup>291</sup> Furthermore, compelling arbitration under foreign law may make obtaining an attorney impracticable, especially if the arbitration is to occur in Nicaragua under Bahamian law as in *Lindo*. Because Congress sought to afford seamen (domestic and foreign) protection under the Jones Act, *Lindo's* holding deprives the Act of its intent and purpose.

Not that all choice of law provisions are void for failure to stipulate to U.S. law. Such a xenophobic holding would certainly be in conflict with ratification of the treaty and the purpose of the FAA. In ratifying the New York Convention, Congress sought to increase comity to international affairs in a globalized economy. Recognition and participation in the Convention meant that companies negotiating in trade could not

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

disavow their obligations when they agreed to litigate under foreign law. Large companies with sophisticated attorneys were expected to negotiate at a caliber that would hold them accountable for their decisions, even if the decisions deprived them of protection under U.S. laws. However, employee and consumer contracts are incomparable to the commercial contracts in dispute in *Mitsubishi* and *Vimar*.

An employment contract, unlike a large commercial contract, is often negotiated by labor unions. The unions, while seeking to preserve the interests of its members, are substantially disadvantaged in bargaining power. The resulting collective bargaining agreement often stipulates to an unfavorable choice of law and diminishes the litigant's rights in court.

The Supreme Court sought to curb this practice when it announced its decisions in *Gardner-Denver* and *Mitsubishi*. However, *14 Penn Plaza* has left room for debate regarding the Court's stance on union-negotiated waivers in collective bargaining agreements. In *Wright*, the Court refused to compel arbitration of the claimant's ADA claims because the contract did not expressly submit those claims to arbitration.<sup>292</sup> However, the Court refused to rule on whether submission of those claims under foreign law would have made the agreement void. Then again, in *14 Penn Plaza*, the Court reiterated that substantive waiver of a litigant's rights is void; however, procedural waiver, such as vesting the claims in an alternative forum for resolution was valid.<sup>293</sup> This would lead the belief that arbitration agreements, such as the one in *Lindo*, are void. However, the Court has failed to announce what substantive waiver is, and if union-negotiated waiver of U.S. statutory rights for protected class members qualifies.

Despite its refusal to issue a definitive holding, the Supreme Court has counseled hesitation in prospectively waiving a litigant's rights through contractual agreements. The Court has reiterated its opinion on union-negotiated waiver in several cases. However, the Eleventh Circuit refused to adhere to the Court's direction and compelled arbitration of *Lindo*'s Jones Act claims to Nicaragua under Bahamian law. The decision not only went against the Supreme Court's dicta, it deviated from the Circuit's precedent in *Thomas*. The decision is an example of why Congress should pass the Arbitration Fairness Act.

Union members and consumers should not be left to defend a contract that they did not have time to review or power to negotiate. The legal fiction that employees and consumers agree to the terms of their contract should be displaced by reality. This fiction is what allows cases

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292. *Wright*, 525 U.S. at 79.

293. *14 Penn Plaza LLC*, 556 U.S. at 265.



like *Lindo* to stand as precedent in the books. Judges and activists seeking fairness and justice should criticize the precedent allowing union-negotiated waiver of individualized U.S. statutory rights.

## VI. CONCLUSION

The Eleventh Circuit's decision in *Lindo* raises several valid concerns over the direction of the Federal Arbitration Act and its interplay with domestic laws. The proposed amendments in the Arbitration Fairness Act would aid courts in preserving the rights afforded by Congress. Statutory rights, which unions and classes have fought so vigorously to gain, should not be subject to waiver without such waiver being knowing and intelligent. Arguably, waiver cannot be deemed knowing and intelligent when the litigant often lacks the legal knowledge and expertise to understand the waiver. Courts and Congress should act accordingly and protect class members from being stripped of their rights. It is to the litigants' detriment that they were a part of a union negotiated collective bargaining agreement.